

# *Duke Law Magazine*

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SUMMER, 1984



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*The Changing Family*



# *Duke Law Magazine*

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## Editor's Column

When I was first asked to join Joyce in editing this magazine, my chief concern was how we could continue to find enough material to fill two 48-page issues each year. One year later I find that one of our biggest problems is what to do with all the material we have: our piles of articles and lists of topics just keep growing. In fact, even with this expanded 56-page issue, we were still forced to hold out three articles for the next issue. The moral here—if there is one—is that one should never underestimate the richness of the intellectual life of the law school; for this issue we were presented with articles by faculty, students, and visiting scholars.

The theme for this issue had its genesis in Professor Karst's Currie Lecture last November. We felt that our readers would be as fascinated as was his audience by his ideas about the relationship between women's view of the world and traditional constitutional law. Then during the week after the Currie Lecture another visitor to the law school, Professor Sanford Levinson of the University of

Texas School of Law, presented a talk to the faculty that also dealt with the theme of relationships—this time in the context of the lines drawn by the law in determining which relationships are “worthy” of testimonial privileges. With those two articles in hand we had a working theme for the issue—relationships and the law. This theme suggested many other possibilities for using material currently being produced at the law school, like Professor Kate Bartlett's piece on non-exclusive parenthood (p. 13) and a student article on divorce mediation (p. 41). And we had finally found the ideal place for Bill Reppy's article on community property law in the U.S. Supreme Court (p. 26), an article which we had been saving until we found the most appropriate issue for it.

While many of you will be familiar with Bill Reppy's expertise in community property law, you may not know that Kate Bartlett, who began teaching in the clinical program at Duke, now also teaches family law, public school law, and a seminar on the representation of children. Pro-

fessor Sara Beale, who has also taught family law, specializes in criminal law and procedure. Before coming to Duke, Beale served in the Office of Legal Counsel at the Department of Justice and in the Solicitor General's Office, where she developed a different perception of the community property cases than that of Bill Reppy. Her comments on his article appear on page 34.

We have divided our articles about law and relationships into two groups this time. Although we feel that all of our articles say something about relationships—especially familial relationships—and the law, the three articles which we considered more theoretical in nature are in the first section, while the more pragmatic articles occupy the second section. Two other pieces which have something to say about relationships, and a great deal to say about law and medicine, have been deferred until the next issue, thus giving us one theme for that issue. We would welcome alumni contributions on that topic, as well as on other topics of interest.

P.L.C.

Since many of the articles in this issue deal with issues traditionally considered to be “women's issues,” we felt that a cover which featured women was particularly appropriate. The woman on the left is Peg Hutchinson, whose husband, Bill, is a Senior Lecturer in Law and the author of the Book Note on p. 54. Gwynn Swinson, on the right, is Assistant Dean for Admissions and Lecturer in

Law. Peg and Gwynn were photographed at last year's alumni weekend: their obvious enjoyment, along with the calendar of activities on the inside back cover, should serve as an inducement to those of you undecided about attending this year's reunion.

Other noteworthy photographs in this issue include the two pictures on pages 39 and 40, which feature Kate

Bartlett, convenor of the *Law and Contemporary Problems* conference on Children with Special Needs, talking to a local elementary class about primary elections in North Carolina. Also, Joyce's son Barak, is one of the children shown on page 14; the unidentified young lady to his left also attended last year's alumni reunion.



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# RETHINKING RELATIONSHIPS



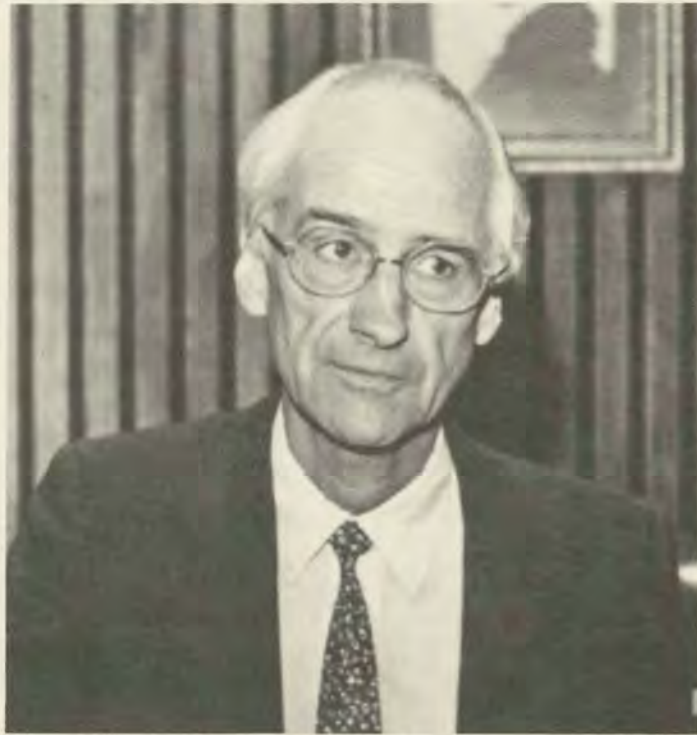
# Woman's Constitution

*Kenneth L. Karst\**

Any law teacher invited to lecture in a series named for Brainerd Currie is bound to feel mixed emotions. Of course the invitation is immensely flattering, but it is also intimidating, when you consider the standard set by Brainerd Currie's scholarship. About twenty years ago, when Paul Carrington and Bill Van Alstyne and I were junior members of the Ohio State law faculty, I was assigned to teach the course in conflict of laws. It was an exciting time in that field; the Currie Revolution was under full sail. It was great fun to teach conflicts in those days, as it must have been fun to be a cartographer in the days of Columbus. In conflict of laws, Brainerd Currie redefined our world.

Another quality was evident in Brainerd Currie's writing, a quality that, for me, is at least as important as his contributions to legal doctrine. He had a strong sense of the human dimensions of law. From his scholarly articles to his light verse, he made clear to us in large ways and small that legal doctrine is best understood by looking at the way it grows out of the experience of individual human beings, and best measured for success by the ways in which it comes to bear on individual lives. I have chosen today's topic with those lessons in mind.

In our time together I want to talk about woman's nature, and its relation to American constitutional law.... Two comments by Virginia Woolf thus take on immediate relevance. On the subject of lecturing, Woolf said that it "incites the most debased of human passions—vanity, ostentation, self-assertion, and the desire to convert." As for discussing the nature of woman, Woolf said that it "attracts agreeable essayists, light-fingered novelists, young men who have taken the M.A. degree; men who have taken no degree; men who have no apparent



*Kenneth L. Karst*

qualification save that they are not women."

I plead guilty to both charges. There is vanity in taking this podium, and I do desire to convert. Furthermore, I claim no special qualification for this task. Men and women often live in different worlds, and no man can know what it feels like to be a woman. Fortunately, any man who wants to learn about women's views on these questions today has an advantage over the men who were Virginia Woolf's contemporaries. Beginning in 1949 with the publication in France of Simone de Beauvoir's modern classic, *The Second Sex*, feminist writers of our time have produced a

rich and sophisticated literature that offers not only illumination but challenge.

What is the nature of woman? At various times and in various places, the answers to that question would differ markedly. Once we pass beyond a limited set of biological characteristics, the qualities that define both woman and man are social constructs. As the outset today I want to look at some of the sources of our traditional assumptions about the differences between the sexes, and to take notice of how those assumptions have been reflected in our law and reinforced by it. But if law has helped to perpetuate our two-sided construct of woman and man are social constructs. At the outset today I want to look at some of the sources of our traditional law in the modern reconstruction of the social order that defines "woman's place." This reconstruction has given a number of women access to positions in our social system, but that system is designed around an essentially male conception of human interaction. There is an alternative conception. Women tend to see social relations differently and to approach moral issues differently. If it is difficult, or unfair, simply to fit women



into the existing social system; one obvious alternative is to modify the system's orientation to take account of women's values. My final theme is an exercise in speculation: What might be the consequences if our constitutional law were reconstructed to add a healthy measure of the morality and world-view characteristic of our society's female half?

Two years ago the Supreme Court upheld the constitutionality of an act of Congress authorizing the President to require young men—but not women—to register for a possible military draft. The draft, said Justice Rehnquist, was designed to produce combat troops, and women were excluded from serving in combat. Thus men and women were “not similarly situated,” and this difference justified limiting registration to men.

You can always find some difference between men and women, if you are looking for a way to justify sex discrimination. A century ago, the Supreme Court rejected the claim of Myra Bradwell that Illinois could not constitutionally limit the practice of law to men. Writing for the Court, Justice Joseph Bradley looked around and found that men and women were not similarly situated. His opinion is routinely quoted today as the perfect example of outmoded sex-role stereotyping. Here is what he said:

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.

Unaware of “the law of the Creator,” Myra Bradwell had been editing and publishing a successful legal newspaper in Chicago. If God intended women to be delicate and dependent, evidently something had gone wrong. Yet very likely Justice Bradley could not even see the incongruity. And how many males here today are sure that if we had been alive in 1873, we would have reacted differently? To live in a society is to be acculturated by it.

The decision of Congress to limit draft registration to men was not a military judgment but a political decision. The President and the Joint Chiefs of Staff had wanted to register women, but Congress heard the voice of public opinion. The strength of the public opposition to drafting women is easy to understand; the issue taps our most profound feelings about sex roles. Before we begin feeling too superior to Justice Bradley, we ought to ask what it is that prevents our own generation from seeing that a woman like Myra Bradwell would be more fit than most men for military service.

The exclusion of women from registering for the draft may look like a gift to women, but it is part of a larger political order that serves to subordinate women to men's uses. Indeed, the social definition of woman has been constructed around men's needs—not just their wanting to have someone to take responsibility for the domestic sphere of life, but their identifying themselves as men through the constructs of woman and man.

In our society, as elsewhere, women have the main responsibility for early child care. Very soon, children learn that their identities are bound up with gender. For a girl, her sense of gender identity is formed within the mother-daughter relationship, where both mothers and daughters tend to see themselves as alike. Identity formation and attachment are combined in a single process.

But mothers see their sons as opposite, and boys, in seeking to be masculine, see that they must separate themselves from their mothers. And if masculine identification is initially found in separation, in later years masculinity is something a boy must achieve, through attaining status and power in the competitive and uncompromisingly hierarchical society of other boys. It is no wonder that men generally emerge from this process with a sense of individuation—separateness—more highly developed than that of women, who typically have a definition of self that is more inclusive.

Given the diversity among individuals both male and female, the traits associated with gender—with masculinity and femininity—are not to be found in a bipolar distribution, with men at one pole and women at the other. But we largely experience the idea of gender as bipolar, and it is important. In our minds, gender is an either/or classification that powerfully affects our attitudes toward an individual. But the classification, woman—unlike man—is an epithet; it implies the objectification of individual women. Like the black who becomes an “invisible man,” with his individuality hidden behind his blackness, a woman's individual qualities are obscured by the abstraction, woman.

The one thing that unfailingly separates man from woman—which is exactly what man is trying to do—is anatomy, the difference in sexual and reproductive function. Women are socially defined as women largely in terms of their sexuality and maternity—and that is what needed to be controlled.

In American society, one prominent means of control has been the law. The range of controls can be called to mind just by reciting a list of legal topics: marriage, marital property, divorce, control over children, illegitimacy, abortion, contraception, prostitution, homosexuality. Women were also kept home, or submissive, or both, by a number of private sanctions, including ostracism of women who left male protection, discrimination in employment, and virtual exclusion of women from certain professions. Until the early 20th century, women were excluded from voting, and thus from any direct influence on changing these conditions by legislation. Thus, one meaning of the feminist slogan, “The



personal is political," is that women's role in society is crucially affected by this social definition of woman.

I began with the question, What is the nature of woman? and immediately conceded that the idea of woman is a construct of the mind. Indeed, it strains the limits of our ingenuity just to try to imagine what women would be like in a world where the abstraction, woman, was not defined around man's needs. The only "nature of woman" we know is the one that prevails in our world, as the compound product of nature and culture.

But if men form their sense of "what women are like" in the course of defining themselves, the same process in women tends to produce a different sense of self and a different moral perspective. In a recent book exploring these differences, Carol Gilligan sums up her conclusions in two contrasting metaphors. For men, the metaphor is the ladder; for women, it is the web. Men tend to see human interactions as the contractual arrangements of individuals seeking position in a hierarchy. Women, defining themselves as more continuous with their human environments, tend to see the same interactions as part of ongoing, sharing connections in a network of relationships.

The view from the ladder tends to produce a morality of rights, an abstract hierarchy of rules to govern the competition of highly individuated individuals. To see the world from the web, however, is to see individuals in connection with each other, and to see morality as a question of responsibilities to particular people in particular circumstances. All of us, men and women alike, embody at least some of each of these moralities. And our institutions, including the law, bear the marks of

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### *Women are moving onto a ladder of hierarchy previously built by men and for men.*

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both the ladder and the web. But it takes no sophistication to see that American law is predominantly a system of the ladder, by the ladder, and for the ladder.

I want now to turn from the construct of woman to reconstruction. The constitutional developments of the past two decades can be seen as part of the first reconstruction. Women are moving onto a ladder of hierarchy previously built by men and for men. There is much to be said for a constitutional law that permits women to do just that. But Gilligan's interpretation suggests another connection between the nature of women—not the abstraction, woman, but real women—and our constitutional law. It is now possible to imagine a second reconstruction, not of the hierarchy, but of constitutional law itself, supplementing the Constitution's historic dedication to protection of the ladder, by recognizing the need to protect the web. After all, there is also much

to be said for a constitutional law that takes into account a view of life, self, and morality that is the dominant mode among the female half of the nation's population.

The traditional social construct of woman promotes the dependence of women on men, because femininity in its classical form gets in the way of a woman's recognition as a complete and independent human being. Simone de Beauvoir dramatized the point, identifying the standard definition of femininity with "mutilation." De Beauvoir saw that any serious concern for releasing women from their dependence must address both the public and private worlds. Women must be recognized as full participants in the public life of the community. They must also gain control over their own sexuality and maternity, the sort of control the abortion rights movement later epitomized in the slogan, "choice."

In 1949, de Beauvoir's agenda looked like a task for Amazons, but we have come a long way since then. One measure of the distance is the change in American constitutional doctrine. The process is by no means complete, but on the whole the Supreme Court has accepted de Beauvoir's objectives as the appropriate concerns of constitutional law. These developments are recent and familiar, and there is no reason to rehearse their details here. Instead, I want to step back for a view of these developments in the aggregate. What has constitutional law contributed to the redefinition of "woman's place," and what are the limits of that contribution?

The claim to equal citizenship is a claim to be treated by the organized society as a respected and responsible member, a participant, one who counts for something in the society. In other words, the status of citizen is inconsistent with the traditional construct of woman. The Supreme Court has readily accepted the argument that the stereotypical view of femininity cannot justify overt governmental discrimination that denies women access to positions in the public sphere: for example, the right to serve as administrator of a decedent's estate, or to manage community property, or to serve on a jury.

In two other kinds of cases, however, the Court has stumbled. First is the case in which the governmental discrimination is not overt, but indirect, as when Massachusetts established a preference for veterans in hiring people for the civil service, with the result that women were largely excluded from the best civil service jobs. The Supreme Court refused to recognize this practice as a case of sex discrimination. Because the law also discriminated against men who were nonveterans, it did not seem to the majority to be an intentional discrimination against women. Perhaps the military services had been guilty of sex discrimination, the Court said, but they were "not on trial in this case."

The Massachusetts case shows how hard it is to prove intentional discrimination. The problem is made especially acute by the Court's statement that discriminatory intent "either is a factor that has influenced the legislative choice or it is not." This view of human motivation would be hopelessly inadequate even if we were talking about the intention of an individual rather than a large



body of legislators. The factors that motivate even the simplest action are myriad in number and complex beyond the capacity of a judge or anyone else to untangle. To extend this sort of inquiry beyond an individual to a group of, say, a hundred members of a legislature, is to ask a question that comes close to being meaningless. The practical effect is to convert the burden of proof into a substantive rule for upholding statutes.

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### *The motivations of men concerning the proper role of women are mostly unconscious.*

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The complications are compounded when the motivation in question is one of discrimination. The motivations of men concerning the proper role of women are mostly unconscious. When a male-dominated legislature considers a woman's issue, it would be extraordinary if the legislators were not influenced by the traditional construct of woman. In this situation the personal is literally political.

The second type of sex discrimination case that has caused difficulty for the Supreme Court is the case of legislation that treats women more favorably than men, in the interest of protecting women or compensating them for their disadvantages. The draft registration case is an example. A major motivation for Congress's action lay in a particular view of the proper roles of men and women in society: men as the protectors, and women as the center of domestic life. A Senate committee imagined the case of a mother who might be drafted, leaving the father home to tend the children; that, the committee said, would be "unwise and unacceptable to a large majority of our people." Thus do stereotypes generate their own perpetuation.

Why is it that the Supreme Court is so ready to conclude that overt governmental restrictions on women's access to public positions are based on an outmoded stereotype of woman's role, and thus invalid, and yet has so much trouble when the discrimination is not overt, or when the stereotype is embodied in "protective" legislation? One reason may be that a citizen's claim to participation is a claim to a chance at individualist achievement. That is a right that a male-oriented institution like the Supreme Court can appreciate. The Justices easily recognize the stereotype when it directly hinders access to the ladder.

In contrast, Justices who insist on a showing of intentional discrimination, as in the veterans' preference case, or who refuse to see the traditional stereotype in "protective" laws, as in the draft case, may find it hard to appreciate the ways in which the traditional construct of woman comes to bear on the issues before them. The mechanisms by which the personal becomes political lie in the deepest recesses of the psyche.

There is another reason why the courts have trouble

in seeing the stereotype at work in a case that does not involve overt discrimination against women. Our legal system, oriented around the morality of the ladder, has a limited view of the reach of constitutional rights and the proper scope of judicial inquiry. To look at the veterans' preference case from the ladder is to focus narrowly on the parties before the court, and largely to ignore the context of their actions: the military was "not on trial in this case." The same narrow focus may lead a court to ignore the presence of the stereotype in "protective" legislation. No woman would have had standing to challenge the draft registration law. To transcend these limits, our courts would have to widen their inquiry, to look beyond the idea of rights as personal zones of noninterference—in short, to supplement the jurisprudence and rhetoric of the ladder with a jurisprudence and rhetoric attuned to the web of connection.

When we turn to the subject of choice—that is, women's control over their sexuality and maternity—we do not really leave the subject of citizenship behind. Citizenship is a form of power, including the power to influence matters that are personal. The point can be illustrated by a short flight of fancy. Suppose for a moment that men were, by some miracle, transformed so that they, rather than women, were the ones who became pregnant and bore children. Does anyone here doubt that "abortions on demand" would be the governing rule of law?

The nineteenth amendment, giving women the vote, was adopted in 1920, the same year that Margaret Sanger wrote "Birth control is woman's problem." Sanger was not being callous, but realistic; she knew women could not count on men to take any responsibility in the matter. About half a century passed between the nineteenth amendment and the Supreme Court's recognition of a woman's constitutional right to prevent or terminate a pregnancy. What the vote had failed to bring about, technology and medical opinion did, with the aid of an egalitarian wind that had been sweeping over the whole Western world for a generation.

Earlier I listed a number of legal topics, to illustrate how men have used law to control women's sexuality and maternity. Let me repeat that list: marriage, marital property, divorce, control over children, illegitimacy, abortion, contraception, prostitution, homosexuality. With the exception of prostitution, every one of those subjects has been the focus of at least one major constitutional decision by the Supreme Court since 1965. In the aggregate, these doctrinal developments offer women a degree of control over the private sphere of their lives that would have seemed fanciful a generation ago.

The constitutional claim of choice in the personal, private world is, if anything, even more important to women than the claim to equal citizenship. Male power over women's sexuality and maternity—expressed in law and in the classical definition of femininity—has restricted women to a passive role, permitting them to control conception and childbirth only through a



strategy of denial. It is not surprising that women who see themselves as receptive rather than active in this central aspect of their lives may display a more general lack of confidence in their own abilities and their own opinion. If consciousness raising is indispensable to the reconstruction of woman's place—and it is—then one necessary foundation for that process will be the experience of millions of individual women in taking control of their own personal lives. Constitutional law has already given that process a big push forward.

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*Women socialized to the culture's expectations about femininity naturally see success, in its usual form, as a direct threat to their feminine identity.*

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But obviously, a woman's control over her personal life is not secured just by assuring her the right to escape an unwanted marriage and the right to prevent or terminate a pregnancy. The choice not to be a mother is costly to many a woman's sense of self; one result of the process of gender identification among girls is identification with the role of mother. Yet to be a mother in our society today is to be expected to make sacrifices of opportunities for participation in the public world. When the young mother tries to manage a career at the same time she is taking the main responsibility for child-rearing, she is apt to experience both guilt at home and guilt at the office. If she chooses instead to suspend her working life during her children's early years, she is apt to feel left behind by others of her age who continue to work. By now, no doubt every woman here is thinking, It doesn't have to be this way. Fathers can share in the responsibility for children; hours of work can be adjusted; job-sharing plans can be adopted; child-care allowances can be provided for working parents; the list of possible individual and institutional responses goes on and on. What prevents their adoption?

To the extent that the answer lies in our legal system, it seems obvious: on the ladder, there is no concern about such dilemmas. The man makes his choices, and the woman makes hers, and so long as the law itself doesn't interfere, nothing is wrong. On the prevailing view, constitutional law has little to say about any of these matters, except to make sure that the rest of the legal system respects individuals' zones of noninterference, and keeps the ladder "open"—which is to say that access to it is unhindered by the law itself.

If we ask why more individuals have not worked out living arrangements that permit both partners to share in the public and private spheres, the answer is complicated; like many another social truth, it lies partly in

myth and partly in reality. The myth is the dual construct of woman and of man. The reality is the difference between the ways in which men and women tend to define themselves and their relations to others. Yet the two seem interrelated in this sense: the abstractions, man and woman, make men reluctant to take time away from the ladder of achievement in order to participate in the web of connection. But that same interrelation can be turned around: to the extent that men do come to appreciate the advantages of a life that includes membership in the network, they seem likely to abandon the stereotypical view of masculinity and femininity. Let no one underestimate the difficulty of getting through to men on this subject. No one likes to contemplate his own failings and wasted opportunities. But there isn't really any alternative, whether we are talking about redefining individual lives or redefining legal institutions. In either case, the effort to rid ourselves of the dual construct of woman and of man is connected with the promotion of a view of human interaction as a network, and a view of justice that sees value not merely in autonomy, but in interdependence and concern for real harms to real people.

Although the sense of autonomy is necessary for a woman's redefinition of self, the idea of autonomy is not free from problems. For one thing, any freedom that matters is the freedom to make serious mistakes; that is why autonomy brings the responsibility of choice. But responsibility is demanding, and usually is no fun at all.

It is particularly difficult when a woman, long accustomed to the demands of the classical definition of femininity, leaves the domestic life and takes a job for which she is paid. The constitutional right of equal citizenship, she will find, is not much help when it comes to such things as wages and promotional opportunities. No-fault divorce has brought a new attitude toward alimony. The woman may find herself exchanging her house for an apartment, working for inferior wages to support the children who live with her, and with minimal help from their father—or no help at all. How will that woman react when we speak to her of autonomy?

Or suppose a woman does enter the public world, and that she achieves the glittering prizes that world has to offer; isn't that a success story for the values of citizenship and choice? Yes and no. For some time social scientists have been finding that many women show a certain anxiety about competitive achievement. One source of this anxiety is easy to understand. Women socialized to the culture's expectations about femininity naturally see success, in its usual form, as a direct threat to their feminine identity.

The psychic problem is by no means lessened for professional women. I was recently appalled to see a sign in the corridor of the UCLA law school, advertising a showing by a dress shop of clothes suitable for the woman lawyer. The idea is to avoid looking too feminine, and at the same time to avoid looking mannish. One woman graduate of our school, who is doing very well in a prestigious law firm, was at a firm party, talking with



a judge. The managing partner of the firm—not some throwback to Justice Bradley's day, but an unusually civilized man—came up and said, "Leave it to Judge X to be with the prettiest girl at the party." The sign in our law school corridor said "Dress for Success."

It is not just the tension between achievement and femininity in its standard definition that produces anxiety in women. It is a more deep-seated distrust of autonomy as threatening not only their security in the web of relationships, but also their sense of self. One who sees herself as continuous with the environment, including the human environment, will be concerned that she may have to give up her affiliations in order to become a separate and self-directed woman.

Half a century ago, Emma Goldman—of all people—looked at the movement for women's emancipation and found it wanting. True emancipation, she said, "will have to do away with the ridiculous notion that to be loved, to be a sweetheart and mother, is synonymous with being a slave or a subordinate." For Goldman, woman was "confronted with the necessity of emancipating herself from emancipation, if she really desires to be free." Today some feminists would call Goldman's assertion a romantic prescription for chaining women to the classical definition of femininity. Making allowance for fifty years' worth of change in awareness and rhetorical style, however, Goldman seems to me to have been touching the edges of a great truth. Women do need to free themselves from the kind of autonomy that not only sets them free but cuts them loose. They do need to find ways of participating fully in public life, without simply exchanging a place in the web for a place on the ladder. But to say that women need these things is only the half of it; men need them, too. What might our constitutional law look like if it were to pay attention to women's "different voice"?

This final inquiry assumes that there are differences in the ways in which women and men tend to see the world of human interaction, and define their places in that world. I have drawn mainly on a body of recent writing that is interpretive, and particularly on Carol Gilligan's book, *In a Different Voice*. I invite you to test this interpretation against your own perceptions about men and women—recognizing, as we all must, that our perceptions are conditioned by our culture.

Even the most skeptical will presumably agree with the Supreme Court that, when it comes to viewpoints, "the two sexes are not fungible." The Court made that unremarkable pronouncement while discussing the exclusion of women from jury panels. As a later Supreme Court put it, "women bring to juries their own perspectives and values that influence both jury deliberation and result."

Gilligan addresses herself to the "perspectives and values" that differentiate women's and men's tendencies in judging moral issues. Of course, all of us, men and women alike, have capacities for both the morality of the ladder and the morality of the web. And if men and women tend to have differences in moral judgment, no

doubt the differences are heavily influenced by the way we all learn our gender identities and maintain them. Here I am drawing a caricature, aimed at highlighting the differences in the ways women and men tend to see the world of human interaction. A few aspects of this interpretation are especially suggestive for our constitutional law.

Men, finding identity in separation, tend to equate adulthood with autonomy and individual achievement; women, defining themselves as more continuous with others, tend to equate maturity with responsibility and care. Men typically see interpersonal relationships in contractual terms, as derived from arm's-length dealings. Women typically see the same relationships as primary, part of their definition of self.

Men, abstracting relationships from their particular contexts, define morality and justice in the vocabulary of rights—specifically, rights to be free from the interference of others. They seek protection against aggression in abstract rules. Women distrust "a morality of rights and noninterference," because it can be used to justify indifference and unconcern. They define morality and justice in the language of responsibility, and look for solutions to moral problems not in impersonal, abstract rules but in "the capacity 'to understand what someone else is experiencing,'" and to avoid hurt to particular people in live human contexts. Men, presented with moral dilemmas, tend to look for solutions

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*Women distrust "a morality of rights and noninterference," because it can be used to justify indifference and unconcern.*

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in a hierarchy of rules. Women, faced with similar either/or choices, seek to widen the range of inquiry in the hope of finding solutions that preserve relationships.

What does it mean to speak of bringing women's moral perspective to bear on constitutional law? The idea that there are such things as "women's issues" has long been an article of faith among politicians, and voting patterns in recent elections strongly suggest that the politicians are correct. But "women's issues" never have been limited to interest-group concerns about the status of women. Congresswoman Patricia Schroeder says this:

Doing something about women's poverty won't make the gender gap disappear. Women will still worry that unless we change the old caveman rules, we will all be blown up.

Schroeder is right, and the Supreme Court was right: women—not all women, but women generally—do tend to see the world differently. To ask about the possible contributions of women's world view to our constitutional law is thus to explore beyond the reshaping of male-defined roles and institutions to accommodate women's needs. It is to imagine the possibility of a more



general widening of our constitutional horizons.

The men who wrote the Constitution in 1787 designed a framework for governing society as it was perceived by men and run by men. The framers inherited a body of thought that saw man as an "atom of self-interest," was suspicious of his insatiable appetite for power, and saw the struggle for power as a zero-sum game in which one person's gain was another's loss. The Bill of Rights, like the original Constitution, defined zones of autonomy, of noninterference. The whole enterprise of constitution-making, from its theoretical underpinnings to its consummation as a political bargain, was relentlessly contractual. In short, the Constitution from the beginning reflected the view from the ladder: safety

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from aggression was to be found not in connection with others but in rules reinforcing separation and noninterference.

For a century and a half, the framers' conception dominated thinking about the Constitution. Even today, five decades after the New Deal opened the modern political era, both judges and commentators chiefly speak a constitutional language treating rights as zones of noninterference. It would be naive to expect American courts wholly to renounce their prevailing orientation in favor of one emphasizing mutual caring and responsibility. Yet it does not seem naive to anticipate the possibility of some modification of our constitutional assumptions, not to dismantle the ladder but to take account of the view from the web.

To define oneself as part of a network of relationship is to find security in connection, and to see the source of aggression in separation and the competitive pursuit of individual recognition and power. In the network the zero-sum-game attitude toward power is moderated; indeed, power itself is seen in a different light. Because women generally find little need to climb the ladder in order to define themselves, they generally find little need for subordinates. The idea of power as domination recedes in favor of the idea of power as capacity—most notably, the capacity to provide care for others. The perception of human interactions as a network does not immunize those interactions from conflict. But the "guiding principle of connection," and the rejection of a view of life in society as a zero-sum game, encourage efforts to resolve conflicts by widening the range of

inquiry, seeking ways for the conflicting parties to define new goals they can share.

It is a fair question whether this process is compatible with the development of constitutional law by judges in the course of deciding cases. The traditional model of lawsuit is a zero-sum game: if the defendant wins, the plaintiff loses. Even in doctrinal terms, the recognition of a legal right implies that someone has a legal duty. Yet there are opportunities in constitutional litigation for courts to contribute to a "network"-oriented vision of human relationships in which conflict resolution is not seen as a struggle for domination. The object is to encourage the parties to explore avenues to cooperation. The courts' means for doing so lie both in the realm of substantive constitutional doctrine and in the realm of process.

One doctrinal contribution to the process of cooperative settlement of social conflict would be for the courts to redefine the idea of discrimination, abandoning the requirement of a showing of discriminatory purpose in favor of a principle recognizing that the discriminatory impacts of a law are a constitutional harm requiring justification by the state. To insist on a showing of illicit purpose in cases of racial discrimination or sex discrimination is to focus the parties on the goodness or evil in the hearts of public officials. Not only does this issue divert attention away from the concrete harms caused to real people by the governmental policy; it also encourages the parties to indulge in name-calling and defensive self-righteousness. Especially when the case involves institutional litigants—say, a city council and a civil rights organization—it is important for those people to be able to talk to each other after the lawsuit is over.

The litigation process, too, can help the parties to see conflicts and questions of power in the light of a "guiding principle of connection." Recent lawsuits involving school boards and hospitals and prisons have given courts opportunities to find alternatives to a "winner-take-all" decision, to promote cooperation, and to preserve the parties' long-term relationship.

The egalitarian decisions of the Warren Court consistently served the equal citizenship values of respect, responsibility, and participation. The idea of citizenship that emerges from the Court's opinions, however, is a citizenship of the ladder, emphasizing independence and freedom of access within a society composed of "atoms of self-interest." In the opinions, stigma or stereotype is seen as harmful mainly because it offends an individualized sense of justice, impeding access to some good such as employment or education. Thus, in a segregated school, the stigma of racial inferiority is said to be harmful because it interferes with a child's ability to learn. Only rarely does the Court describe stigma as the direct hurt that it is—a severance of its victims from the web of connection. Similarly, in decisions defending the constitutional right to vote, the court's opinions focus on voting as a means of access to governmental power. Yet the value of the vote to the citizen surely lies at least



as much in the symbolism of citizenship itself. Voting affirms that the citizen is a valued participant in the community. Thus, while equal citizenship opinions generally are written in the language of the ladder, the results of the cases also convey a meaning that is important even though it is unspoken: citizenship is belonging; citizenship is connection.

If our constitutional justice should more overtly embrace the morality of care and responsibility, we might expect not only the abandonment of the threshold requirement in discrimination cases of proving the discriminatory purpose of government officials, but other doctrinal developments as well. One would be renunciation of the "state action" limitation in cases of racial discrimination. Secondly, some forms of poverty are stigmatizing, or otherwise serious enough to prevent their victims from participating as members of the community. The idea of an affirmative constitutional responsibility of the state to relieve persons from such harms would also be a predictable derivation from a constitutional perspective in which the organized society's duty to its members is not limited to respecting their zones of noninterference, but extends to preventing or alleviating harms that are dehumanizing.

Another consequence of the "network" frame of mind is that women tend to distrust the effort to resolve a moral dilemma according to a hierarchy of abstract rules. Instead women's morality emphasizes context—the needs of real people in the fullness of their real situations. Can this contextual morality be translated into law without violating "the rule of law"?

In one sense contextual justice is already here. In constitutional law, every effort to take the judgment of human *judges* out of the process of judging will be doomed to failure. The act of judging inescapably implies choices among competing considerations. "General propositions do not decide concrete cases," Justice Holmes said that in 1905. He might have added, judges decide concrete cases—and they perform best when they inquire into the concrete facts that touch the lives of the flesh-and-blood people who will be affected by their decisions.

Even the identity of the parties may be relevant to the doing of justice, as it is when the Supreme Court encounters conduct by a state court or legislature that is out to "get" the NAACP. And in dealing with various forms of racial segregation, the Court could not ignore the context of Jim Crow as a political and social system, even though the Court's opinions gave no hint that it was seeking to repair a damaged web. Contextual justice is part of our constitutional law, whether or not the Supreme Court acknowledges its presence.

My point, however, is a different one. The concern to understand moral conflict in its particular human context may contribute not only to the quality of justice for particular individuals but also to the development of new legal doctrines that promote justice. Women's insistence on the need to appreciate the whole contexts in which moral issues arise drives them to widen inquiry,

to redefine issues, to expand the range of possible solutions. These are intellectual resources worth cultivating. The ability to find new approaches is the essence of creativity, including legal creativity.

In constitutional law the creation of new doctrines often begins in a sense of injustice that is not analyzed but felt. One such creative development began fifteen years ago in two cases that are very much on point in a discussion that links women and constitutional law. Louisiana allowed a lawsuit on behalf of a child for damages for the wrongful death of a parent, and allowed a similar action by a parent for the wrongful death of a child. When the child was born outside marriage, however, neither child nor parent could bring a wrongful death action. The Supreme Court, speaking through Justice Douglas, held that this scheme violated the rights

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of both an illegitimate child and a mother under the equal protection clause. A new constitutional category had come into being.

Justice Douglas plainly stated a moral intuition about the injustice of the Louisiana law, but he didn't offer much further explanation. In later cases the Supreme Court spoke of the unfairness of disadvantaging a child for a status outside her control and unrelated to her potential contributions to society. (The language of the ladder comes easily to the Court.) What is missing from these later opinions is any suggestion that the Justices are in touch with the human contexts—or, for that matter, the institutional context—in which the legal status of illegitimacy has its being. One major effect of the modern law of illegitimacy is that a man's wealth and status usually will not attach to a woman and her children unless he chooses to formalize their union or to recognize the children as his. Furthermore, in Louisiana, where this constitutional saga began, the legal disabilities of illegitimacy surely were not unrelated to that society's history of race relations.

Intuition is another name for a way of knowing that looks at patterns and textures, not analytically but contextually. In the first illegitimacy cases the Court's intuition was not only creative but right: there is injustice attached to the status of illegitimacy. When the Court ultimately decides to widen its doctrinal inquiry, seeking more inclusive ways of looking at these issues, the constitutional problem of illegitimacy will be seen clearly as a problem of responsibility and care in the web of connection. Today, however, outside the pages of



the law reviews, constitutional law knows only the vocabulary of the ladder.

Vocabulary matters. Language shapes the way we analyze the world and even the way we perceive it. We need a new vocabulary in order to redefine our constitutional polity to take account of women's perspectives of life and self and morality. Plainly, the language of the ladder is inadequate to express the fundamental values in the network of connection. Our standard moral and legal vocabulary, focused on autonomy and equality, cannot even express what women seek for themselves, let alone what they envision as the core values of social life. The vocabulary of women's perspectives, including their moral perspectives, is going to have to grow out of the experience of women. Thus, consciousness raising

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is the essential foundation for the second reconstruction as well as for the first.

Surely, however, further infusion into constitutional law of the morality of the web need not await the announcement that women have agreed on a new way to talk about the values of affiliation. Constitutional law has a vocabulary presently in place, and lawyers and judges who seek to promote "the guiding principle of connection" will continue to cast their arguments in the language of equality and freedom. After all, the normal progression of doctrinal development in constitutional law is for change in substance first to occupy existing words, and only later to produce changes in vocabulary.

By now some feminists may be getting edgy. Women's suffrage was sold in part on the romantic theory that women would somehow purify politics—a silly and patronizing view that reinforced the traditional stereotype of woman. I do not propose a modern analogue to this "sentimentalization" of the suffrage movement. Yet I am persuaded that a distinctive moral perspective will be infused into our public life as more and more women become judges and generally assume positions with policymaking responsibility.

Constitutional law in particular is a field in which movement toward the values of the network may come sooner rather than later. Not only is constitutional law

somewhat less precedent-bound than the law in other areas, it is also a field that has engaged the interest, the emotions, and the sense of purpose of large numbers of women who are just now entering the legal profession. Gilligan's interpretation of women's moral development rings true for me because it is confirmed by my own experience in the classroom. Women law students generally do seem to bring to our discussions the perceptions and values of the web of connection, and a sense of justice focused on care. These women do not seem to think change is impossible, and neither do I.

As if there were not challenge enough in thinking our way—and feeling our way—to new conceptions of our public life and new ways of expressing those conceptions, at the same time women must ask themselves whether it is self-defeating to engage in the conflict implicit in bringing those conceptions into institutional reality. Virginia Held puts the question in this form: "Can the decision to experiment with love . . . be reconciled with the decision to fight for equal power?" It would take real effrontery for any man to presume to resolve that dilemma. But as individual women seek their various answers to it, one hopeful sign is the increasing recognition that power, in the network, means not domination but capacity to aid the network itself. One way to exercise that capacity is for individual women to raise the consciousness of the men nearest them. It isn't easy to do that. No man has had a woman's experience, and most men, having found their identities in separation, will begin by fearing the web of connection. And women themselves may fear the consequences of trying to offer men new perspectives on matters that hit so close to home.

Most fear, however, is fear of the unknown. And it is amazing how quickly people adapt to new experience. Consider the recent changes in our law redefining the role of women in our public life. Those changes were hard to attain, but now they seem natural, even inevitable. The same institutional changes have altered the setting for relations between individual women and men. The redefinition of individual lives and the redefinition of our constitutional order are intertwined, and they cannot be separated. In both those processes of redefinition, men can learn a lot from women's experience and women's perceptions. The first step in conquering the unknown, after all, is to learn about it.

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*\*Mr. Karst, a professor of law at UCLA School of Law, delivered this address as the 1983 Currie Lecture. A longer article on the same theme will be published in a forthcoming issue of Duke Law Journal.*



# A Reappraisal of Parenthood as an Exclusive Status

*Katharine T. Bartlett\**

## THE NATURE OF EXCLUSIVE PARENTHOOD

Parenthood is, by and large, an exclusive status. A child has only one set of legal parents, at least at any one time, and these parents are autonomous, with a comprehensive set of privileges and responsibilities that they share with no one else. A core premise of parental autonomy, and one that helps to account for the dimension of exclusivity, is that parents raise their own children. This is assumed to be done in families; more particularly, in nuclear families. Indeed, *parental* autonomy overlaps with a concept of *family* autonomy that encompasses a set of prerogatives, some of which relate to children and others of which do not.

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The nexus between the premise of family and the exclusive nature of parenthood is complex. It begins with the fact that the nuclear family is itself an exclusive institution. Membership is restricted to a married man and woman and their dependent children. Spouses may choose each other, but only one at a time. Children, who may neither earn nor choose their place in the family, also belong only to one nuclear family. The family gains much of its moral and emotional force from its restrictiveness, for out of it is forged a sense of common destiny and mutual commitment that create powerful incentives for family members to do well by one another.

The law capitalizes on these incentives when it gives exclusive powers to parents. This assignment of power, in turn, reflects some very important political and social judgments. First, it denotes an unwillingness by the state to select caretakers for children based upon qualitative standards. Qualitative standards would require society to define a parenting norm, a task it claims to be unwilling to do. Giving rights to parents also acknowledges that the state itself cannot be an effective parent. Finally, and to come full circle, parental autonomy reflects a normative preference for the family as the basic social unit within which children should be raised. Parental autonomy encourages the formation of families and then protects families from interference by others (including the state) in the raising of children. This choice of the

nuclear family has a strong tradition, based upon the assumption that the family offers many advantages both to the individual and to society at large. The family is valued because it is thought to provide a secure and stable environment for its individual members, especially children, who benefit from an intimate setting within which they can be nurtured and socialized. It is said to provide a refuge from a cold, impersonal world. The family is also credited with helping to cultivate among individuals a sense of altruism, honor, dignity, and character—human values which engender the voluntary obedience to authority, self-sacrifice, citizenship, and virtue upon which a free society depends. Finally, it is through the family that both the common shared values of the culture and those diverse cultural and social traditions that make the society a richly pluralistic one are passed on through the generations.

## CHANGING PATTERNS OF FAMILY ORGANIZATION

The firm roots of the nuclear family in this society together with the legal framework that has grown up on those roots explain the dimension of exclusivity in parenthood that this paper challenges.

Changing patterns of family organization, however, contradict the basic premise of the nuclear family. Despite the assumed advantages of families to children, there are an increasing number of children who do not live with their parents. In 1982, twenty-five percent of children under the age of eighteen in the United States—over 15½ million children—did not live with both parents. One authority estimates that in 1990 this figure will be forty percent. The reasons for this phenomenon are familiar. More and more parents divorce, resulting in single parent families. Many divorced parents remarry, forming stepfamilies. Some parents never marry. Others abandon their children, sometimes without a family in any real sense ever having existed. Some parents are indifferent to their children. Others are unfit to raise them. Some leave their children “temporarily” with others for an array of reasons. Following these and other circumstances, many children are raised by adults who serve as parents but whose parenting roles are not secured by parental rights. A child whose divorced parent remarries may be raised by a stepparent. A child whose parents cannot or will not care for him may become attached to foster parents, to relatives, or to others.

Out of these circumstances arise disputes between the child's parents and non-parents for which current





law provides virtually no satisfactory resolutions. These disputes arise in the context of family disruption, and yet are resolved according to rules reflecting the norm of the nuclear family and, for the most part, the exclusive view of parenthood implied by that norm. Under rules applied in many states, relationships formed by those other than natural (usually married) parents may not be recognized unless the natural or legal parents are unfit. Thus, relationships based upon ties that are psychological often are sacrificed to those based upon those that are biological. Under tests applied in other states that focus on the welfare (or "best interests") of the child, rather than parental unfitness, biological relationships may be sacrificed to those that are psychological. *Both* approaches, however, have in common the view that parenthood is an exclusive status.

**APPLYING THE DOCTRINE OF EXCLUSIVE PARENTHOOD WHEN THE PREMISE OF THE NUCLEAR FAMILY HAS FAILED**

The impact of the exclusive nature of parenthood in situations in which the child has developed familial ties with adults in more than one family unit can be illustrated in a number of different fact situations. The most common is that of the stepfamily. Approximately twenty-five percent of American children are living or are about to live in stepfamilies. Despite the familial relationship that often develops between a stepparent and a child, a stepparent may not establish any legal relationship to the stepchild so long as the noncustodial natural parent retains any parental rights. The only generally recognized legal relationship that may be established between stepparent and stepchild is adoption, which terminates permanently the rights of the natural parents, and this is

usually impossible, unless the same-sex natural parent has been shown to be unfit or to have abandoned the child. Liberal adoption states have made it easier for stepparents to adopt in some states. While facilitating stepparent adoptions, however, stepparent adoption rules permanently sever all ties between the same-sex natural parent and the child, a result which may be undesirable for many reasons, which will be explored shortly.

A divorce between a child's natural parent and stepparent highlight some of the difficulties with the choice that is forced between one parent and the other. A stepparent without legal rights, who may have functioned as a parent for many years and to whom the child may have a deep emotional commitment, may be cut out of the child's life entirely at divorce. Alternatively, if the rights of a natural parent were terminated in order to recognize the stepparent/child relationship, the child may find himself without an important parental resource following the stepparent divorce.

Laws relating to the rights of unwed fathers pose another set of problems created by the law's exclusive approach to parenthood. The unwed father may have to overcome different barriers in order to obtain custody of his child, to be entitled to visitation privileges, or to have the right to withhold approval for the child's adoption. Uniformly, however, so long as the unwed father has any rights as a parent, no other father can have any rights. Thus, an unwed father who has no right to custody or even to visitation may be able to block the child's adoption by another. Alternatively, an unwed father who makes every effort to be a parent to his biological child may be so completely frustrated by the efforts of the mother and a welfare agency that his rights can be com-



pletely terminated so that the child can be adopted. No middle ground is possible. Only one father can have parental rights; all others, no matter what constructive role they might be able to play in the child's life, are excluded.

Many legal battles over children have involved persons claiming to be a child's psychological parent in conflict with a child's natural parent. While some cases raising claims by psychological parents result in custody orders that fall short of terminating the rights of the natural parents, very few recognize any meaningful, continuing role for more than one parent or set of parents in a child's life. For example, foster parents who become a child's psychological parents, and who may develop a long-term parental relationship to the child, can acquire no *permanent, legal* relationship to the child unless the rights of the natural parents have been terminated. Under traditional parental rights statutes, this often cannot be done, for natural parents will demonstrate just enough interest to avoid application of termination statutes requiring a showing of parental unfitness or abandonment. The foster care relationship, if allowed to continue, does so as a supervised, paid, theoretically short-term relationship. Under more liberal termination statutes, the rights of the natural parent may be severed, but foster parents are not necessarily given priority or even standing as a party to the adoption proceeding. And whoever adopts the child, the child loses all legal ties to the natural parents though these may, at some date in the future, have been meaningful to the child.

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Disputes involving grandparents pose different problems, but these, too, are related to the exclusive approach to parenthood that persists under most applicable laws. Under the common law, grandparents will have no custody or visitation rights, no matter how close their relationship to their grandchildren, unless the rights of the natural parents are terminated, and even then, they may not be favored in subsequent adoption proceedings. Over forty states now provide for court-ordered visitation by grandparents under certain circumstances, the most common being divorce or separation of the parents or a death of one of the parents. In a few states, visitation statutes give courts discretion to make grandparent visitation awards even in the face of opposition by a child's parents who live in an intact family. To an extent, these statutes represent an exception to the exclusive view of parenthood, for in the circumstances under which they apply, they infringe upon the autonomy of parents in controlling custody and access to their children. The limited nature of this exception is demon-

strated, however, when the child, whose grandparents gained visitation privileges at the divorce or death of a parent, is adopted. In most states, either specifically by statute or by judicial construction of adoption statutes, adoption, either by a stepparent, or especially by strangers, will automatically terminate visitation rights which grandparents are otherwise afforded.

#### CHILD DEVELOPMENT RESEARCH

Exclusive parenthood is defended by modern experts on the grounds that children need one parent (or set of parents living together), who have unequivocal and undivided parental authority over the child. This conclusion, though persuasive enough to warrant the concentration of parental authority in parents at the birth of the child, fails to take into account what is known about children who form child-parent relationships with adults outside of as well as within nuclear families. Current research demonstrates that even if nuclear families are best for children, parental relationships arise and will continue to arise outside nuclear families, and that when they do, children lose more than they gain from enforcing exclusive parental relationships.

While the substance and implications of these studies cannot be developed fully in this paper, I should highlight a few areas of research that have particular relevance to law and policy relating to the definition of parental relationships. First, there is near consensus among child development experts that a child's healthy development depends in large part upon the continuity of relationships that he or she experiences. When a child's family life is disrupted as a result of a family crisis, continuity for the child inevitably is sacrificed to some degree. While it is possible that some children do not experience lasting emotional or social harm from disruptive childhood crises and that some may even benefit from them, it is reasonable to adopt as an operating principle the conclusion of most modern experts that a break in family continuity is usually detrimental to a child, and that the law, to the extent it is relevant to these crises, should attempt to minimize the detriment.

Continuity as a goal of child custody law can be an illusive concept, however, in that for any particular child whose family has been disrupted, the goal of continuity may suggest different and inconsistent resolutions. If the goal of continuity centers on the prospects for stability and certainty in the future, continuity may be served best by making a clean break with the past, cutting off past relationships that have been unstable or risky for the child, or severing ties with all but the child's custodian. On the other hand, if continuity comprehends the whole of a child's past existence as well as his present and future, it may require preserving ties with the past, even at the risk of some uncertainty or instability in the present and future. Taking these changing needs into account, it is nevertheless fair to conclude on the basis of the best evidence to date that the maintenance of contacts with a child's former caretakers, particularly the natural parents, is an important component of the child's



need for continuity, and that this component becomes increasingly important through each progressive stage of development. For adolescents, particularly, the process of identity formation generally requires a comprehension of the child's familial history and connections and an integration of the child's immediate life involvement with a larger sense of personal involvement in a family heritage. Children in the age 3-10 range who must be separated from their parents benefit from an awareness of and connection to the family relationships that have developed in order to consolidate a value system and make the developmental transition from the contained world of their families to the wider world of school and community. And even younger children, whose ability to form lasting attachments may be prejudiced by multiple parenting figures in infancy, may later on in their development benefit from connections to their familial past.

The conclusion that children benefit from contact with their broken past is reinforced by a number of other factors. One of the problems faced by children whose relationships with their parents have been disrupted is that they are confused about the cause and

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*Children who develop a more realistic sense of their past may achieve a continuity that provides the foundation they need upon which to establish their identity and internal stability.*

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meaning of the disruption. Children tend to create irrational reasons for their parents' absence, often premised on their own imagined guilt, or they may develop unrealistic ideas about who their absent parent or parents are. They may either idealize their parents, or exaggerate parental faults and negative parental behavior toward them. While these fantasies may temporarily help children deal with a lack of confidence, poor self-image, and feelings of anxiety, guilt, and shame, they do not provide a suitable foundation for long-term resolution of loss.

Research has shown that children are able to understand and accept reality far more than was earlier thought. Although children's imagined explanations are almost always enormously exaggerated, irrationally fearful, and illogical, they can understand and accept the truth. Indeed, it has been shown that children not only *can* know, but that they *need* to know what their parents are like and, especially, why they are not with them. Children who develop a more realistic sense of their past may achieve a continuity that provides the foundation they need upon which to establish their identity and internal stability.

Loyalty conflicts are another problem for children

whose families have been disrupted. Children are known to form extremely tenacious loyalty commitments to adults. These commitments are based in part on their identification with many of the caretaker's personality traits, which become part of the child and which persist long after a separation from the parent occurs. Regardless of the apparent instability of the family relationship, loyalty commitments are a source of security and support, and exist even when the memory of the parenting relationship is unpleasant. Conflicts in children's minds between those to whom they are loyally committed threaten their security. Because the identification with parents, even abusive ones, is strong, any attack on the parents or challenge to their authority is perceived to be an attack on the child as well.

A common assumption about children who must live apart from one or both parents is that continued contact with the absent parent or parents creates confusion and conflicts in loyalty that make adjustment to the underlying crisis and to the new arrangement more difficult. Based upon this assumption, it has been urged by one research team that when families are disrupted, all but one source of loyalty should be removed from the child's life. With respect to children removed from their parents because of abuse or neglect, this team argues that if reunion is not achieved within a certain time, the former legal ties between the child and the absent parent or parents should be permanently severed. As to children of divorced parents, only one parent should have a legally recognized interest in the child.

Recent research does not support the underlying assumption of these recommendations. There is no doubt that continued contact by a child with an adult from whom he has been separated can create genuine

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problems. Children whose repressed separation feelings about the adults are triggered by visits can be upset, and adults can become resentful and hostile. Perhaps the most important criticism of non-custodial parent visitation is that it may create ambiguity about whom the child is to view as his or her parent.

Despite the negative consequences of contacts between non-custodial parents and children, however, there is considerable evidence that these contacts are in the best interests of many, even most, children. It has been shown, both in divorce and foster care cases, that



lack of contact with an absent parent can be damaging to the child. Two California researchers who performed longitudinal studies for sixty-six children of divorce, over a five-year period, found that children of divorced parents who are not visited by their non-custodial fathers suffer intensely at every developmental level. Children who maintain relationships with both parents, on the other hand, suffer less disruption and upset as a result of the divorce. Good relationships with the non-custodial parent are correlated highly to high self-esteem and lack of depression in children of all ages.

Studies of abused and neglected children show that despite the negative experiences these children may have had in their natural homes, they also still feel substantial ties with their parents. It has been shown that foster children who maintain some contact with their parents experience fewer adjustment problems in terms of cognitive and psychological functioning than those whose biological bond is completely severed. Indeed, children, especially older children, are often able to draw strength from multiple relationships. On the other

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hand, children whose parents have had their rights terminated suffer anxiety, not only about losing contact with parents and family but also about being disloyal to their families. The amount of contact by parents whose children have been removed from the home can be critical to the positive attitudes necessary to make the contact meaningful or productive. Feelings of lack of acceptance have caused many non-custodial parents, after early efforts to maintain contact, to drift away, and to finally terminate visitations, giving rise to the accusation that they lost interest in their children.

The need of children to maintain continuous contact with parent figures, including their natural parents, and their ability to manage multiple parenting relationships are important considerations in evaluating the present legal framework within which parenthood is defined. The framework of exclusive parenthood overlooks these considerations. In the next section I will sketch the outlines of an alternative, non-exclusive view of parenthood that are more responsive to them.

#### **ALTERNATIVES TO EXCLUSIVE PARENTHOOD**

The basic argument of this paper is that when children develop *de facto* parental relationships with adults

outside the nuclear family, alternatives to exclusive parenthood should be available in resolving disputes over children arising from these relationships. These alternatives should not replace altogether traditional parenthood; insofar as traditional parenthood identifies with and reinforces the nuclear family, it is likely to remain society's "first choice" option. Non-exclusive parenthood alternatives should be limited to circumstances in which the assumption that children are raised by their parents, within a family, has been significantly attenuated, and when psychological parenting relationships develop outside the nuclear family with adults who are not the child's natural or legal parents.

Nothing in current law endorses the formation of these relationships. Only natural or adoptive parents are expected to develop parental relationships. Even so, adults other than those assigned by nature or legal presumption become parents to children, and it is safe to assume that they will continue to do so. The law's reluctance to recognize these relationships probably does little to discourage an adult from stepping in as parent for a child when the occasion arises, and unless society is prepared to outlaw adults from doing so, it would seem that the most constructive role the law can play in responding to this phenomenon is to refrain from creating more suffering for people in their domestic relations than they already do for themselves.

The concept of non-exclusive parenthood essentially recognizes *de facto* psychological parenting relationships when they are formed; however where possible, these relationships are recognized along with, and not instead of, the relationships formed with natural or legal parents. This concept is similar in many respects to recommendations that have been made to make wider use of guardianships and permanent placements with nonparents in order to recognize and regularize parenting relationships for children who cannot live with their biological parents but who will not benefit from an absolute break from them. Unfortunately, these recommendations, which current law is inadequate to implement, have not been widely followed.

There are risks, of course, to opening up a legal status to more than one set of parents at a time. Making the status of parenthood non-exclusive in certain circumstances may cause parents, or their substitutes, to value it less and therefore to take their responsibilities less seriously. It may also create unreasonable claims by adults who develop relationships with children. Many adults are important to children, including teachers, swim instructors, girl scout leaders, neighbors, little league coaches, camp counselors, parents of friends, and babysitters. It would be both impractical and unwise

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*The custodial requirement is necessary to restrict the field of prospective psychological parents.*

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to create legal rights every time an adult developed a relationship with a child, the continuation of which is thought to benefit the child. Broadening access to parenthood also may create an even greater indeterminacy than that which already exists in child custody law today. Risks of uncertainty and lack of finality in child custody matters, and the distortions in private bargaining among parties to child custody disputes arising from this uncertainty and lack of finality may be enhanced. I attempt to address these problems by defining guidelines that are as limiting and determinate as possible.

First, I propose to restrict this non-exclusive brand of parental status to adults who are either the natural, the legal, or the psychological parents of the child. Psychological parents are those who act for the child to provide those physical, emotional, moral, and social needs that are normally associated with the home and family, "on a continuing, day-to-day basis through interaction, companionship, interplay and mutuality." I assume that more than one parent may have a psychological parent relationship with the child at the same time, but I would limit recognition of psychological parenthood to situations in which the parent is acting or has acted as a custodian for the child. Although in some cases a child may have a closer, more meaningful relationship to a non-custodial adult (a warm, loving grandmother) than to a custodial one (a cold, distant mother), the custodial requirement is necessary to restrict the field of prospective psychological parents. In an important sense, it is familialism, not friendship, love, guidance, or caretaking, that the definition seeks to encompass, and a custodial relationship would seem the most accurate guarantee of this quality.

Another feature incorporated in the definition of psychological parenting is mutuality. Psychological parenting implies that parent and child perceive each other as such. In determining the perceptions of the adult, an important element is motivation. To be sure, the circumstances of the onset of the relationship may not foretell the nature of its future development. An

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*Psychological parenting implies that parent and child perceive each other as such.*

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adult who temporarily assumes custody of a child as a favor, or for pin money, may grow attached to her as the relationship continues and develop parent-like feelings for the child which conceivably could be recognized under the non-exclusive parenthood concept. On the other hand, an adult who continues to think of caring for a child primarily as a way of obtaining revenge, as a job, or as a favor is not a suitable prospect for a status intended to secure certain of the rights and privileges otherwise reserved for parents.

It is also important that the child perceives the role of the adult to be that of parent. This perception, of

course, can be measured only in terms of the age and capacity of the child. Also, as with the adult, perceptions of the relationship by the child may change as it develops. Again, however, so long as the child perceives the adult to be a temporary caretaker, such as a babysitter, for example, subject to the regular direction of the *real* parent, mutuality and hence a true psychological parent relationship does not exist.

A time period may provide one means to measure the nature and seriousness of a psychological parent

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*Any rule in child custody that includes an analysis of the strength or length of parental relationships must address the serious problem of child-snatching.*

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relationship, and thus, although it will not guarantee a psychological parent relationship, may help to ensure that this new parental status is not inappropriate. Such a period, while necessarily inexact, may provide a minimum threshold below which recognition of a parental status should be withheld. Six months is a conservative minimum time period. A psychological parent relationship will take longer to form in many cases, especially for older children whose ties with former caretakers may inhibit the formation of new ties. In no case, however, should a psychological relationship be shown to have developed in less than six months.

I would also eliminate one set of circumstances under which psychological parenting relationships would be recognized under this proposal. The circumstances under which these relationships are formed are irrelevant to the quality of the relationship and thus ordinarily should not be a factor pertinent to its legal significance. I would propose, nevertheless, that parental status be denied to any adult whose *de facto* relationship to the child became possible as a result of illegal action by the adult, especially the removal of a child from the legal guardian without consent or a court order. Any rule in child custody that includes an analysis of the strength or length of parental relationships must address the serious problem of child-snatching. The effect that the recognition of multiple parental relationships would have on this problem is not clear. One might suppose that the availability of alternatives to the all-or-nothing proposition implicated by exclusive parenthood might reduce the number of desperate acts undertaken by parents threatened with the total loss of rights to a child. It seems more likely, however, that the problem would be exacerbated rather than alleviated by rules that focus on the strength of relationships rather than on conduct-oriented parental rights. Child-snatching is, after all, a serious problem among divorced parents, who ordinarily have not lost all rights in their children, but only primary custody. I hesitate to provide



any fuel to the tinderbox of emotions and frustration that attend parental acts of taking off with a child in defiance of a court order or parental agreement. Thus, despite the fact that in some cases the goals non-exclusive parenthood is intended to achieve will be frustrated, I would recommend that only those *de facto* relationships that have arisen, at least initially, at the forbearance of one or both parents or legal guardians, or under court order, be recognized.

One question raised by the concept of non-exclusive parenthood is the practical one—how, exactly, can two, or even more, parents who acquire parental rights be able to exercise them? A non-exclusive view of parenthood does not compel any particular set of rules and priorities for dividing parental privileges and responsibilities between parents. It does not help decide which parent, if either, should have primary custody, or whether there should be a presumption in favor of mothers, or of joint custody. Ordinarily, however, parental status implies the opportunity to develop or to continue to develop a relationship with a child, and this remains the expectation—indeed the purpose—of the proposal for non-exclusive parenthood alternatives. In resolving the practical difficulties, it would seem appropriate to consult current models for shared parenting within marriage and divorce. While some of these may seem rather complex when applied to multi-parent situations, the need for a child to adjust to complex situations should not warrant, in itself, the exclusion from the child's life of associations with parents from both households, nor should the unsupported assumption that too many fathers (or mothers) is bad for a child.

The availability of non-exclusive parenthood status should not depend upon an amicable relationship between the various parties nor upon the satisfaction of the noncustodial parent's child support obligations, a condition imposed in some post-divorce visitation disputes. From the point of view of the child's need for continuity, visitation has an importance for the child independent of the financial responsibility of the parent. Moreover, although it might be supposed that parents would take their financial responsibilities more seriously if their rights to visitation depend upon it, a more effective incentive actually may be provided by unconditional visitation. While cause and effect are virtually impossible to establish, it has been demonstrated that noncustodial parents who see their children often are more faithful over time in meeting their child support obligations than those who do not.

This same argument may raise questions about whether the expansion of parenthood beyond its present bounds may lessen the access of some noncustodial parents to their children and thereby the likelihood that they will comply with child support obligations. This factor reinforces the need for caution in redefining the nature of parenthood to accommodate relationships not recognized under current law, but it should not be exaggerated. As to noncustodial divorced

parents, the class of parents under current law who are likely to have child support obligations, the availability of parental status to other parent figures, particularly stepparents, will not necessarily mean that the access of noncustodial parents to their children will be curtailed. In addition, the creation of legal status for parent figures seems as likely to cultivate reliable sources of support for the child as to destroy them.

The effect of non-exclusive parenthood alternatives on current adoption law must also be considered. Non-exclusive parenthood alternatives cannot and should not replace adoption entirely. Adoptions by consent will continue to serve the interests of many adults and children. Involuntary adoptions may also be necessary in cases of true abandonment or parental depravity. Non-exclusive alternatives should reduce the need for adoption in many cases, however, and eliminate some of the damaging aspects relating to the exclusive view of parenthood that it presupposes. Because adoption would no longer be the only way in which a child can acquire a permanent legal relationship with *de facto* or other prospective "adoptive" parents, laws that reflect opportunities for non-exclusive parenthood may increase the ability of courts, otherwise fearful of the drastic consequences of adoption for natural parents, to order custody to nonparents who have *de facto* relationships with the child.

Where children retain ties with natural parents or where the rights of natural parents cannot be terminated under applicable law, non-exclusive parenthood alternatives may permit the creation of a stable, permanent legal relationship with another set of parents, more permanent and formal than some of the more typical foster care arrangements or ambiguous *de facto* arrangements that now exist under laws that assume that parenthood is exclusive. In still other cases, alternatives to exclusive parenthood would remove the necessity for proving that a natural parent has abandoned, neglected,

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### *Non-exclusive parenthood alternatives cannot and should not replace adoption entirely.*

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or abused a child in order to recognize legally a non-parent who is actually functioning as a parent. This non-parent can attain status as a parent, even as the primary custodial parent, without cutting off permanently and completely all rights of the natural parent. These alternatives would reduce the conflict that often is stimulated when parents are threatened by the total loss of their parenthood. More importantly, these alternatives address the needs of children for continuity of relationships with both natural and *de facto* parents.

In some instances, even the most limited role for a parent will be plainly detrimental to the child. Although the cases in which this is shown to be true will be rare,



the concept of non-exclusive parenthood does not eliminate entirely the possibility of terminating parental rights involuntarily in extreme cases. Relieved of the pressure to protect parents from the total and permanent loss of parenthood and simultaneously to assure the welfare of children, however, termination standards can be reserved, more properly, for terminating the rights of parents whose involvement in the lives of their children is truly detrimental to those children.

Will families formerly eagerly willing to adopt children, as exclusive parents, be willing to accept children

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*Termination standards can be reserved, more properly, for terminating the rights of parents whose involvement in the lives of their children is truly detrimental to those children.*

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“as their own” under the more limited, non-exclusive parenthood status? There is little evidence upon which to base speculation on this point. It has been shown, however, that adults with familial connections to a child who do not have exclusive parenting status can come to regard and care for a child as their own, in a variety of circumstances in which other adults share a parental role with them, or are, indeed, the “real” parents. Formal parenthood status that is not exclusive both recognizes and helps to perpetuate these roles, roles that may be unnecessary, or even negative, if the premise of the nuclear family is a reliable one, but necessary and constructive if it is not.

#### CONCLUSION

The concept of non-exclusive parenthood is not a precise legal doctrine intended to provide easy answers to difficult questions of authority over and access to children. It is, rather, an alternative for approaching certain child custody disputes in which, because the child has developed childparent relationships with adults outside his nuclear family, one of the critical, underlying premises of child custody law—that parents raise their own children in families—is no longer a fair one. It is an alternative view of parenthood that eliminates the element of exclusivity that long has dominated our understanding of parental rights, and may therefore be a more appropriate way of handling certain disputes over children. It is a flexible concept, one which allows

for a wide variety of child custody arrangements including those now ordered in divorce cases, and which accommodates changes in those arrangements over time, according to changes in the needs of the child. In some cases it suggests answers that courts, more mindful of the welfare of children than of legal precedent, are already reaching, but it urges the development of determinate, principled standards that can serve as a more stable foundation for these decisions. Without such a foundation, courts more often will be constrained to apply the law as they understand it to be, law that remains bound by an exclusive view of parenthood.

A final concern I must address is whether alternatives to exclusive parenthood will contribute further to the decline of the nuclear family. The relationship between legal reform and social change can be neither easily discovered nor accurately predicted. Given the reasons children come into the care of nonparents, and the growing possibility that a psychological parent may prevail in a child custody fight, it seems unlikely that an approach that attempts to accommodate more than one parent or set of parents in a child custody arrangement will further weaken an already vulnerable American institution. Indeed, the decline of the family seems more directly related to economic and social factors than to legal ones. No matter; once it is demonstrated that children with certain parenting histories experience more benefit (or, if you prefer, less detriment) from carrying on multiple, non-exclusive parental relationships

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*The decline of the family seems more directly related to economic and social factors than to legal ones.*

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than from being restricted to exclusive ones, child custody law seems an inappropriate tool for suppressing the decline of the nuclear family. In this regard, the view that the failure to make legal changes to correspond to social change harshly punishes those who participate in the evolution of society is especially compelling, because the participants are not willing ones.

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*\*This paper is the short version of a substantially longer article entitled Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed, to be published in the June, 1984, issue of the Virginia Law Review, Vol. 70, No. 1, Copyright Virginia Law Review Association.*



# The Preferences of Friendship

*Sanford Levinson\**

WE ARE JUSTLY PUNISHED for those exclusive attachments which make us blind and unjust, and limit our universe to the persons we love. All the preferences of friendship are thefts committed against the human race and the fatherland. Men are all our brothers, they should all be our friends.<sup>1</sup>

*(The author begins by discussing this statement by Rousseau and attempts by others to delineate the conflict between citizens' duty of loyalty to the society at large and their private allegiances to friends. He states that this conflict surfaces in the law in the doctrines that concern testimonial privileges.)*

All testimonial privileges block the state from compelling the disclosure of presumptively important or desirable information. The most famous such privilege in our legal system is, of course, the fifth amendment privilege against compulsory self-incrimination. This presentation shall concentrate on those testimonial privileges that allow one person to affect the testimonial process on the basis of the relationship of the information being requested to another person.

Testimonial privileges are a rich field for inquiry because they represent an area of the law where the state, in effect, seemingly limits its own sovereignty by recognizing the continuing validity of pre-political personal relationships (or relationships designed to protect or enhance one's extra-political *persona*) over full-scale identification of oneself as a member of the political community. This is very different, it is worth noting, from general protection of a "right to privacy" by preventing a psychiatrist, for example, from publishing a book disclosing a patient's secrets.<sup>2</sup> In this latter case, the state is merely arbitrating a dispute between two private individuals. Although important questions of theory are involved, to be sure, there is not the ultimate drama of the state's denying *itself* information it would prefer to have in order to achieve some legitimate public purpose, such as the discovery and punishment of criminal



behavior. Assessing the validity of claims of privilege raises problems of the utmost importance for any theory of the liberal State. Moreover, clarification of those claims also enables us to discover what might be involved in truly taking (certain) rights seriously. Certainly one of the aims of this essay is to suggest that genuine commitment to the values of friendship and private life might require significant changes in the way we approach testimonial privileges.

It is obvious that there is no single notion of testimonial privilege that can successfully capture all of the nuances present in considering, on the one hand, the marital privilege or, on the other, the "professional" privileges (e.g., lawyer-client, doctor-patient). The Supreme Court has suggested that the classical privileges "are rooted in the imperative need for confidence and trust."<sup>3</sup> The marital relationship is indeed described by the Court as "the best solace of human existence." And the Court goes on:

The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts, and to receive priestly consolation and guidance in return. The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out. Similarly, the physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment.<sup>4</sup>

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*Genuine commitment to the values of friendship and private life might require significant changes in the way we approach testimonial privileges.*

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This passage generates two observations. The first concerns the basis of the privileges; the second, their scope. As to the first, whose conception of "need" controls? Does society honor those conceptions of individual "need" held by its members, regardless of the cost to important general policy goals? As Ronald Dworkin has argued so insistently, this indeed is what it means to take a right seriously.

Or, on the contrary, is "need" to be defined, in a basically utilitarian manner, by the society itself, so that *it* decides what is socially useful and then structures a regime of privileges accordingly?

This latter, utilitarian, justification is, of course, at the heart of Dean Wigmore's classic presentation of the circumstances under which a privilege should be recognized in law:

- (1) The communications must originate in a *confidence* that they will not be disclosed;
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties;
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; and
- (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.<sup>5</sup>

This is not a conception that takes rights seriously, for individuals have only those privileges which the society itself deems desirable in order to attain broad social goals. Should a particular kind of relationship not be thought functional to the social order, or should the good purchased even by a desirable relationship not be high enough, from a social perspective, to justify its encouragement at the cost of society's foregoing the receipt of valuable information as evidence, then society

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*Thus we have the potential paradox of society's supporting "the imperative need for confidence and trust" only so long as that support is useful.*

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is under no compulsion to grant a testimonial privilege. Thus we have the potential paradox of society's supporting "the imperative need for confidence and trust" only so long as that support is useful; should it be socially counter-productive, it can be withdrawn, unless one roots at least some privileges in some non-utilitarian conception of the self's relation to the social order.

Regardless of the basis of privileges, though, the second problem remains—defining their scope. Does the particular structure of privileges we have present a coherent whole? Or, on the contrary, does a yearning for analytic clarity drive us toward either expansion or limitation of the existing privileges?

One may have a panoply of privileges in regard to her spouse but have no legally recognized privilege concerning her lover. In the latter context one can be compelled on pain of jail to divulge the most intimate conversations, let alone merely to testify adversely. A and B are protected only if they enjoy the legal status of husband and wife. The private structure of intimacy must take specific legal (and therefore public) form if it is to be safeguarded against public intervention.

Indeed, it is not only the lover who is unprotected in American law. Family relationships other than the spousal are generally not recognized as conferring testi-

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*The private structure of intimacy must take specific legal (and therefore public) form if it is to be safeguarded against public intervention.*

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monial privilege, although several courts have recently recognized a parent-child privilege. There is no doubt, however, that American law does not recognize a sibling privilege, let alone other kinship privileges. A similar selectivity and uninclusiveness is apparent in the realm of the professional privileges, with the result that the state offers no protection at all against many potential incursions into the territories of the private self.

*(The author next considers defenses of testimonial privileges [besides overtly utilitarian ones]. He distinguishes between theories "emphasizing self-protection—i.e., protection of an essentially atomistic, psychologically egoistic individual"—on the one hand, and those concerning the value of protecting intimate relationships as "goods in themselves," on the other hand. The "professional" privileges [e.g., lawyer-client, doctor-patient] are in the former category. These privileges can be seen as extensions of the fifth amendment's protection against self-incrimination, with the lawyer or doctor "merely an agent of the central self accorded the Amendment's protection." By contrast, the spousal privilege exists to protect the relationship itself—to foster reciprocity and mutual sharing between husband and wife. The fifth amendment, the author contends, thus cannot be the source of privileges [e.g., spousal] which are based on intimacy—since in many cases, the values of self-protection and relationship protection [i.e., intimacy] are in direct conflict.)*

Whatever one's approach to testimonial privileges, though, perhaps the most basic problem is trying to achieve some "fit" between the interests deemed to be protected and the specific relationships to which the privileges apply. All of the present privileges are distinctly role-related. An individual is protected against disclosure of confidential conversations with other persons of defined roles: spouses, doctors, priests, and



lawyers, for example. What joins all except the first, of course, is that they share the social status of being professionals. Indeed, insofar as claims are made to add to the present list of privileges, they are almost inevitably linked to specific professional groups who claim similar functions to already recognized professions.

And all these supplicants for testimonial privileges adopt what I have termed the “agency” theory of protection. Today’s individual, it is claimed, needs not only to consult doctors, lawyers, and priests, but also to take advantage of the special skills of accountants, gurus, and others. It is argued that maximum use of such agents can be safeguarded only if we underscore the trust that A can safely place in B by giving to A the right to prevent B from testifying about what he was told in confidence.

Even if we adopt agency claims in regard, for example, to psychiatrists, surely the “fit” is highly imperfect. Why exactly should only the M.D.-holding psychiatrist or (in some states) the Ph.D.-certified clinical psychologist be protected as one’s agent, but not one’s

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*All these supplicants for testimonial privileges adopt what I have termed the “agency” theory of protection.*

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sensitive colleague who is willing to listen (and to respond helpfully) to one’s troubles? *That* person must lie or go to jail if disclosure of intimate material is to be avoided.<sup>7</sup>

One of the things we see in the development of testimonial privileges through time is our capitulation to professionalism: Ordinary men and women are deprived of access to testimonial privilege (and thus protection against the forced betrayal of their friends and associates) through failure to share professional status. Thus, far from being evidence of a general commitment to the values of trust and privacy, the present system of testimonial privileges is a symbol much more of our cultural over-commitment to the values of professionalism. Indeed, the present scheme of privileges actually denigrates the general importance of private intimate relationships.

The emphasis on status and credentials serves two functions. First, it adds social support to the claims of

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*One of the things we see in the development of testimonial privileges through time is our capitulation to professionalism.*

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importance made by the protected professions. A way of indicating that a new profession has “arrived” is to give it access to testimonial privileges enjoyed by the

classical professions of medicine and law. But there is a second function as well: Emphasis on credentials makes it possible to identify the specific individuals entitled to hold themselves out as enjoying the privilege. That is, even if in theory we might agree that sensitive office-workers should be allowed to claim the same privilege as psychiatrists, we are wary of identifying the category of “sensitive workers.” The transaction costs of such identification would be far too high to commend adoption by a society even minimally committed to efficiency.

The marital privilege is a paradigm case of easy identifiability. There are relatively unambiguous legal tests to determine who is “married” and who is not; if one passes those tests, the privilege holds. There is similar ease of identification of those who are lawyers or doctors, though even in the last group we enter the world of the “unconventional” doctor—the chiropractor, herbalist, or practitioner of acupuncture. And when we reach the religious minister, chaos ensues. It was easy enough to decide who was a “priest” so long as the Catholic Church maintained its hegemony, but Protestantism of course opens the dikes. If one accepts the priesthood of all believers, then is every believer entitled to the priest-penitent privilege?<sup>8</sup> The answer, legally speaking, is obviously not, though the theoretical difficulties remain.

We could, of course, get around this set of problems by allowing anyone to refuse to testify, or to block the testimony of others about confidential communications—or to testify adversely at all—simply by asserting that to allow such testimony would be to betray an important private relationship. A Mafia-connected lawyer is entitled to claim the privilege against disclosing conversations with his clients; we could extend the same privileges to others connected with the Don. I assume that we would hesitate to do so: we do wish to maintain some capacity of the collective social order to garner evidence against those who break its laws. If one is entitled to purchase

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*There may even be a touch of sexism linked to the emphasis on spousal status.*

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invulnerability to forced disclosure merely by prefacing a remark with “Confidentially, and I’m telling you this only because you’re a good friend (like the 200 other close friends I’ve told this to),” or by invocation of personal distress at betrayal, conviction of criminals would become markedly more difficult.

Whatever the difficulty of establishing “fit” in agency relationships, the problem is even greater in regard to truly intimate relationships, especially if we defend protecting such relationships by reference to notions other than mere mechanisms of self-defense in a cold and brutal world. Whatever the enthusiasm of the United States Supreme Court, among others, for the marital state, there is surely nothing unique about marital relationships in the ability to provide emotional and other succor. Many marriages are emotionally sterile, and



emotional intimacy is often found with non-spouses.

There may even be a touch of sexism linked to the emphasis on spousal status. Some research indicates that women are much more likely than men to confide intimate matters to close (female) friends.<sup>9</sup> Men, who seem to confide only to their wives, if at all, may be relatively better protected by the spousal privilege than their wives who have confided as well (or perhaps only) in their friends.

If one takes seriously the notion of private life linked with the "preferences of friendship," it is necessary to expand the circle of protected relationships well beyond the marital arrangement and accord lovers and friends the same protection as spouses. Anything less means simply that the professed regard for intimacy and trust is questionable. Just as the professional privileges can be interpreted at least in significant measure as a social means of shoring up the status of professionals, the spousal privilege can be interpreted as an effort to support the bourgeois notion of emotional monogamy. Whatever one's views about sexual monogamy, that is certainly a different issue from the protection of more general privacy and intimacy. The spousal privilege can be defended in terms of the latter values only if one is willing to assert the justifiability of the state's limiting one's deepest intimacy to her spouse.

At this point I hope it has become clear that the issue of testimonial privileges implicates one of the central questions of contemporary liberal political theory: Can the State be truly neutral among life plans? Ronald Dworkin, among others, has defined liberalism

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*The spousal privileges can be interpreted as an effort to support the bourgeois notion of emotional monogamy.*

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as consisting precisely in the State's refusal to define the good life for its citizens.<sup>10</sup> Yet it is impossible to imagine a coherent theory of testimonial privileges that does not at the same time enunciate some notion of the good life, whether that be expressed as one including the blessed state of matrimony, close friendship, or frequent consultations with one's psychiatrist. That is, of course, as true of this essay as of any other defense of any given privileges. Tell me the privileges you wish the state to

adopt and I will tell you your vision of the good life. It comes with the territory.

There is, then, no escape from the deep problems of social and political theory presented by any attempt to make testimonial privileges cohere. Each of the present privileges can be explained historically or sociologically, but this is obviously different from defending them theoretically as "fitting" within an overall rationale. What might we do other than return the topic to its present place within the shadows of our concerns?

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*\*Professor of Law, University of Texas School of Law. This article is excerpted from an address given by Professor Levinson to a meeting of the Duke Law School faculty on November 11, 1983. A longer version will be published in a forthcoming issue of Duke Law Journal.*

1. 4 J. Rousseau, *Correspondance Generale* 827, quoted in S. Okin, *Women in Western Political Thought* 182-83 (1979).

2. See *Roe v. Doe*, 34 N.Y.2d 562, 354 N.Y.S.2d 941, 310 N.E.2d 539, cert. granted, 417 U.S. 907 (1974), dismissed as improvidently granted, 420 U.S. 307 (1975).

3. *Trammel v. United States*, 445 U.S. (1980).

4. *Id.* at.

5. 8 J. Wigmore, *Treatise on Evidence* 2290 (McNaughten ed. 1961). See generally R. Lempert and S. Saltzburg, *A Modern Approach to Evidence* 606-15 (1977).

6. See, e.g., Comment, *Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers*, 61 Cal. L. Rev. 1050 (1973); Robinson, *Testimonial Privilege and the School Guidance Counselor*, 25 Syracuse L. Rev. 911 (1974); Cross, *Privileged Communications Between Participants in Group Psychotherapy*, 1970 Law and the Social Order 191. Even though the last article suggests the extension of a testimonial privilege to (lay) members of therapy groups, the argument depends on the supervision of such groups by professional psychiatrists. There is no suggestion, for example, that ordinary friendships, surely more pervasive even than therapy groups, be protected.

7. See R. Harris, *Freedom Spent* 313-435 (1976) (about two friends who go to jail rather than testify before a grand jury about one another).

8. See Kuhlmann, *Communications to Clergymen—When Are They Privileged?*, 2 Val. L. Rev. 265 (1968). It is also vital to decide who holds the privilege, the defendant or the member of the clergy, as illustrated by a *New York Times* article detailing the decision of a New York court letting a rabbi voluntarily testify about a murder confession, although the defendant invoked New York's law disallowing the disclosure of a confession "made to a [member of the clergy] in his professional character as spiritual adviser." The rabbi, a professor of Talmudic law, noted, "There is no priest-penitent relationship in Judaism," because rabbis are not viewed as mediators between the laity and God. See Fried, *Court to Allow a Rabbi to Testify on Alleged Confession in Slaying*, *New York Times*, May 9, 1980, at B5.

9. See M. Komarovsky, *Blue-Collar Marriage* 205-19 (Vintage ed. 1967). See also L. Rubin, *Intimate Strangers* (1983). The topic of friendship among women has also been the subject of increasing historical interest, sparked by Smith-Rosenberg, *The Female World of Love and Ritual: Relations Between Women in Nineteenth-Century America*, 1 Signs 1 (1975). There seems to be less of a literature on intimacy among men, though see Leonard, *Private Lives*, *New York Times*, March 28, 1979, at C16.

10. See Dworkin, "Liberalism," in S. Hampshire, ed.



# REVIEWING SOLUTIONS



# Community Property Cases in the United States Supreme Court —Why Such a Hostile Reception?

William A. Reppy, Jr.\*

**L**inda and Don Smith, a hypothetical couple, were married in California in 1948. Linda went to work as a secretary for the University of California; Don took a job as a mechanic for Southern Pacific. They lived the good life, quickly spending take-home pay on a deluxe rental apartment, evenings out at the best nightclubs, vacations abroad, etc. The only assets of substantial value that Linda and Don acquired during their marriage consisted of rights in retirement plans funded by payroll deductions. In Don's case the deductions were technically of Railroad Retirement Act (RRA) "taxes."

In 1983 both Don and Linda retired. Each began receiving \$1000 per month in retirement benefits under his or her respective pension program. As sometimes happens, a major change in lifestyle—retirement—caused the Smiths' marriage to fall apart. They separated; Don filed for divorce; Linda began dating Jim and hopes to marry him after the divorce is final.

The divorce court has determined that the Smiths' only assets of any substantial value are the rights in the two retirement plans and that the value of Don's is the same as Linda's. A California statute directs the court to divide "equally" between the divorcing spouses assets acquired by labor during marriage (community property under California law). If Don had been working for any employer other than a railroad, the judge would have distributed to Don all rights in his retirement plan and to Linda all rights in hers.

But the United States Supreme Court would not allow an equal division when one of the pensions is governed by the RRA. Application of California's equal division statute would be unconstitutional under the Supremacy Clause of the U.S. Constitution. According to *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), Congress demands the division of the Smiths' property to be as follows: (1) all of Don's pension benefits, \$1000 per month, to him because this is his property alone by virtue of federal law; (2) Linda's future pension benefits to be paid \$500 per month to her and \$500 to Don (!) because California views her pension as co-owned community property. Since Linda is planning to remarry, no alimony award can correct the imbalance and unfairness of the United States Supreme Court commands.<sup>1</sup>

Such was the law from 1979 to 1984. Recently Congress abrogated *Hisquierdo* in part by authorizing the



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treatment of some of Don's future RRA benefits as divisible property. But not all of the benefits become divisible; and the unfairness compelled by *Hisquierdo* under the theory of federal pre-emption of state law still haunts many California divorces.

In a community property system, the labor of one spouse, say the wife, whether at a paying job or in the home (e.g., cleaning, ironing, caring for the children) is viewed as a co-equal factor along with the labors of the husband (e.g., working at the railroad yard) that is responsible for producing financial gain. So the wife owns fifty percent of the husband's paycheck as well as fifty percent of fringe benefits he earns on the job. Her financial gains are, of course, likewise shared.

Only eight American states apply this equal sharing approach—drawn from the law of Spain and brought to the United States by Mexican settlers in Texas and California, etc.—to married couples' property rights. In most states a nonpartnership approach rooted in English common law prevails: the husband is sole owner of what he earns by labor; the wife the sole owner of what she earns.

In *Hisquierdo*, the Supreme Court compelled California to mix the two systems: apply equal sharing to wealth earned by the wife but use the English approach—viewing the acquiring spouse as sole owner—when



dealing with the husband's retirement benefits.

An identical approach was taken by the Supreme Court in *McCarty v. McCarty*, 453 U.S. 210 (1981), for cases where the husband's retirement benefits were earned during marriage while he was a member of the armed services.

In just over a year Congress reversed most of the unfair effects of this decision. But *McCarty* still does apply if a spouse, say the wife, sues her armed serviceman husband for divorce in a state where he is assigned to serve but not domiciled. And the *McCarty* opinion remains in the *U.S. Reports* as evidence of the Supreme Court's animus to equal sharing by spouses of gains during marriage. This article seeks to trace the history of that hostility to community property and attempts to explain it. The causes seem to be (1) ignorance of the basic principles of community property; (2) stereotyped assumptions about the economic contribution of married women; (3) a notion that marital property law with English roots must be superior to that drawn from Spanish law; and (4) application of the maxim that "hard cases make bad law."

The Constitution does not, of course, directly confer on the federal government power to dictate the rights inter se of married persons. Indeed, domestic relations is the archtypical area of lawmaking preserved to the states by the tenth amendment. But the federal government is empowered to wage war, can regulate interstate commerce, etc. And statutes enacted in implementing these powers granted by the Constitution have been interpreted by persons disfavored by the sharing principles of community property—usually disgruntled husbands or their estates—as pre-empting a rule of state family law and either replacing it with a federal rule or restructuring the state law to conform to a federal model.

A number of Supreme Court decisions purport to establish a strong presumption against pre-emption of state law of domestic relations. One of two tests must be met if state law is to be inapplicable. (1) Has Congress spoken with "force and clarity"? *Wissner v. Wissner*, 338 U.S. 655 (1950). Congress does know how to do so, and in the Internal Revenue Code and Social Security Act sometimes expressly says: "State community property law shall not apply." (2) Even if Congress has not spoken with force and clarity, state law will be pre-empted if, as said in *McCarty*, its application "threatens grave harm to" or will do "major damage" to a "clear and substantial" federal interest. The Supreme Court's findings of such grave danger, we shall see, are almost absurd.

The first of the significant cases holding state marital property law pre-empted was *McCune v. Essig*, 199 U.S. 382 (1905). A Washington husband applied under a federal homestead act to enter certain federal land. The act provided that after five years' occupancy and the making of improvements a patent of title would issue to the entryman. The husband died before the five years elapsed. The federal act empowered his widow to complete the period of occupancy and to make improve-

ments upon proof of which a patent would issue to the widow. That happened in *McCune*.

Under Washington law if either spouse (or both together) began during marriage the process of acquiring a title to land over a course of time, this inception of the right during the marital community's existence meant the title when acquired would also be community—even if death or divorce had intervened to dissolve the community. Accordingly, when the patent was issued to the widow, under state law a half interest vested in the estate of her deceased husband, who had died intestate. At that time, his heir was the daughter of the marriage.

The United States Supreme Court held that Congress had forbidden the state from treating the title granted by a patent naming the wife as patentee as community property: "The statute which gives him [the entryman] a right gives her a right. She is as much a beneficiary of the statute as he. The words of the statute are clear..." 199 U.S. at 389. In other words, a patent issued in the name of the husband, whom the statute contemplated would be the original entryman, would be owned solely by him; thus a patent issued to the widow would be owned solely by her. To say that the words of the statute

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*There was, moreover, no reason as a matter of federal law for Congress to interfere with Washington domestic relations laws by prohibiting marital sharing of the family home.*

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were "clear" in barring community ownership is un-supportable. The statutory language gives no reasons even to suspect that Congress thought about application of the community property system to the homestead grant. There was, moreover, no reason as a matter of federal law for Congress to interfere with Washington domestic relations laws by prohibiting marital sharing of the family home.

Why, then, did the Court render its unanimous decision that concluded that "the law of the State is not competent to do this"—i.e., to characterize ownership as community when the federal patent named only one spouse as grantee? The plaintiff's claim was greedy and inequitable. The widow had sold the land to defendant, who quite obviously thought he was getting full ownership. Some time later, asserting the technical position that her minor daughter (as heir of her father) was co-owner and that the procedures for conveyance of her interest through a guardian had not been complied with, the family sued the buyer to quiet title to a half interest and for accounting for half the rents and profits the buyer had made, apparently in farming the land.

Also, the husband had died within a year of making entry so that the wife, without his help, was responsible



for almost all the occupancy and probably almost all the making of improvements necessary to obtain the patent. It was not pointed out to the Court that Washington law gave her a reimbursement claim against the husband's estate for separately owned funds she expended to obtain issuance of title. Probably Washington law also allowed a reimbursement claim for the value of her labor. On the facts, however, the right of reimbursement may have been more a chimera than a substantial method for protecting the wife. Costly estate administration proceedings would have had to have been commenced with the wife filing as a contingent creditor (since she would not know for more than four years after her husband's death how much funds and labor would have to be expended to complete the homestead process). The only practical way to deal with the claim would be keeping the estate open until a patent issued and then giving the widow, a judgment as creditor, which would possibly become a lien on the husband's half of the real property at issue.

In sum, not only was the plaintiff's claim unfair to the buyer from the widow, but the state law rule of inception-of-title could not operate efficiently under a homestead-grant system where the community title

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### *The McCune Court's imputing to Congress an anti-community intention it surely did not have was erroneous but not surprising.*

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might ripen many years after the community was dissolved by death. Moreover, the briefs for the plaintiff did not stress the serious damage that would be done to the principle of husband-wife equality in sharing gains during marriage if homestead statutes referring to issuance of a patent in the name of just one married person precluded community ownership.

Hence, the *McCune* Court's imputing to Congress an anti-community intention it surely did not have was erroneous but not surprising.

Possibly, too, the *McCune* Court was hostile to a system of marital property that would make one spouse half owner of property acquired by the labors of the other spouse. But the opinion was by Justice Joseph McKenna, who hailed from the community property state of California, where he had been a lawyer and legislator. Hostility to community property as "foreign" to the common law would not be expected from one acquainted with marital sharing.

In *Buchser v. Buchser*, 231 U.S. 157 (1913), decided eight years after *McCune*, the Court's attitude was completely different. But *Buchser* involved typical application of community property theory rather than the technical and inequitable application attempted by the daughter in *McCune*. A Washington man married a

woman who had three children. Several years later the entire family settled on federal land under a homestead act. After five years a patent issued in the husband's name. The wife died intestate, and by state law her one half community interest in the land passed to the three children. In the widower's quiet title suit against his three stepchildren it was held that only the "clearest expression" of congressional intent would preclude state marital property law from attaching to property once the federal government deeded it out. No such intent was found in the statutory directive to issue title in the name of the entryman. Nor, said the Court in a unanimous opinion by Massachusetts' Oliver Wendell Holmes, would application of the community property law interfere in any way with federal policy.

A surprising degree of ignorance about community property appears in the Supreme Court's next significant pre-emption decision, *Wissner v. Wissner*, 338 U.S. 655 (1950). A California husband serving in the army obtained life insurance under an act of Congress by payroll deductions. The husband designated his mother as beneficiary, but by state law the wife, at his death, could claim half the proceeds in her capacity as co-owner in community of the policy. A passage of the federal law said that the armed serviceman insured "shall have the right to designate the beneficiary." By this language, held the Supreme Court, "Congress has spoken with force and clarity" to preempt state law. To recognize the widow as half owner "nullifies the soldier's choice and frustrates the deliberate purpose of Congress." Allowing the husband to defeat his wife's rights under state law of marital partnership "might well directly enhance the morale of the serviceman."

Even though California law gave relief to the wife as co-owner rather than as creditor, the Court also said that a provision of the act of Congress that exempted insurance proceeds from attachment, levy, or seizure by creditors precluded the state court judgment that the mother pay over to the widow half the proceeds. Conceding an exception was recognized under such anti-attachment statutes for alimony claims by an ex-wife, the Court distinguished a wife's community property claim as not resting on the "moral obligation of supporting spouse." Rather, community property was viewed by the Court as a "business relationship of man and wife for their mutual monetary profit." This led to the conclusion that:

[v]enerable and worthy as this community is, it is not, we think, as likely to justify an exception to the congressional language as specific judicial recognition of particular needs, in the alimony and support cases.

The author of the opinion was Justice Tom Clark, from the community property state of Texas, and it is remarkable that he could be so far off base as to characterize a marital community as a "business relationship." The principle of marital sharing rests, rather, on the mutual love and commitment of the man and woman that lead them to marry. The legislatures in the community property states determined that more often than



not a couple who marry want a more complete partnership—one including a sharing of gains—than English common law attached to the marital state. Such sharing was not mandatory. The spouses could contract between themselves so that each would be the sole owner of his or her own earnings.

The majority in the 5-3 *Wissner* decision rather clearly envision a wife in stereotypical terms of a stay-at-home whose only contribution to the marriage is raising children and doing housework. (This despite the fact that Mrs. *Wissner* had during the early years of the marriage put her husband through medical school with

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*The principle of marital sharing rests, rather, on the mutual love and commitment of the man and woman that lead them to marry.*

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her earnings as a nurse.) The theory of community property is directed in part to such marriages. It views the domestic labors of one spouse as equivalent in making a success of the marriage as the labors of the other to bring home a paycheck. But the federal domestic policy as expressed in *Wissner* is that the labors of a stay-at-home spouse should entitle her to no more than the basic support obligation enforceable by alimony claims. Congress, the Court assumes, would not want to recognize a claim that viewed domestic labors as making an equal contribution to the financial health of the marriage.

Obviously, too, the *Wissner* majority did not consider the possibility that the wife of the soldier whose life insurance policy is to be federally insulated from the community sharing of gains might herself be employed and might be earning as a fringe benefit of her employment life insurance coverage on *her* life, an annuity, etc. The *Wissner* result applied to that situation results in the husband's obtaining 100 percent fringe benefit earned by his labors plus, under state law with no federal pre-emption, 50 percent of the financially valuable fringe benefits earned by his wife's labors. Maybe this would boost a soldier's morale, as the *Wissner* majority said, but to impute such an intention to Congress is baseless. In a footnote the *Wissner* majority invited soldier husbands in the future to urge on the basis of federal pre-emption an even more extreme distortion of marital sharing, stating that "[t]he view we take of this case makes it unnecessary to decide whether California is entitled to call army pay community property." (The U.S. Department of Justice in an amicus brief favoring the husband had suggested *that* possibility.)

What can explain *Wissner*? It was, like *McCune*, a case where on the facts state law was being asserted to reach an inequitable result. Major *Wissner*, who had died in action, was, the Court believed, estranged and living

apart from his wife at all times when he was in the armed services, i.e., at all times when his labors generated the premiums paid for the life insurance. Prior to 1971 California law provided that when a married couple were separated, the wife's earnings were her separate property but the husband's were community. *Wissner* was decided in 1950—long before there was precedent for a constitutional attack on such sex discrimination (see *Reed v. Reed*, 404 U.S. 71 [1971]). Perhaps the majority in *Wissner* employed federal pre-emption instead as the device for avoiding a state law that was distasteful because of sex discrimination.

But neither that unfair aspect of California law nor the fact that the U.S. Justice Department had filed an amicus brief opposed to marital property sharing fairly explains the Court's nasty and sometimes sarcastic opinion. For example the Court said, "We shall not attempt to epitomize a legal system at least as ancient as the customs of the Visigoths..." And, said the Court, the statute construed as mandating separate ownership of the NSLI policy was a "legitimate" exercise of the federal war and defense power since defeating his wife's property rights under state law "might well directly enhance the morale of the serviceman."

*Wissner* was followed by *Free v. Bland*, 369 U.S. 663 (1962). The husband here invested community funds under his management in U.S. savings bonds, taking title in the name of the spouses as joint tenants with right of survivorship. His wife then died with a will leaving all of her estate to her son. The son urged that Texas law did not permit the husband to deprive his wife of testamentary power over her half interest in community assets by converting community property to joint tenancy. The son pleaded that the investment by the husband that he contended had deprived the wife of testamentary power over property she owned (a half interest in the money used to buy the bonds) was made by the husband without his wife's knowledge.

The United States Supreme Court—observing that a right of survivorship that avoided estate administration made purchase of federal bonds attractive—substituted for Texas's flat ban against converting joint tenancy into community property a federal rule that the husband could do so absent "fraud" by him on his wife.

The hostility to state law of community property in the *Free* opinion (written by Earl Warren, the former Attorney General and Governor of California, who should have had a close understanding of community sharing) appears in an assertion that federal, not state, law would determine the extent to which the husband could deal with his wife's property in such manner as to deprive her of testamentary power over it. This aspect of federal pre-emption was not asserted by the husband but by the U.S. Department of Justice which had, once again, filed a brief in opposition to state community property law.

The wife's son in *Free* asserted that state law imposed an absolute ban on the husband's investing community funds without his wife's consent so as to deprive her of



testamentary power over her property. But the U.S. Justice Department wanted a showing of some sort of "fraud" by the husband, apparently some evil intent on his part to impose any restrictions.

Reading between the lines of the U.S. amicus brief one gets the feeling the writer assumed something not appearing of record, that the money used to buy the bonds was the husband's earnings. The writer then appears to fall into an English common law attitude about marital property: that the husband should be able to do whatever he wants with his earnings so long as he does not "defraud" the wife.

There was not the slightest basis in the bonds statute for concluding that a federal rule was necessary to determine under what circumstances X could use money owned by Y to buy such bonds. Neither the Solicitor General's brief nor the opinion of Chief Justice Warren even hints that language of the act of Congress spoke with "force and clarity" so as to pre-empt state law on that issue. And it seems inconceivable that a state law imposing a flat ban (X can never do so without Y's consent) would threaten grave harm or do major damage to a substantial federal interest (the basis for pre-emption when Congress has not spoken with force and clarity).

Only an unspoken hostility to a marital property regime that treats a wife as co-equal owner along with the husband of his earnings can explain use of federal pre-emption to require a finding of "fraud" by the husband in investing his wife's money so as to deprive her of testamentary power.

The next of the community property pre-emption cases, *Yiatchos v. Yiatchos*, 376 U.S. 306 (1964), required the Court to decide how far the federal concept of "fraud" announced in *Free* departed from state law that imposed a flat ban on a husband's making gifts of community property without the consent of the co-owner wife.

In *Yiatchos* a Washington husband invested during marriage more than \$15,000 of community funds in U.S. savings bonds, taking title in the names of the husband and his brother Gus as joint tenants. After the husband died survived by his wife, the Washington Supreme Court held void his attempt to pass the wife's half interest to Gus.

Gus contended there was no "fraud" under the federal approach to that concept declared in *Free*, because the husband's will left other property to the wife so that in the aggregate she was left at his death with assets equal in value to her half of the community property. But the wife's attorney convinced the Supreme Court that Washington employed the "item theory" of community ownership. That meant she had a property right to claim half the bonds that husband could not defeat.

The United States Supreme Court said that "in applying the federal standard [of fraud] we shall be guided by state law insofar as the property interests of the widow created by state law are concerned." Thus the wife could reclaim the bonds if she had not consented to her hus-

band's plan to pass title at his death to Gus.

However, the Court then announced that federal law required the wife to carry the burden of proving she had *not* consented and preempted Washington law that placed the burden on the husband's donee to show that the wife had consented to the transfer. The upshot of this is that if the wife dies or goes insane before she can testify that she did not consent, the husband by virtue of federal pre-emption is able to give away her property,

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*There is nothing in the RRA that even hints that Congress wanted this kind of mixing of English common law attitudes about marital property with civil law community sharing to the benefit of a railroading spouse.*

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since it is highly improbable that anyone else will be able to establish that the wife did not consent (the husband being dead when the issue arises).

No reason at all for this pre-emption appears in the Court's opinion. Most certainly the statutes creating federal bonds did not speak with "force and clarity" on the issue of placing the burden of proof. Nor does it appear even arguable that the placement of the burden of proof by the state of Washington would cause any harm to federal interests.

The theory of reversing the burden of proof via pre-emption emerged in an amicus brief filed by the U.S. Department of Justice, once again taking a hostile attitude to principles of community property. The federal rule concerning proof of fraud that this brief contended should be applied was fashioned for cases of actual fraud, where the owner of property has himself or herself voluntarily deeded or assigned it to another person and the issue arises whether the transfer was induced by misrepresentations. The Justice Department's brief (and the Supreme Court's opinion) equates the situation where X voluntarily transfers property to Z and then alleges it was caused by Z's misrepresentations to the situation (in *Yiatchos*) where Y takes the property of X and transfers it to Z and it is contended this was done without X's knowledge. But the latter simply does not raise an issue of fraud.

Again it seems to me that the Solicitor General in authoring the amicus brief that suggested shifting the burdens and Justice Byron White (who does not hail from a community property state) in writing the majority opinion in *Yiatchos* were assuming that the husband there had used his own earnings to buy the federal bonds and neither considered the wife to be truly a co-owner of the funds used.

The next pre-emption decision was *Hisquierdo*, which may be another case where a greedy and in-



equitable claim led to an unfortunate decision. There both husband and wife worked during the marriage of over fourteen years. It was anticipated that when they retired the husband would be receiving RRA benefits and the wife benefits under the Social Security Act. The two acts are very similar. Federal pre-emption barring community ownership of benefits under one of them should carry over to the other. The California trial court divorcing the couple found federal pre-emption in both the RRA and the Social Security Act that required treating future benefits each party would receive as his or her separate property. Mr. Hisquierdo would be receiving more than Mrs. Hisquierdo in the future, so she appealed. He neglected to file a protective cross-appeal (to get an appropriate community share in future social security benefits if she were to have overturned the order denying a community interest in future RRA benefits).

Thus, after Mrs. Hisquierdo prevailed in the Supreme Court of California her posture before the United States Supreme Court was as part-owner under community property law of the RRA benefits but sole owner by way of federal pre-emption of the Social Security Act benefits earned by labor during marriage. Her brief neglected to note that it was Mr. Hisquierdo's procedural error (failing to take a protective cross-appeal) that had created the inequitable situation; her brief did not suggest that the U.S. Supreme Court affirm and remand to the state courts so that her community interest in the RRA benefits could be offset by Mr. Hisquierdo's interest in the Social Security Act benefits.

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*Community property was viewed by the Court as a "business relationship of man and wife for their mutual monetary profit."*

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Not surprisingly—especially in view of anti-community property cases like *Wissner*—the husband prevailed on the first prong of his pre-emption argument. Congress intended the RRA benefits to be his separate property even though funded and earned by payroll deductions and community labor.

The Court's opinion seems to find pre-emption on both cognizable theories: (1) that Congress had spoken with force and clarity to preclude community ownership of RRA benefits, and (2) application of state law would cause grave harm to a substantial federal interest. Point (1) is debatable. Much of the majority opinion discusses such provisions of the RRA as a spendthrift clause exempting RRA benefits from claims of all creditors. There is no reason whatsoever to believe Congress had community property in mind when the RRA was originally enacted. On the other hand, a 1977 statute

applicable to RRA benefits as well as to other federal pension plans was susceptible to the construction that Congress did intend to bar a community interest.<sup>2</sup> It removed alimony claims from the operation of the anti-creditors clause and defined alimony to exclude "any community property settlement." 42 U.S.C. § 662(c). At least we know that in enacting this Congress had community property in mind.

The portion of the opinion apparently intended to show how California law would cause grave harm to substantial federal interests is not convincing. The judgment of the California Supreme Court remanded the matter to the divorce court, which had an option of applying either of two remedies: (1) find a present, dis-

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*Spouses in community property states are free to live separate in property if they wish to make such an agreement, but few do.*

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counted value for the community interest in the RRA benefit package and award that interest entirely to the husband with an offsetting award of other community property to the wife in order to achieve the equality required by state law; or (2) order Mr. Hisquierdo to pay over to his ex-wife in the future when he retires an appropriate fraction of RRA benefits he receives. (The fraction would be much less than half since most of Mr. Hisquierdo's work for the railroad was done when he was not living in community with his wife.)

The latter remedy, said the U.S. Supreme Court, would deprive the railroading husband of "an amount thought appropriate to support an employee's old age." When it is recalled that the proposed state order implements a state policy to treat marriage as a *partnership* and that it assures the husband of half the partnership gains, it is difficult to conclude that the disappointment to the husband that he is limited to half causes any grave harm to federal interests. The railroad industry will not collapse.

In any event, the alternative remedy—awarding the RRA benefits to the husband and other community property of equal value to the wife—would not discourage early retirement by the railroading husband, for all retirement benefits he would receive would be owned by him. As to this the Supreme Court said:

An offsetting award, however, would upset the statutory balance and impair petitioner's [the husband's] economic security just as surely as would a regular deduction from his benefit check. The harm might well be greater. . . . If, for example, a nonemployee spouse receives offsetting property and then the employee spouse dies before collecting any benefits, the employee's heirs or beneficiaries suffer to the extent that the offset exceeds the lump sum death benefits the Act provides.<sup>3</sup>



This quotation about impairment of economic security in effect adopts a statement by the Solicitor General in an amicus brief in *Hisquierdo* (once again taking an anti-community property stance) that the offsetting award would "increase the economic uncertainty for" Mr. Hisquierdo. The majority opinion also refers to the argument by Mr. Hisquierdo's attorney that the offsetting award argument of the wife would require giving her the couple's residence, apparently community owned. The majority apparently thought that awarding the wife the house would be unfair, but California law would do this only to equalize the division of property.

The most unsupportable aspect of the majority opinion is the declaration that federal law forbids California to treat the Hisquierdo marriage as not subject to state community property law and instead subject to an equitable rather than equal division of community property. The wife urged that if the husband invoked federal law to make pension benefits earned by his labor separate property, the remaining community property should not be divided equally. Her position was logically sound: because the husband refused to

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### *Only a hostility to the general concept of treating marriage as a financial partnership can explain Hisquierdo.*

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participate in the type of community of gains that California considers a 50-50 partnership, the statutory rule for dividing the assets at termination of a community partnership should be inapplicable. The statute being inapplicable, the California courts must fashion a common law rule. The wife suggested the division of the community property unequally so that what the husband received would—when added to the value of his RRA pension—be equal to the community property awarded the wife.

Rejection of this argument of the wife and mandating a 50-50 division of the remaining community property after the husband withdraws per force of federal law his pension benefits is what causes the outrageous result in the hypothetical case of Linda and Don Smith, with Don getting \$1500 in benefits per month and Linda \$500. She is subjected to the state law rule of partnership sharing while her husband escapes that obligation under cloak of federal law.

There is nothing in the RRA that even hints that Congress wanted this kind of mixing of English common law attitudes about marital property with civil law community sharing to the benefit of a railroading spouse. Congress did not speak with force and clarity with respect to this aspect of the pre-emption ordered by the *Hisquierdo* majority. And I cannot see how grave harm to substantial federal interests could possibly arise from allowing California to adopt the wife's suggestion.

Only a hostility to the general concept of treating marriage as a financial partnership can explain *His-*

*quierdo*. The majority must have felt that since Angela Hisquierdo did not earn as much as Jess Hisquierdo at her job (even if, perhaps, she did most of the housework, a point not of record), she ought to get less than half the property on hand at divorce.

All of the pre-emption holdings of *Hisquierdo* were extended to a California husband's future military retirement benefits in 1981 in *McCarty*. The brief of the husband there sought to fan the fires of prejudice lit in *Hisquierdo* by expressly arguing that since he had done the long hours of work as a military doctor who earned the retirement benefits, the wife had no entitlement to them. Her labors as a homemaker were denigrated by the husband's brief, which was an assault on the policy basis of California's community property law. Such was also the tenor of the Solicitor General's brief—once again taking an anti-community property position—although it was not as stridently anti-woman as the husband's.

The hostility of the Supreme Court majority for state law that treats the wife as making an equal contribution to the financial success of the marriage is as evident as in *Hisquierdo*. For example, the *McCarty* opinion notes that in some states property, such as an annuity contract earned by a husband's labor during marriage, is divided between the spouses at divorce so that each owns a share in the equivalent of fee simple absolute. This means that if the ex-wife dies and annuity funds are still being paid out, her heirs or legatees receive her interest. The *McCarty* Court chastises a Montana court (applying equitable division rather than community property law) that "has gone so far" as to confer such ownership rights on the wife and announces that with respect to military retired pay "clearly" a state cannot do that. But the type of order that horrified the *McCarty* majority is necessary if the wife is to have *under a theory of marital*

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### *Why is it so clear that states cannot "go so far" as to treat wives as co-equal contributors to proprietary gains during marriage unless there is a federal policy that wives are inferior to husbands?*

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*partnership sharing* an interest in acquisitions during marriage by labor *equal* to her husband's. If his interest lasts as long as funds are paid out, then so must hers. Why is it so clear that states cannot "go so far" as to treat wives as co-equal contributors to proprietary gains during marriage unless there is a federal policy that wives are inferior to husbands?

The *McCarty* Court was so eager to decide the case for the husband that it picked up from his brief misstatements of community property law (echoed in part by the brief of the Solicitor General). Community property law was especially unfair to members of the armed



services, the husband argued, because they cannot choose where they will work and are ordered into community property states by the Army, Navy, etc. In other words, the husband asserted that community property law attached to a marriage based on residence, rather than domicile, of the spouses.

That is plainly incorrect, as the wife's brief and some amicus briefs pointed out. Community property law attaches to a marriage because of domiciliary status, not residence. See *Cameron v. Cameron*, 641 S.W.2d 210 (Tex. 1982); *Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975); Cal. Civ. Code § 4803. Thus it should have been of little concern to the *McCarty* Court that members of the armed service are "not free to choose their place of residence" and may be "involuntarily transferred" to a community property state. Moreover, even if the soldier transferred to a community property state wanted to become a local domiciliary so that he could, for example, vote in local elections, he and his spouse are perfectly free to avoid coming under a community regime by contracting together to live separate in property.

The *McCarty* majority also misrepresented the law of California and some other community property states in declaring that recognition of community ownership of military retirement pay would frustrate the federal policy of encouraging early retirement so as to ensure "youthful and vigorous" military forces. The idea, apparently, was that as soon as the husband retired he would have to begin making payments to his ex-wife

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### *Apparently, then, the United States Supreme Court simply does not like community property.*

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under the divorce decree. Therefore, he would not retire when eligible but only when he reached mandatory retirement age.

But if the divorce court divided the property by awarding the community retirement benefit package to the husband and other community property of equal value to the wife, no incentive to delay retirement could exist. Yet, *McCarty*—following *Hisquierdo*—announced that the greater property rights the Court was recognizing for the husband were "not to be circumvented by the simple expedient of an offsetting award." (Another good example where the choice of words quickly betrays hostility to a marital property system that views the wife as making an equal contribution to gain during marriage.)

Moreover, at least in some community property states, including California, if the divorce court provides that the ex-spouses shall remain co-owners of the husband's pension package, he must begin making payments to her as soon as he can retire even though he chooses not to do so. *Gillmore v. Gillmore*, 29 Cal. 3d

418, 174 Cal. Rptr. 493, 629 P.2d 1 (1981); *Wilder v. Wilder*, 85 Wash. 2d 364, 534 P.2d 1355 (1975). Thus even this type of division of property that the Supreme Court majority found so odious would not discourage early retirement.

### CONCLUSION

Some of the older pre-emption decisions can perhaps be explained as attempts by the Court to escape from silly state law (such as the absurd Texas rule in *Free v. Bland* prohibiting a consensual community to joint tenancy transmutation); from state law that was discriminatory (such as the living-apart doctrine of California as it existed when the *Wissner* case arose); or from greedy claims by wives resting on technicalities of state law (such as those in *McCune v. Essig* and *Hisquierdo*). But the last word is *McCarty*, which reaches a new peak of hostility to community property, and the fact-law pattern in *McCarty* involved a straightforward, nondiscriminatory, nongreedy, nontechnical assertion by a wife of co-equal property rights with her husband.

Apparently, then, the United States Supreme Court simply does not like community property. Perhaps the Justices do not understand this approach to marital property. Perhaps they suspect it because its roots are in Spanish rather than English law. Perhaps they reject community property because it views a wife's contribution by way of domestic service around the couple's home as co-equal to husband's labors at a paying job. Perhaps the Justices think a woman's labor is not equal to that of a man's. Perhaps the Justices just blindly follow the hostile views of the Solicitor General's amicus briefs without independent analysis, for it is a fact that with the exception of *McCarty*, in all the cases where pre-emption was found after the 1905 *McCune* decision the U.S. Justice Department filed a brief arguing for the rejection of community property principles.

What can be done? Supreme Court briefs dealing with community property issues should be written with the assumption that a majority of the Justices both misunderstand community property and are hostile to it.

I suggest that a brief intended to change the Court's

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current attitudes about community property stress the following: (1) a marital partnership approach to gains by labor during marriage is not, at least at divorce, any longer a minority view in the United States; almost all of the equitable distribution statutes in common law states borrow the partnership theory from community prop-



erty; (2) it is federal policy as found in several Civil Rights Acts to reject stereotypical notions of the proper role of a married woman; (3) community property sharing is not mandatory; spouses in community property states are free to live separate in property if they wish to make such an agreement, but few do. Why? Because the typical married couple believe that the sharing principle of community property accurately reflects the love and commitment the spouses feel for each other.

*\*This article is adapted from a 1983 piece by Professor Reppy published in the Community Property Journal. Both are drawn from a 90-page chapter by Professor*

*Reppy in a treatise on division of property at divorce to be published in 1984 by Matthew-Bender.*

1. Linda's remarriage also disqualifies her from receiving at age 65—she is now 57—divorced wife benefits under the RRA.

2. Even so, the Hisquierdo marriage had been dissolved before 1977 and community property rights had vested long before Congress spoke in the 1977 legislation; and there was no basis for construing the 1977 statute as intended to retroactively wipe out property rights of wives that arose before the 1977 declaration with force and clarity that results in pre-emption. Moreover, since the property rights protected by the fifth amendment due process clause are those created by state law, it is difficult to see how the 1977 statute could constitutionally be applied retroactively in the manner urged by Mr. Hisquierdo.

3. This possibility—that an untimely death will subsequently reveal to be unequal a division of property that was equal based on actuarial tables—exists any time there is a community asset the value of which depends on how long an individual lives. For example, community-owned business property may include a leasehold terminable on death of a party.

## A Contrary View

As might be expected, not all of Professor Reppy's colleagues on the Duke faculty consider his critique of the Supreme Court's handling of community property cases to be a balanced one.

Professor Sara Sun Beale served in the Solicitor General's Office between 1977 and 1979, the period in which *McCarty* and *Hisquierdo* were appealed and won by the government. She asserts that in these cases, the government agencies involved had a proper litigation posture and valid arguments to put forward—winning arguments in fact—and that it was correct for the Justice Department to represent faithfully its *clients*—the government agencies.

Beale notes that the article by Professor Reppy brings up an interesting question about the role of the Justice Department attorney in cases involving difficult social issues. Professor Reppy suggests that the government attorney should respond to and be an advocate for a higher order of justice and morality. Professor Beale dis-

agrees and believes this view to be skewed. She points out that the government attorney, like any other, has an affirmative duty to his client to promote his case, assuming that the arguments are not so outrageous as to be palpably unreasonable. She suggests that the attorney cannot simply "roll over and play dead," refusing to represent a possibly unpopular government position. With policymaking power residing in Congress, she says, the attorney should, if need be, defend that policy so that all sides of the issue may be heard by the court. The court then must make a decision, and as Beale notes, in *McCarty* and *Hisquierdo*, the government arguments prevailed, which suggests that "they had some merit!"

As to the issues of political influence or departmental bias against the community property doctrine, Beale sees little evidence to suggest that either played a role in the handling of the cases by the Solicitor General's Office. She notes that community property is somewhat "foreign" to the



Sara Sun Beale

"East Coast Establishment" at the Justice Department; but, she contends, reasonable arguments, and not strong biases against community property law, are responsible for the victories in these cases.



# Education for Children

*Marilyn Yarbrough\**

Although the United States Supreme Court has declared that there is no constitutional right to an education, all states have provided for the maintenance of public school systems and for compulsory school attendance. Since the states have undertaken to provide children with public education, the United States Constitution requires that that education be provided in a fair and equitable manner. Controversy over children's rights in the educational setting began in the 1960s. Most of the conflicts that arose between school officials and students during that time concerned political, rather than educational, matters. Unlawful



*Marilyn Yarbrough*

search and seizure, dress and hair codes, first amendment expression, suspensions and expulsions, and

corporal punishment were some of the topics addressed. The confidentiality of student records, bilingual education, education of the handicapped, and vocational education were matters addressed by the federal government. Federal budget cuts in the eighties, which have returned much of the responsibility for and control of funds for education to the states, may have a profound impact on some of these gains in children's educational rights. In the conflict between federal and state government over these issues and programs, parental concerns have often been lost.

## *Does a Parent Have Any Control over a Child's Education?*

The law has traditionally held that parental control over a child's welfare includes control over that child's education. Despite compulsory attendance laws, parents have been allowed to choose between public and private schools for their children. They have been allowed to withdraw their children from school when continued attendance would have a detrimental effect on an established religious community's way of life. They have also been allowed to provide home instruction for their children.

Withdrawing children from school for home instruction or even from particular courses within the school depends on state law. Some states require only that home instruction be equivalent to instruction received in the public schools. Other states may require that home instructors be teachers who meet all the requirements prescribed by law for private tutors, or even that they be certified teachers.

## *What Right Does a Parent or Child Have Regarding the Quality of the Child's Education?*

By 1981, at least eight educational malpractice lawsuits had been filed. None of those suits resulted in recovery by the parent or child. Many lawyers believe, however, that recovery for educational malpractice, like recovery for medical or legal malpractice, may be recognized in the near future. At present, the only recourse a parent or child has regarding the quality of education received is through protest and lobbying actions with school administrations and school boards.



### *Who Has a Right of Access to a Child's School Records?*

The Family Educational Rights and Privacy Act of 1974 (Buckley Amendment) gave parents the right of access to their minor children's records. This includes a right to review and correct any data directly related to a student that are maintained by an educational agency or institution that receives federal funds.

When a child reaches the age of 18 or is a student in a postsecondary educational institution, the student acquires the right of review and correction described above. Otherwise, the law requires that the parent of a dependent student (with dependency defined by the child's dependent tax status) is the person who acquires rights under the Act. This would seem to preclude a divorced parent who does not claim the child as a dependent under the tax laws from claiming the right of access to the student's records. Minor children have no right of access to their records.

The Buckley Amendment also provides for nondisclosure of any information except "directory information" to anyone except the persons mentioned above and educational personnel who have a legitimate educational interest to pursue. Directory information includes the student's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student. Students or parents who have the right of access also have the right to request that none of that directory information be released.

### *School Grounds: What Rights Does a Child Have?*

Although school officials have the power to limit the substantive rights of students when it is necessary to maintain order on school grounds, some definite rights with regard to the areas mentioned in the introductory paragraph above continue to be recognized.

It is usually held that for a *search* to violate the fourth amendment of the United States Constitution, it must be conducted by a state official and there must be no probable cause for the search. In school cases, the United States Supreme Court has ruled that only reasonable suspicion is necessary for there to be a lawful search where the school official is acting so as to maintain order and enforce rules of the school, rather than for general law enforcement purposes. School locker searches have almost uniformly been allowed under the theory that the student and the school jointly own the locker. It has also been held that the school has the duty to inspect the locker in the interest of the health and safety of the other students.

*Dress and hair codes:* These have not caused much controversy in the past few years. Most courts have supported the discretion of school administrators as long as regulations are reasonable and essential to the educational process. In determining whether this standard has been met, courts have balanced the student's rights to personal freedom against the school administration's duty to ensure adequate health and safety standards, maintain discipline, and prevent interference with the educational environment. Since the United States Supreme Court has indicated that this matter should be left to the states, the validity of school regulations has often depended upon state law.

*Freedom of religion:* This is guaranteed in the first amendment of the United States Constitution, which requires that there be a separation of church and state in public education. This would require that schools do nothing to promote any religious instruction. This has been interpreted to prohibit prayer in schools and to prohibit the teaching of the "creationist" theory of human origin as scientific theory. As noted above, however, the Supreme Court has recognized an exception to the compulsory attendance



law where that law would have a detrimental effect on an established religious community's way of life.

*Freedom of expression:* This has been upheld with regard to activities that do not materially and substantially interfere with school educational activities. These have included the right to wear armbands, the right to picket, the right of association, and free speech and press. Schools are allowed to impose reasonable restrictions with regard to time, place, and manner on the distribution of literature and on speech. Courts will no doubt continue to balance the rights of students against the duty of the school to maintain order. For instance, even though students may have the right to speak to classmates about political issues, the school may prohibit such speech during formal class periods or prohibit the use of loudspeakers on school grounds when either may disrupt the education process if allowed at that time or place.

*Suspensions and expulsions:* These require that students be accorded due process of law. Prior to a short term suspension, a student is entitled to a basic due process hearing. This can be met by telling the student orally or in writing what the alleged wrongdoing was and what the evidence is, and by giving the student a chance to tell the other side of the story. With regard to serious disciplinary matters which may result in long term suspension or expulsion, there must be notice and a formal hearing. The accused student must be given the right to confront witnesses and the right to counsel. There must also be a statement of the findings, conclusions, and recommendations of the hearing officer(s). There must be a right to appeal.

*Corporal punishment:* Unless it is specifically prohibited by state or local law, corporal punishment is not illegal. Where excessive force is used, students may bring civil or criminal actions for battery against school officials, but there is no constitutional right to be free from corporal punishment.

### *Does My Child Have a Right to Participate in Extracurricular Activities?*

Students have no absolute right to participate in extracurricular activities. If schools provide opportunities for such activities, however, they must be made available on a nondiscriminatory basis. There can be no discrimination based on race, sex, marital status, or even pregnancy.

### *Does My "Special" Child Have Special Rights?*

Children who may be considered "special" (basically, handicapped, gifted, learning-disabled, bilingual, etc.) are entitled to an education suited to their special needs.

Congress has enacted the Education for All Handicapped Children Act, which requires that any school system receiving federal funds provide for the education of handicapped children according to those children's needs. The Act also provides for procedures to assure fairness in determining whether a child is properly placed in a special program when that child may be capable of performing in a regular classroom.

For bilingual children, the United States Supreme Court decided in 1974 that it was a violation of the Civil Rights Act of 1964 not to provide special instruction for non-English-speaking children whose educations were severely handicapped by a language barrier, where there are substantial numbers of such students in the district. Although some federal officials question the need for such a provision, there is at this writing continued funding for such bilingual programs.

*\*Professor Yarbrough visited Duke Law School in 1983-1984 from The University of Kansas School of Law. This piece is extracted from her chapter on "Children*

*and Child Custody" in Every Woman's Legal Guide (B. Burnett ed. 1983), copyright © 1983 by Nelson Doubleday, Inc., published by Doubleday & Company, Inc.*



*Conference Report*

# Children with Special Needs

Duke University School of Law was the site of a conference on "Children with Special Needs" on Friday and Saturday, February 23 & 24, 1984. The conference, which featured papers for a future issue of *Law and Contemporary Problems*, was chaired by Kate Bartlett of the Duke Law faculty and Judith Wegner from the UNC School of Law, the special editors for the symposium. The focus of the papers prepared for the symposium was the Education for All Handicapped Children Act (EAHCA), enacted by Congress as Public Law 94-142 in 1975. The papers discussed on the first day of the conference covered the progress in special education since the Act, the problems yet to be solved, and proposed solutions for those problems. On the second day, the focus was on comparisons between the EAHCA and other solutions to problems of children with special needs, either in other countries or under other U.S. statutes.

The two main themes underlying the first day's presentations were the analysis of whether the EAHCA was accomplishing its goals and the role of the Act's due process provisions. Two papers specifically concentrated on techniques for analyzing the success of the EAHCA. William Clune and Mark Van Pelt, both from the University of Wisconsin-Madison Law School, discussed political "gap" analysis of the EAHCA, while Dr. James Gallagher, Director of the Frank Porter Graham Child Development Center, presented his model for implementation analysis of the Act. The primary difference between these analyses is their initial starting points: implementation analysis starts with the articulated policies underlying the passage of the Act, while political gap analysis starts with an evaluation of the rights sought to be vindicated



*Katharine T. Bartlett*

by the Act and the political compromises between advocates of different sets of rights which resulted in the Act's final form. Both analyses then evaluate what actually happened after the Act was implemented, either in terms of the articulated policies of the Act or in terms of the political "trade-offs" that were made. In this instance, both analyses led to some of the same conclusions, for example, that the EAHCA has succeeded in improving the methods of teaching handicapped children and, to some extent, has alleviated their exclusion from normal school life (although Gallagher pointed out that the labeling required by the EAHCA can be harmful to children), and that one of the main failures is that the individualization of education contemplated by the EAHCA has not taken place.

The EAHCA contains various due process provisions, so that parents of

handicapped children will have an avenue to appeal school decisions about the appropriate education of their children when they believe those decisions are wrong. These due process provisions were the subject of two of the first day's presentations. Victor Rosenblum of Northwestern University School of Law (responding to a paper by David L. Kirp and David Neal, which was prepared for the symposium but was not presented at the conference) reviewed considerations generally applied in due process procedures. He concluded that the courts' check on the schools will probably be in terms of whether parents have been afforded procedural due process. He stated that in substantive matters the courts are likely to defer to the professional judgments made by school administrators and teachers. Peter Kuriloff of the University of Pennsylvania's Grad-



uate School of Education gave a presentation that addressed the efficacy of the original hearing process by evaluating a number of Pennsylvania hearings in terms of whether parents were able to achieve a favorable outcome and whether they felt they had been treated fairly. One of his more surprising findings was that a relatively constant sixty percent of parents felt that they had been fairly treated *regardless of the outcome of the case.*

Due process was again addressed in Karen Sindelar's presentation, "Empowering Parents: Some Modest Proposals." Sindelar, who serves on North Carolina's Governor's Advocacy Council on Persons with Disabilities, felt that the due process system is helpful only in dealing with problems involving lack of services—or inappropriate services—to handicapped children. She stated, however, that lack of services problems constitute only about twenty-five percent of the problems. The other three major problems she identified—poor quality of instruction, attitudinal problems, and bureaucratic rigidity—cannot be solved, she asserted, through due process mechanisms. For these problems, she suggested

that the answer lies in the empowerment of parent groups to deal with the schools collectively, rather than on an individual basis.

Several of the presentations focused on the difficult issue of how the goals of the EAHCA could be achieved within the limited budgets of local and state school districts. Kate Bartlett's "A Proposal for Numerical Standards Affecting Standards and Burdens of Proof to Take Cost into Account under the EAHCA" dealt with allocating the burden of proof in due process hearings on the basis of the cost factors. She proposed that the school's commitment to handicapped education, as determined by its spending on programs for handicapped children, could be used to determine whether the school or the parents should bear the burden of showing whether the school's assessment of the proper placement for a child was correct. Paul Tractenberg, of the S.I. Newhouse Center for Law and Justice at Rutgers University, also addressed issues of money and due process in his presentation, "State Use of Private School Alternatives under the EAHCA." He examined the question of who should bear the

burden of private school placements for children whose needs could not properly be met in public schools. One problem he discussed was that parents who feel that their child needs a private specialized school instead of the services offered in the public school have no way of predicting who will end up footing the bill if they appeal the school's decision that the child can be adequately served in the public school. He proposed a specialized "voucher" system to take care of this uncertainty.

Judith Wegner presented a paper which also had cost implications. This paper explored the various definitions of equal educational opportunity in special education, concluding that no one definition properly resolves the distinct legal issues that arise in making programming decisions under the EAHCA, and that different definitions may need to be applied in different contexts.

The second day of the conference saw the presentation of the comparative papers. William Buss of the University of Iowa College of Law reported on "Special Education in England and Wales" with a particular







emphasis on Britain's Education Act of 1981, which is broadly similar to the EAHCA. Betsy Levin, Dean of the University of Colorado School of Law (and a former member of the Duke Law School faculty) presented some of her observations on special education in Australia.

Finally, Martha Minow of Harvard Law School presented an intriguing analysis of the tensions in special education by identifying and describing three dilemmas apparent in education law and policy generally:

the difference dilemma, the design dilemma, and the power dilemma. After exploring some of these dilemmas both in special education and in bilingual education, she began suggesting changes that could be made, such as having a school system in which *all* students are pulled out of regular classes some of the time, thus removing the stigma attached to having handicapped or bilingual children pulled out for special remedial classes.



# Divorce Mediation

Suzanne Bryant\*

Divorce has become a part of the American way of life. Recent studies show that "for every two marriages there is one divorce; children are involved more than half the time."<sup>1</sup> Behind these statistics are families in crisis trying to cope with anger, guilt, and confusion. Restructuring the family unit is never easy, but as Diane Trombetta has stated, "how the divorce is managed is probably more critical to the welfare of individuals than the fact of divorce *per se*."<sup>2</sup> Studies of divorce show that decreasing parental discord and maximizing children's access to both parents improves the successful adjustment of families,<sup>3</sup> yet the adversarial framework historically employed by the legal system often increases discord. Today, divorce mediation is emerging as an option for couples who seek a more amicable and cooperative process for dissolving their marriage than that provided in the courtroom.

Mediation is "a cooperative dispute resolution process in which a neutral intervenor helps disputing parties negotiate a mutually satisfactory settlement of their conflict."<sup>4</sup> While divorce mediation is not a panacea or a replacement for the judicial system, it is an appropriate complement to the legal process for resolving disputes.

## THE JUDICIAL SYSTEM AND DIVORCE

Historically, the law has supported the institution of marriage. Until a few years ago a marriage could be dissolved only through a fault-based judicial confrontation in which moral failure and guilt were important issues and the party "at fault" might be punished through the allocation of marital assets. In the shadow of this harsh legal context, many married couples in conflict



Suzanne Bryant

remained in "holy deadlock" and sought counsel, not through the court system, but through their church, school, friends, or extended family. As cultural values have changed and our society has become increasingly mobile, many of these alternatives to the court system are less easily available. In addition, American society has become generally more accepting of divorce.

In keeping with these societal changes, two major contemporary trends have occurred within the legal system. First, all but two states have adopted "no-fault" divorce as a means of ending a marriage on the basis of individual choice rather than blame.<sup>5</sup> The legislative intent behind no-fault statutes was to reduce hostility between divorcing parties and enable the courts to make decisions about child custody, property, and support without consideration of blame. A second important legal movement in the last few years has

been toward the enactment of "equitable distribution" laws enabling the courts to fairly divide a wide variety of assets that, until recently, would have been considered the sole property of one spouse or the other.

Critics of the legal system believe the courts, even with these innovations, are inappropriate forums for many divorces. In the adversarial American judicial system, divorcing parties are each represented by an attorney who advocates the client's strongest position while attempting to weaken the opposition's position. Obviously, this system creates a competitive, win-lose model for resolving conflicts between husbands and wives. In many divorces where anger is already extremely deep-rooted and the spouses have no mutual desire to reach an amicable solution, this judicial system is appropriate. However, in less hostile divorce situations this system only tends to exacerbate the problems, increase the trauma, and escalate the conflict between spouses who simply want to dissolve their marital ties.<sup>6</sup> Lawyers are usually poorly trained to handle the psychological aspects of divorce<sup>7</sup> and often encourage their clients to adopt extreme bargaining positions that are unnecessarily divisive.<sup>8</sup> As Ann Meroney states, "Even those who intend to divorce in a responsible and fair manner find that their best intentions are lost in the adversary negotiating process."<sup>9</sup> According to San Francisco Judge Donald King, "If the differences between the parties were not unreconcilable before the [contested divorce] trial occurs, they certainly will be afterward, probably forever."<sup>10</sup>

Furthermore, the court system is overwhelmed by the increased incidence of litigation, especially divorce. "Over half of the cases filed in all trial



courts of original jurisdiction are connected with matrimonial actions."<sup>11</sup> In many courts waits of nine to ten months are common for no-fault divorces, and contested divorces often have to wait one or two years to be scheduled.<sup>12</sup> Because of crowded dockets and the resultant pressure to move cases quickly, many judges simply do not have time to examine a case thoroughly. Yet, these judges must often make major decisions which forever affect the courses of litigants' lives, based only on the attorneys' pleadings and a few minutes contact. Realizing today's courts are hopelessly unequipped to handle the tremendous workload, Chief Justice Warren Burger recently urged increased use of alternative methods of dispute resolution such as mediation, conciliation, and arbitration.<sup>13</sup>

#### **THE ALTERNATIVES: MEDIATION, CONCILIATION, AND ARBITRATION**

There has been a growing movement in the past few years to establish various alternatives to the overworked and sometimes inappropriate judicial system. Mediation, conciliation, and arbitration may be used successfully not only between divorcing spouses, but also between a wide variety of disputing parties who have an ongoing relationship, mutual interests, or the need to avoid expensive, time-consuming litigation. In both the public and private sector, third party neutrals such as arbitrators are often employed to provide a quick and impartial decision.

Mediation is similar to conciliation and arbitration in that all employ a third party neutral to aid in dispute resolution. In mediation, the mediator, a neutral third party, encourages clients to generate their own options and to assume responsibility for their decision-making process. In contrast, a conciliator is a more directive neutral third party who generates ideas, points out their advantages or disadvantages, and encourages adoption of one alternative. Arbitration is often used when parties are unable to reach a mutually acceptable solution through mediation or conciliation. In this process the arbitrator formulates a legally binding settle-

ment agreement to which the parties must adhere.

Because it is based on the assumption that the couple is the best authority on how to restructure their family, mediation is the alternative which allows divorcing couples to retain the most self-control. Rather than rely on a process where parties initially adopt extreme positions and subsequently negotiate a "compromise" solution, mediation encourages disputants to cooperatively explore a variety of options before choosing a fair and mutually acceptable alternative. The emphasis is placed on informal, honest, open, and direct communication. Although the focus of mediation is on creating workable options for the present and future, rather than on casting blame for past incidents, there is space in the process for emotional expressiveness and attention to the underlying causes of disputes. The mediator, however, is not acting as a therapist and may find it necessary to refer the couple to a counselor or other professional in order to insure that the divorce mediation process stays focused on the central issues of custody, property, and support.

#### **THE DIVORCE MEDIATION PROCESS**

The divorce mediation process is a progression of basic stages with a finite outcome of either a consensual divorce agreement or declaration of a major impasse which cannot be resolved through mediation. Initially, the mediator is responsible for setting the stage by providing a neutral setting and establishing mediation ground rules. It is paramount that s/he gain the clients' confidence and commitment to mediation. Thus, the first session is usually spent asking or answering questions, and establishing rapport. During this meeting the mediator also gleanes subtle information about the parties' interactional styles, present emotional states, and expectations. Throughout the process the mediator must maintain a balance between controlling the situation and encouraging the clients to take responsibility for their own decision-making process.

In the next stage, the mediator attempts to define the issues by elic-

ing facts, feelings, and desires. If the clients are unable to provide the required information, they may be referred to outside experts such as appraisers, accountants, or tax attorneys. The mediator must watch carefully for cues that may signal withholding of information or hidden agendas that could sabotage open, honest negotiations. During this stage the mediator is very active and directive in keeping the parties on track by eliciting responses which define the major issues. These larger issues are then broken down into manageable segments for which alternative options can be explored. At all times it is important to pace the session and maintain positive momentum by managing emotions, encouraging empathy, and reinforcing cooperation.

After the facts have been established and the issues defined, choices must be made among the alternatives. Resolving low priority issues first tends to reduce tension and establish an interactional pattern for more difficult questions. During this phase, the mediator facilitates communication but does not become a conciliator or arbitrator since it is the parties themselves who must make the decisions with which they will ultimately live.

Finally, the mediator aids the couple in producing a written document which states all the agreements reached during earlier sessions.

To insure fairness it is imperative that the settlement agreement be reviewed by separate attorneys representing each client. In addition, a clause addressing the resolution process for future conflicts should be included. If, during mediation, the couple is able to reach agreement on all details of custody, property, and support, they are ready to have an attorney draft the agreement and submit it to the courts as part of their request for an uncontested divorce.

Initial empirical research suggests that divorce mediation is not only more harmonious, but also quicker and less expensive than courtroom litigation. Even if the couple is only able to reach partial agreement, or no agreement at all, they seem to



benefit from participating in the mediation process. "Most couples who failed to reach mediation agreements remained enthusiastic about the process... reported improved communication... [and] appeared able to settle their differences on their own prior to court hearings."<sup>14</sup>

*\*Miss Bryant is a first-year student at Duke Law School and a former divorce mediator. These ideas were first presented in a paper prepared for*

*presentation at the Sixth Annual Communication, Language, and Gender Conference on October 10 & 11, 1983, in New Brunswick, New Jersey.*

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2. D. Trombetta, *Custody Dispute Mediation: A Meeting of the Minds*, *Conciliation Courts Review* 48 (December 1981).

3. *Id.*

4. L. Vanderkooi & J. Pearson, *Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles*, 32 *Family Relations* 557 (Oct. 1983).

5. J. Pearson & N. Thoennes, *Divorce Media-*

*tion: Strengths and Weaknesses Over Time*, in *Alternative Means of Family Dispute Resolution* 52 (1982).

6. *Id.*

7. *Id.*

8. *Id.*

9. A. Meroney, *Mediation and Arbitration of Separation and Divorce Agreements*, *Wake Forest L. Rev.* 69 (Aug. 1979).

10. D. King, *Child Custody—A Legal Problem*, *California State B. J.* 157 (May/June 1979).

11. J. Pearson & N. Thoennes, *supra* note 5.

12. *Id.*

13. Burger, "Annual Report on the State of the Judiciary," 1982.

14. J. Pearson, *Child Custody: Why Not Let The Parents Decide*, 20 *Judges J.* 7 (Winter 1981).



# ABOUT THE SCHOOL



# Chancellor Keith Brodie's Welcome to New Students

(August 1983)

**I**t is a great privilege to welcome you to Duke University.

I believe you have chosen wisely. Not only is Duke Law School outstanding, it is but one diamond in the crown of an excellent University whose other professional schools, graduate school, and College of Arts and Sciences will provide you with broad educational opportunities along with your course of study in the School of Law. As you know, you are allowed to take up to six hours of course-work of suitable academic rigor outside the Law School for credit toward the J.D. degree. This opportunity affords you access to a very rich curriculum. This University is one in which you can take pride. Although young, it provided outstanding education for women well before Princeton or Yale, and achieved a program that was truly coeducational before Harvard or Columbia. It is not at all surprising that of only seven women to have served in the U.S. cabinet, two of them have been graduates of Duke University—Juanita Kreps and Elizabeth Dole. Liddy Dole is a member of Duke's Board of Trustees and Juanita Kreps serves as a director of the Duke Endowment.

Duke has a strong reputation for protecting the academic freedom of its faculty. This reputation was nurtured in the Bassett Affair of 1903, about which you will read in the history of Duke University and its predecessor, Trinity College.

Many of you have never lived in the South. Although Duke is not a very southern school and its faculty are probably for the most part from areas outside the South, nonetheless there are subtle North-South differences which I believe will cause you to look favorably upon your new three-year home. Perhaps the principal North-South difference that I have detected in my nine years in



Keith Brodie

residence here has been a certain southern optimism—an expectation of good from the other person which takes many forms—for example, a greeting which begins “You’re looking great!” rather than “How are you?” In fact, oftentimes you are greeted with “Fine,” as if to avoid the possibility of the question altogether.

I suspect that many of you will begin to abandon your northern reflex of locking car doors. This habit can be dangerous when you leave us. However, I predict that many of you will assimilate this southern optimism to the extent that your expectation of fellow students and faculty will move subtly from a negative to a positive in the coming year and that when you leave Duke you will take with you a positive expectation of people that can only serve you well in the years ahead. This positive mind set may engender behavior in your future colleagues that will exceed the level of good others would normally expect from them.

As we stand at the beginning of your three-year law study, I would be remiss in my responsibilities as a psychiatrist if I did not highlight the two principal areas of personal development that you will experience here. First, there is the obvious area of academic growth. You will learn a great deal. It is not my task to anticipate what you will learn but, rather, to say that you have selec-

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*Mastery involves not only an understanding of a great deal of information, it also requires judgment and the ability to express yourselves in creative verbal and expository fashion.*

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ted a profession which requires intense study in order to achieve mastery, and the mastery involves not only an understanding of a great deal of information, it also requires judgment and the ability to express yourselves in creative verbal and expository fashion. As your Dean has noted:

Mastery of this discipline is rarely to be achieved by passive learning... full development requires substantial interaction with others. For most learners of law, the best school is the one that affords the best opportunity and inducement to participate in a long conversation about the law with persons of wit, industry, and experience. The more intense the dialogue, the stronger is the mastery of the discipline.

Legal education has come under attack recently from the former Dean of Harvard Law School, now President of Harvard University, and from the current Dean of Stanford Law School. Both seem to agree that not enough attention is being placed on judgment, values, and ethics as they are part of the law school curriculum. Further, both seem to focus on the need for broad based legal education involving students in courses outside of the standard law school curriculum—courses in anthropology, economics, and philosophy, to name a few. Some believe that curricula of law schools are insufficiently clinical and do not involve students in the practical aspects of lawyering but, instead, prepare them solely for careers in corporate and tax law as practiced in the large firms on Wall Street.

These criticisms of legal education seem to have less relevance to Duke than they do to many other law schools. Many of you will not engage in the practice of law but, instead, will use your law study to launch careers in commerce, banking, politics, or criminal justice. Because there is danger that as a nation we may be training too many lawyers, I am pleased that the Duke curriculum will equip you to enter many fields, for you will have had a breadth of academic opportunity and legal training that is not available to the majority of law stu-

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*I urge you to heed the critics of legal education by striving for breadth in your studies.*

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dents in this country today. I hope you will pursue your interests in other fields sufficiently to allow yourselves access to educational opportunities that exist here.

Thus, your academic developmental tasks are well demarcated and will preoccupy you for the next three years. I urge you to heed the critics of legal education by striving for breadth in your studies.

In addition to your academic responsibilities you have a second and equally important set of tasks. These relate to your personal development of a nonacademic nature. Your psychological development occurs in

stages, and each stage has associated with it a set of critical tasks that must be mastered in order for you to move on to the next stage of development. Thus the critical tasks of each developmental phase must be met at the proper time and in the proper sequence to assure a healthy development of the personality. This concept is adapted from embryology, a field of biology focusing on the proper development of the embryo as it relates to proper sequencing and timing of organ development. If something happens to the embryo that disturbs one aspect of an organ's development, a series of maldevelopments occurs and there does not seem to be a midcourse correction possible as the embryo matures. Psychological development seems to involve the same sequentiality. Everyone must master certain developmental tasks before moving on to the next set. Lack of mastery fixes the individual at the level of the unmastered task.

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*Everyone must master certain developmental tasks before moving on to the next set.*

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The principal developmental tasks of young adulthood for those of you who are between the ages of twenty and twenty-five involve the mastery of intimacy and isolation. You must develop your capacity for isolation, the ability to tolerate loneliness and oneness, while at the same time developing your capacity for intimacy and your ability to relate one on one with another human in a relationship marked by intense emotional feelings. In that these two states—intimacy and isolation—are really opposites, your task during law school, from a psychological development standpoint, is to widen your repertoire and your capacity to achieve both of these extremes.

Taking intimacy first, it is Fromm's thesis that you cannot love another without loving yourself first. This concept seems generally accepted and now includes developing a respect for one's body through the use of diet and exercise together with a limitation on the abuse of recreational drugs. Fromm maintains that only an individual who has established in adolescence a firm sense of identity can risk the experience of intimacy, which, as he puts it, requires "losing one's self in another." Some of you have already mastered the developmental tasks of intimacy, yet I believe the majority of you will, in the course of the next several years, embark on relationships leading to an intimacy which you have not yet experienced.

Moving from intimacy to isolation, we find Fromm once again advising us: "The ability to be alone is the condition for the ability to love." Thus, the ability to tolerate aloneness seems to be a prerequisite for the development of intimacy. The two developmental goals



which you have before you in the next several years are related. What is even more important is that, in reality, your law study will cause you to seek mastery of these tasks. Because of the rigors of your curriculum and the competition which you face, and the personal growth that will be required of you in order to achieve success

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*The ability to tolerate aloneness seems to be a prerequisite for the development of intimacy.*

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both as students of the law and as young adults, you will find that some studying is best done in isolation. The importance of your ability to tolerate this state in order to effect learning, and to enhance recall, cannot be over-emphasized. It is interesting that during the last two decades, many in our society have come to an interest in meditation—perhaps from a religious conviction, its novelty, or a sense of mastery usually associated with this state. Heretofore it has been rare for an individual when alone to *experience* rather than to *dispatch* time. Some of you may use meditation as a means to facilitate isolation and study.

As with isolation, so intimacy may be achieved under the pressures of your three-year world to come. The competition, the overwhelming sense of personal responsibility for your own future, and the shared aspects of your law study may aid you in achieving intimacy. You will oscillate on the spectrum of intimacy and isolation, moving from one pole to another. In the

process you will expand your mastery of both.

These are meant to be words of welcome and advice at the beginning of your venture. As you contemplate your three years here, you should outline the parameters you will utilize in measuring our success and your success: increased knowledge, enhanced judgment, graduation, a successful job search—all will be important for us and for you as you depart the campus in 1986. However, what may be of greater importance will be your own personal growth and development, your ability to achieve intimacy and tolerate isolation, and the development of a set of values and interpersonal skills which will be with you for all time. Yet if you are unable to master intimacy and tolerate isolation in the next several years, you may be prevented from further develop-

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*You will oscillate on the spectrum of intimacy and isolation, moving from one pole to another.*

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mental maturity in your thirties and forties.

I wish you success and fulfillment here. May you achieve the personal and academic growth which you desire, and may your three years with us prepare you for a lifetime of helping others, for you are entering a profession marked by its service to others and to society. It is, in fact, the future of that society which you will shape. Thus, as we teach you about past and present we place the future in your hands. To you we will entrust the promise and the responsibility for all that we cherish.



# Lon Fuller at Duke

On February 13, 1984, the Law School and the Department of Philosophy's Robert L. Patterson Lecture-ship jointly sponsored a symposium on Lon Fuller (1902–1978). Fuller's contribution to legal philosophy was discussed by Robert S. Summers, McRoberts Professor of Research in Administration of Law at Cornell Law School. Fuller's contribution to the theory of contract was addressed by Patrick S. Atiyah, Professor of English Law at Oxford University.

An intriguing sidelight on Fuller was provided at an informal presentation by Professor Summers of Fuller's correspondence when Fuller was on the faculty at the Duke Law School. The following biographical background is drawn from Summers's opening remarks at the formal symposium:

Fuller arrived at Duke in 1931 at the age of 29. He had been on the University of Oregon law faculty for two years, and after that a member of the University of Illinois law faculty for three years. He remained at Duke from 1931 until 1940, when he descended to Harvard. Though he spent the bulk of his career at Harvard, it is evident that he had very special fondness for Duke. And it was here that he did his greatest work in contract theory—his essay<sup>1</sup> with William R. Perdue, then a Duke law student. Fuller was only 33 when that essay appeared.

It was also at Duke that Fuller wrote one of his most famous essays in legal theory—entitled "American Legal Realism,"<sup>2</sup> for which he won the Phillips Prize of the American Philosophical Society in 1935, and here that he laid the foundations for much of his later writing, including his best book in legal theory, called *The Law in Quest of Itself*, which he delivered as the Rosenthal Lectures at Northwestern in 1940 just as he was severing his ties with Duke. Fuller was much attracted to Duke



Lon Fuller (photo courtesy of Duke University Archives)

as a place where his scholarship could flourish. Indeed, it might even be said that when Fuller came to Duke he "dug in" for a life-long attack on the deepest problems of the law. He built himself a small self-contained study out in his back garden where, I am told, he spent vast amounts of time every week. In one of his letters he wrote:

"I also have a small cabin study about 100 feet from the house, with a fireplace, shelves for books, desk, and the furnishings generally of an office." Now this workplace does not sound exactly like a fox hole, but we may infer that he got a lot of good work done there—far more than one can in the usual American law faculty office of today.

Fuller's papers, now in the Harvard Archives, include Dean Justin Miller's invitation to Fuller to join the Duke faculty, where he was promised that he could "teach anything [he] want[ed]" in a school with an impressive faculty, fifty full-tuition scholarship students, and a library budget of \$25,000 per year in an era in which faculty salaries were around one-third that figure.

Fuller did not regret his acceptance of that invitation, for he repeatedly rejected invitations to other law schools throughout the decade. In a letter to the Dean at the University of Pennsylvania Law School, Fuller praised the "greater freedom" at

Duke, the opportunities created by a large endowment and generous Duke University Research Council funds, and life in the "double oasis" of academic communities in Durham and Chapel Hill. In a letter to Dean Kirkwood at Stanford Law School, Fuller stated that the best library was at Duke and he then listed the "splendid young faculty at Duke under age 40."

In arranging for his "temporary" replacement at Duke for the 1939–40 period in which he had accepted a visiting professorship at Harvard, Fuller referred to Duke's "excellent and well-managed library," called the student body "a pretty bright bunch," and noted that the first-year students were "inquisitive." His acceptance of a permanent appointment at Harvard in 1940 was influenced in part by the opportunity to teach as many as 240 students in a single contracts class, an opportunity denied him by the small student body then at Duke.

Summers, who is preparing a biography and study of Fuller as legal theorist, ranks Fuller ahead of the three other most important American legal theorists of the last hundred years (Oliver Wendell Holmes, Jr., Roscoe Pound, and Karl Llewellyn).

Fuller's student collaborator at Duke, William Perdue, '37, has provided the Law School with an endowment which supports two Fuller-Perdue fellows. For the summer of 1984 two awards have been granted to student-faculty projects involving a collaborative effort with a significant protégé relationship. John M. Tanner has been named to work with Professor Reppy and Mary LaFrance will work with Professor Lange.

1. *The Reliance Interest in Contract Damages*, 46 Yale L.J. 52, 373 (1936-37).

2. 82 U. Pa. L. Rev. 429 (1934).



# Visiting Professors from Germany

**D**r. Bernhard Grossfeld, a member of the law faculty of the University of Munster, continued his international teaching career in the spring of 1983 as a Martha G. Price Visiting Scholar at the Law School. In conjunction with Claire Germain, Lecturer in Comparative Law and Legal Research, he taught a seminar in Civil Law which focused on comparative law as an introduction to comparative legal culture. The study of comparative law is important, he stresses, "not simply as a means of conveying particularized knowledge of foreign legal systems but as a window of exposure to other ideas, other ways of thinking."

Seminar members compared the structure, sources, and history of the civil law with that of the common law. The differences between English and American common law were also examined. Commenting on these differences Dr. Grossfeld notes, "England and America are two legal cultures separated by a common legal language. Due to differences in geography, social structure, and history the dissimilarities between English and American are greater than is often thought of. However, these same variables of geography, social structure, and history account for a greater similarity than is often thought of between English law and the civil law of the Continent."

Dr. Grossfeld has taught comparative, civil, and commercial law since 1973 at the University of Munster, where he obtained his law degree in 1960. From 1966 to 1973 he was a Professor of Law at the University of Göttingen. In addition to teaching in his native West Germany, he has also enjoyed an international teaching career which included three years (1969, 1971, 1972) as Visiting Lecturer at the University of Michigan and one term (1979) as a Visiting Fellow at Wolfson College, Cambridge University.

Prior to arriving at Duke last year, Dr. Grossfeld, accompanied by wife Maria and six children, visited Southern Methodist University in Dallas, where he taught comparative conflicts law and international investments. He has published widely in the fields of commercial and corporate law and his sabbatical at SMU and Duke enabled him to devote time to a work in progress on the relation between geography, language, and law. This work formed the basis of remarks he delivered at one of the Law School's Friday afternoon faculty seminars.



*Bernhard Grossfeld*



*Herbert Bernstein*

According to Dr. Grossfeld, geography impacts strongly on the structure of our legal institutions, as evidenced by how clearly the changes in English law can be traced from its transfer to the American East Coast and then to the Southwest and Midwest. Similarly, our legal institutions have been influenced by the structure of our languages. Western law he explains "is largely structured by the logical structure of Western language, especially the West European languages. This is easily demonstrated when one tries to transfer Western legal thinking into the Japanese."

Grossfeld's interest in geography and language flows naturally from his interest in comparative law, where dealing with different languages and cultures causes one to reflect on the influence of language and environment on legal reasoning. Law, for him, is "also a language science" and his intent is "to make lawyers aware of language, to be careful of language because of its importance for our profession."

Another West German professor will soon come to Duke permanently. Herbert Bernstein was appointed a Visiting Professor of Law for the fall of 1983. He taught courses in Comparative Law and in Insurance, which has been his long-standing scholarly interest. Professor Bernstein is a distinguished graduate in law of the Universities of Hamburg and Michigan. (He stood first in the class of 1967 at Michigan.) He was, for four years, a professor of law at the University of California. He is widely published in American journals as well as German. He presently holds a chair at the University of Hamburg, and in 1984-85 he will join the tenured faculty at Duke as a Professor of Law.



*Conference Report*

# The Use of Statistics in Business Litigation

One of the indications that we are entering the "information age" is the increase in the use of statistics and mathematical data by lawyers as evidence in litigation. The availability of a large volume of data on a particular subject does not, however, insure its effective use as evidence in a trial. One of the skills a successful trial attorney must acquire is the ability to employ statistical data in an effective manner in combination with the other available evidence. To inform the legal profession about the variety of roles of statistical inference in litigation, the Duke University School of Law and Fuqua School of Business conducted a two-day conference on "The Use of Statistics in Business Litigation" on May 2nd and 3rd, 1983.

The conference, which was presented in affiliation with the American Corporate Counsel Association, was hosted by Professors Ray Watson and David W. Peterson of the Fuqua School of Business. Professor Peterson is also currently a Senior Lecturer in Law at the Law School. Their goal was to provide a forum to address issues concerning the strategic use of statistical inferences in litigation. The focus of the program was practical application of statistical analysis, not merely a survey of specific quantitative methods. Two of the papers addressing practical applications are discussed below.

The program brought together leading academics and attorneys to discuss the latest research on the use of statistics in business litigation. In addition to the theoretical aspects of the topic, the program included a microcomputer demonstration of the uses of statistics and software available for litigation support. The papers presented at the conference will form the nucleus of a forthcoming issue of the Law School's publication *Law and Contemporary Problems*.

The formal program was opened by Professor David H. Kaye of the Arizona State University School of Law. Professor Kaye's presentation, entitled "Statistical Significance and Legal Proof," concerned the role of the concept "statistically significant" in satisfying the applicable burden of persuasion. After presenting an overview of the application of significance tests, Professor Kaye proceeded with an analysis of the limitations of the significance tests in both the social science and litigation contexts.

The remainder of the morning session addressed the use of regression analysis. Mr. Michael Finkelstein, a partner in the law firm of Barrett, Smith, Schapiro, Simon & Armstrong, presented a paper on the use of "Regression Estimates of Damages in Price-Fixing Cases."



*Fuqua School of Business*

Another paper drawing on the use of regression analysis was presented by Professor Daniel Rubinfeld of the University of Michigan Law School. Professor Rubinfeld discussed the results of research he and Peter O. Steiner conducted for the Law and Economics Program at the University of Michigan in a presentation entitled "The Use of Regression Analysis in Antitrust Litigation." Professor Rubinfeld demonstrated the use of econometric models, and in particular, the use of multiple regression analysis to estimate the effects of various explanatory factors on particular variables.

In addition to the need for a sound theoretical basis in statistical analysis, one must also have the ability to comprehend the methods employed to analyze the data. This concern was the subject of a paper presented by Mr. J. Randolph Ayre and Mr. Guy Bennett of the Boise Cascade Corporation. Their presentation on "Computer Assisted Legal Analysis" included discussion of data management techniques for use in business litigation.

Two papers addressing the use of statistics in particular areas of practice concluded the afternoon session on the first day. Assistant Professor of Law and Economics David Barnes, of the Syracuse University College of Law, presented a paper on "Uses and Abuses of Statistics In E.T.C. Proceedings with Emphasis on Consumer Protection." Following this presentation, Professor W. Kip Viscusi of the Duke University Fuqua School of Business discussed "Alternative Methods for Valuing Accidents."

The evening of the first day was set aside for demonstrations of microcomputers and their application in



business litigation. Speakers at the demonstration were David Kaye, who provided further insights on the concept of statistical significance and legal proof, and Mr. Ayre and Mr. Bennett, who demonstrated software that could be used for litigation support.

The presentations on the second day specifically addressed areas of litigation where statistical analysis has been successfully employed. Professor Elaine Shoben, of the University of Illinois College of Law, presented a paper on "The Use of Statistics to Prove Intentional Employment Discrimination." Professor Finis Welch of the University of California at Los Angeles Department of Economics discussed "Testing for Discrimination in Employment Practices." The final paper of the program was "Insights Offered by Marketing Research Relevant to the Presentation of Data in a Courtroom," presented by Richard Staelin, of the Duke University Fuqua School of Business.

Following these presentations, the conference concluded with an insightful keynote speech by Judge Patrick H. Higginbotham of the United States Court of Appeals for the Fifth Circuit. Judge Higginbotham's decision in the case of *Vuyanich v. Republic National Bank* made extensive use of statistical analysis. According to Judge Higginbotham, the increased use of mathematical data packaged in analytical models presents a challenge to the judiciary. He observed that "the assumptions incorporated into these packages may be hidden and difficult to detect with traditional judicial techniques of scrutiny." The risk is that judges may fail to recognize the underlying assumptions and bias in the models. The result is that there is a greater risk of error in the decisionmaking process than when courts rely on the intuitive and traditional analogical processes of lawyers. Judge Higginbotham believes the ability of the courts to process and evaluate the statistical data presented to them is hindered by the lack of doctrinal and institutional structure for handling the flow of information in the quantity and form now available.

One of the recurring fundamental problems addressed at the conference was how to best integrate statistical evidence into the judicial process. In fields of law as diverse as environmental protection, food and drug regulation, and employment discrimination, statistical data are sought to assist in the determination of issues of fact. Regardless of the nature of the proceeding, the triers of fact must determine how to weigh the statistical data presented given the appropriate burden of proof. Often they turn to the standard of proof scientists employ to evaluate the accuracy of statistical hypotheses, the significance test. Professor Kaye contended that the traditional significance tests are of very limited value and often misleading. Professor Kaye argued that the scientific concept of "statistically significant" should not be considered the equivalent of legally satisfactory proof. He first observed that there are "severe limitations" in using the objective statistical methods. These limitations are more likely to mislead than to enlighten triers of fact when presented in court.

Three of the major limitations he notes are: (1)

inherent problems, acknowledged in the field of statistical analysis, with the choice of a particular point at which something becomes statistically significant; (2) the choice of a particular hypothesis to be the "null hypothesis" for purposes of testing gives an advantage to the person whose position is consistent with the alternative hypothesis; and (3) the use of the terms "significant," "not significant," or "highly significant" are misleading because they refer to the reproducibility of the results and, therefore, do not have their "ordinary" meaning.

Professor Kaye proposes that all uses of the significance tests be presented in the courtroom merely as the P-value—the statistical form describing the confidence level of the data—along with the statistician's definition of the P-value. According to Professor Kaye, this would eliminate some of the problems inherent in presenting data on significance tests in litigation. He is skeptical, however, that the costs of educating the triers of fact about the significance tests outweigh the benefits that hypothesis testing brings to resolution of disputed factual questions.

Professor Kaye takes the position that the task of determining fact should be left to the court and jury without reliance on the statistical significance of the data in evidence. Expert testimony that data are significant does not necessarily mean that the evidence satisfies the applicable burden of proof, according to Professor Kaye. He further points out that if hypothesis testing is limited in this way the factfinders cannot avoid their duty to make factual determinations by "placing their trust in superficially impressive methods whose seeming objectivity does not withstand analysis."

The view of the desirability of this limited role for significance testing was not shared by all of the participants. The utility of significance testing in evaluations of quantitative data was considered in the context of F.T.C. deceptive advertising regulation by Professor David Barnes. Professor Barnes examined guidelines used by the F.T.C. for evaluating factual disputes concerning deceptive advertising claims. After analyzing the distinction between practical significance and statistical significance, he suggested some principles to be followed in employing significance tests in order to clarify and simplify litigation in deceptive advertising proceedings. One of the examples presented by Professor Barnes, the famous Listerine case, serves to highlight the practical versus statistical significance dichotomy. It also illustrates some of the problems with significance tests pointed out by Professor Kaye.

In *Warner-Lambert Co. v. The Federal Trade Commission*, the makers of Listerine challenged the F.T.C. determination that Warner-Lambert had misrepresented the efficacy of Listerine against the common cold. The quantitative evidence presented by the company included results of a clinical study involving more than 3,000 school children, in which those who had used Listerine were compared to those who had not. By comparing the severity of the cold symptoms for the group that used Listerine and those that did not the





*Duke University School of Law*

company claimed Listerine was efficacious against the common cold.

For the evidence of the results to be acceptable to the scientific community, the reported data must be statistically significant. The statistical significance of an experiment is a measure of the probability that the differences between the two groups tested resulted from chance. The significance level presents the probability between 0, indicating no probability that the difference is due to chance, and 1.00, indicating a 100% chance that the difference is a result of random fluctuations in the study. The lower the significance level, the higher the statistical significance. The most commonly employed significance level is .05, indicating that the probability the results are due to chance is 5% (sometimes this is termed the 95% confidence level).

In the Listerine case, the clinical test showed a statistically significant difference between the average severity of cold symptoms (on a 0-6 scale, with a 6 being the most severe cold) for students who used Listerine and the control group who gargled with water. Over the four years of the study, the overall severity of the colds of the group using Listerine was 2.191 while the control group had colds with an average severity of 2.305.

Professor Barnes noted that the statistical significance of the study demonstrates that the differences in the average severity of the children's colds was not likely a result of chance. The criticism of the study is that the difference between a 2.191 degree cold and a 2.305 degree cold is not medically significant to an individual. Professor Barnes observed that the choice of a large

sample group increases the chance of finding a statistically significant difference even where the magnitude of the difference is very small. As Professor Barnes said: "A finding of statistical significance is meaningful in that it eliminates chance as a causal explanation even if it tells us nothing as to the absolute magnitude of the demonstrated difference and, therefore, its medical significance."

Professor Barnes did not agree with Professor Kaye that the use of significance tests should be limited to evidence of the P-value and an explanation of the statistical implications of the measurement. Instead, he suggested that the F.T.C. develop guidelines for litigators to employ in deceptive advertising cases. Included in his suggestions is disclosure of the objectives, methods, and controls utilized in the research. He would also advise the Commission to require an evaluation of the data collected and the methodology used in the study. This would allow, among other things, the Commission to evaluate the practical significance of tests by reviewing sample size, and perhaps, requiring statistically significant results to be obtained with a reasonably sized sample.

Professor Barnes acknowledged some problems with the pre-trial disclosure requirement, including the reluctance of lawyers to disclose strategy and evidence before a proceeding begins. He contended that issues regarding statistical significance should be able to be resolved prior to trial because the issues on the significance level concern the methodology of a study and therefore are separate from the strategic considerations in the hearing.

These disputed issues concerning the use of statistics before the F.T.C. exemplify the questions that the widespread use of statistics in litigation has created. The advent of the computer generated analytical model is creating a need for the legal profession to reassess the relationship of statistical evidence and the applicable burden of proof.

The number of disputed issues concerning the use of statistics in litigation that surfaced at the conference indicates that the controversy over employment of mathematical models as evidence in trials concerns almost every area of law. Although the immediate concerns of the judiciary, government, and trial advocates may differ, the underlying challenge that must be addressed is the same; given the explosive growth of data management techniques and computer capability to analyze large volumes of information, how can the resulting information best be integrated into the traditional judicial process of dispute resolution?



# THE DOCKET



## Book Note

# The Trial Process: Law, Tactics and Ethics

*The Trial Process: Law, Tactics and Ethics* (The Michie Company, 1983).

**T**his book, authored by J. Alexander Tanford, a Duke Law School graduate (J.D. 1976, L.L.M. 1979) and now Professor of Law at Indiana University, is a much more comprehensive approach to the litigation process than the usual "how to" book on courtroom skills and techniques. As the title suggests, the book includes extensive readings and other materials not only on skills training but also on the law, ethics, and tactics of trial practice, which Tanford considers of equal importance.

The book is intended as a text for courses in trial advocacy, and it has been so used in the Clinical Seminar in Trial Practice at Duke during 1983-84. Like other books in this area of clinical instruction, it includes chapters on the usual components of a jury trial in their normal trial sequence, such as the selection of a jury, opening statements, and evidentiary matters. These are preceded, however, by a short opening chapter on such introductory subjects as courtroom demeanor and courtesy, followed by chapters on interviewing, negotiation, and closing argument. The somewhat unusual inclusion of extensive materials on interviewing and negotiation reflects Tanford's view that these are not only important parts of the trial process but should be studied before the student gets to courtroom skills. Similarly, the placement of the chapter on closing argument before the materials on *voir dire* and other sequential trial components reflects the belief of many trial advocacy teachers, Tanford among them, that early preparation of the closing argument is an effective means of organizing the presentation of a case before actually presenting it.

As Tanford puts it, this approach to the relationship between evidence and argument says that "the evidence you introduce is dependent on your closing argument, not the other way around."

In the introduction to the book Tanford argues that a trial practice course is (or at least should be) an "integrative experience," teaching students that effective representation in the courtroom requires not merely skillfulness in trial techniques and tactics, but also knowledge of evidence, ethics, procedure, and substantive law. This concept underlies Tanford's unusual and welcome inclusion of discussions on ethical issues throughout the book; for example, the chapter on cross-examination concludes by examining the requirement of a "good faith" basis for questions and the problem of discrediting a truthful witness.

J. Alexander Tanford, the son of Dr. Charles Tanford, James B. Duke Professor of Physiology and an internationally-known research scientist, was a Bradway Fellow at Duke Law School from 1977 to 1979. The Bradway Fellowship program, named for John S. Bradway, Professor of Law and Director of the Legal Aid Clinic at Duke from 1931 to 1959, was a primary resource for clinical teaching at the Law School from 1973 to 1980. In the preface to his book, Tanford acknowledges his indebtedness to the many people with whom he was associated in the Bradway Fellowship program, especially Donald Beskind, formerly Director of the Clinical Studies Program at Duke and now Senior Lecturer in Law, and former Dean A. Kenneth Pye, now Samuel Fox Mordecai Professor of Law.



# SPECIALLY NOTED

## Obituaries

### Theodore R. Price

Theodore R. Price, class of '48, died August 28, 1983, in Akron, Ohio, where he had been a judge for 25 years. Judge Price entered Duke Law School after serving in World War II. Although Judge Price had been seriously wounded during the war—losing the use of his left arm—he was determined to pursue his dream of becoming an attorney. After his graduation from Duke, he returned to his native Akron, where he served as an assistant prosecutor and municipal attorney before becoming a municipal court judge in 1958. After serving in that capacity for twelve years, he was appointed to the court of common pleas where he served until his death. The *Akron Beacon Journal* noted in an editorial following his death that “[Judge Price’s] courtroom record won respect from

[the local] legal community. His docket was consistently up-to-date, because of his efficiency as a jurist and his persuasiveness in negotiating out-of-court settlements.”

### John R. Fay

John R. Fay, class of '37, died January 3, 1983. Mr. Fay, a native of East Norwalk, Connecticut, returned to the Norwalk area to enter private practice after his graduation from Duke Law School. He interrupted his practice for a seven-year stint as a judge of the city court. He was active in his local bar association and Chamber of Commerce, a 32d Degree Mason, and an active participant in his church. Mr. Fay also served as state president of the Circus Fans of Connecticut and was a long-time member of the Circus Fans of America. He also found time to engage in

philately, winning numerous awards for his collection of 18th and 19th century Connecticut covers.

### Raymond K. Perkins

Raymond K. Perkins, class of '33, died December 23, 1983. Mr. Perkins, who came to Duke Law School after receiving his A.B. at Duke, practiced in Concord, New Hampshire, and was active in state and local politics. The offices he held include county commissioner, speaker of the New Hampshire house, and president of the state senate. He also served on the Educational Television Commission, chaired the Tri-State Commission, which coordinated educational activities in New Hampshire, Maine, and Vermont, and worked on the staff of President Eisenhower’s Commission on Federal-State Relations.

## Alumni Activities

### Ember D. Reichgott

Ember D. Reichgott, class of '77, has been selected as one of ten Outstanding Young Minnesotans by the Minnesota Jaycees. Her selection followed her receipt of a Distinguished Service Award from the Minneapolis Jaycees for her outstanding achievements in civic, professional, and legislative activities. Within the year following her graduation from Duke Law School, Ms. Reichgott began working with legislative groups to secure protective legislation for the victims of domestic spousal and child abuse. She has continued her attempts to provide such protection by helping to establish a battered women’s center and by authoring pro-

tective legislation after her 1982 election to the state senate. She is the youngest woman ever elected to the Minnesota Senate and the first to serve on that body’s judiciary committee.

### Otto G. Stolz

A former professor of law at Duke, Otto G. Stolz, has been named to a newly created post of vice president and general counsel for Amway Corp. Since leaving Duke, Mr. Stolz has served as an appointee of President Gerald Ford at the Department of Housing and Urban Development, president and chairman of the board of Cannon Mills, and a managing partner in the Washington, D.C., offices of Mudge, Rose, Guthrie,

Alexander & Ferdon. Mr. Stolz’s duties at Amway will include overseeing both the domestic and international legal staffs, which have previously operated separately.

### William C. Lassiter

William C. Lassiter, class of '33, has begun winding down his active practice of law, although he remains the preeminent North Carolina authority on newspaper law. Mr. Lassiter’s interest in newspaper law came naturally—his family owned and edited the *Smithfield [N.C.] Herald* from 1896 until 1980, when the *Herald* was purchased by the publishers of the nearby *Raleigh News and Observer*. One of his earliest cases after leaving law school involved the issue of the



status of newspaper carriers for purposes of unemployment compensation. Mr. Lassiter's advocacy of the newspaper owners' cause in that case not only established that the carriers were independent contractors but also impressed the owners enough that in 1938, when he had established his own practice, he was retained by the North Carolina Press Association at the then-magnificent

fee of \$50 per month. Although his practice has involved all facets of newspaper law—including a recent case that went all the way to the U.S. Supreme Court on the issue of newspaper access to certain public records—his real love is libel law. In the past, he twice represented plaintiffs in libel actions but, although he won both cases, he felt uncomfortable on that side of the issue and, about

twenty years ago, he resolved to represent only the defense in libel actions. That resolve has proved to be a felicitous choice for both Lassiter and the newspaper owners; he has lost only one libel defense case—involving only a \$200 verdict—in his career, a remarkable record even for someone with printer's ink in his blood.

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## Estate Planning Conference

The Duke University School of Law and The Duke University Estate Planning Council will present the Sixth Annual Estate Planning Conference on the campus of Duke University in Durham, North Carolina, October 4–5, 1984. An outstanding and nationally known faculty will present a program of timely and practical interest to all members of the estate planning team.

Subjects on the program will include: Current Developments; Special Use Valuation; Impact of New

IRS Actuarial Tables on Estate Planning; Charitable Trust Drafting; Will Contests; Computers & Estate Planning with a Demonstration; Tax Consequences of Trustee Selection, Control, and Removal; Problems of Principal and Income Accounting for Estates and Trusts; Post-mortem Tax Planning (Estate and Income); Available Options in Defined Contribution Plans—What They Are and When to Use Them; What You Can Do for Yourself and Your Clients With Self-Employed Plans; Forum on Qualified

Plans and the \$100,000 Question—including questions from the floor. The Conference is designed for continuing education credit.

Participation is strictly limited to 175. For information write or call: Ralph McCaughan, Director  
6th Annual Duke University  
Estate Planning Conference  
2127 Campus Drive  
Durham, North Carolina 27706  
Telephone 919/684-2123  
Fee: \$225



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## CHANGE OF ADDRESS

Name \_\_\_\_\_ Class of \_\_\_\_\_  
Position, firm \_\_\_\_\_  
Office address \_\_\_\_\_  
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Home address \_\_\_\_\_  
Home phone \_\_\_\_\_

## PLACEMENT

Anticipated opening for third , second , and/or first  year law students, or experienced attorney .

Date position(s) available \_\_\_\_\_

Employer's name and address \_\_\_\_\_  
\_\_\_\_\_

Person to contact \_\_\_\_\_

Requirements/comments \_\_\_\_\_

I would be willing to serve as a resource or contact person in my area for law school students.

I would like to be placed on the mailing list for the *Placement Bulletin*.

Submitted by: \_\_\_\_\_ Class of \_\_\_\_\_

## ALUMNI NEWS

Name \_\_\_\_\_ Class of \_\_\_\_\_

Address \_\_\_\_\_

Phone \_\_\_\_\_

News or comments \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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## Agenda

# Law Alumni Weekend, October 26–27, 1984

### Friday, October 26, 1984

2:00 p.m. Registration Desk Opens—Lobby,  
Law School

3:00 p.m. Law Alumni Council Meeting—  
Room 201, Law School

5:00 p.m. Cocktails, Lobby, Paul M. Gross  
Chemical Laboratory

6:00 p.m. Dinner on your own

### Saturday, October 27, 1984

9:00 a.m. Coffee—Danish, Hallway, adjacent to  
Moot Courtroom

9:15 a.m. Professional Program—Moot Courtroom

11:00 a.m. Pig Pickin' BBQ Luncheon, Back Lawn,  
Law School

(If rain, Portico of Gross Chem.)

To be catered by Bullock's Barbecue

1:30 p.m. Duke vs. Maryland

### REUNION CLASS PARTIES

7:00 p.m.\* Cocktails, Governors Inn  
(each reunion class will have its own party)

8:00 p.m.\* Dinner, Governors Inn  
(each reunion class will have its own party)

\*Should the University decide to reschedule the afternoon football game to an evening game, the reunion parties will be held earlier (i.e., 4:00 p.m. for cocktails, and 5:00 p.m. for dinner).



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Duke University School of Law  
Durham, NC 27706

Address Correction Requested

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