

Duke Law Magazine

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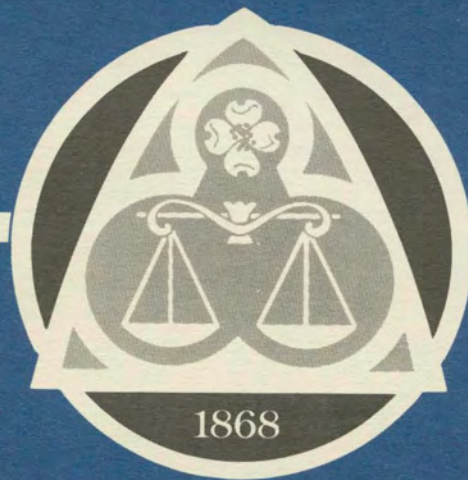
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Editor's Column

The contents of the current issue again reflect the breadth of interests among Duke Law School's faculty and students: the relationships between legal philosophy and literary theory, between law and economics, and between law and the actions of the medical profession, its clients, and legislative regulators; the process of choosing judges as a political and ideological problem; and the expansion of federal criminal law into areas formerly reserved to the states. These are topics covered in the first three sections of the *Magazine*.

The fourth section, describing

some recent curricular and co-curricular developments, indicates a continuing emphasis at the School beyond a narrow professionalism and premature specialization. An older joint degree program, of which many of our readers may already be aware, has been considerably widened by the evolving J.D./Master's joint study program. Student involvement in PAC may also increase. I want also to recognize the contributions to that article made by Dabney Etheridge, a trained lawyer who occasionally assists at PAC.

In the future, *The Docket* will continue to be larger than in past

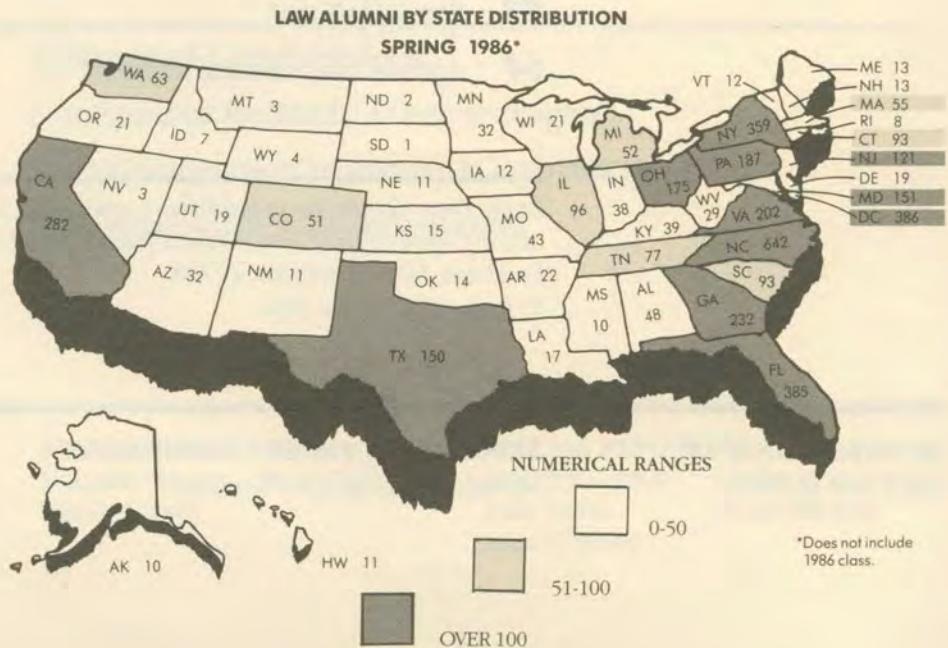
issues, reflecting the orientation of next year's new *DLM* editor, Assistant Dean Evelyn Pursley, toward strengthening the bond between our alumni and the life of the Law School.

This issue marks the end of my fourth year of monitoring the birth and growth of the *DLM*, while simultaneously learning how to be a parent of a son of exactly the same age. Both jobs have brought me satisfaction and excitement, as well as a certain number of surprises. I hope our readers have enjoyed the written product as much as I have enjoyed the task.

On the Cover

As the cover of this issue graphically illustrates, Duke Law School is truly a national school. Clearly our ties with our home state remain strong as North Carolina still boasts the largest number of our alumni, but we have at least one alumnus or alumna in every state.

With the addition of the recently enlarged classes, our alumni body has grown to a size and dispersed across the country to an extent which requires a major effort to involve all of our alumni in the ongoing life of Duke Law School. To meet this challenge, the Law School Alumni/Development Office has expanded its staff, equipment, and programs. An article on the office appears in *The Docket*.



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THEORY AND THE LAW

Mechanical Jurisprudence

George C. Christie*

Mechanical Jurisprudence is the term coined by Roscoe Pound (b. October 27, 1870, in Lincoln, Nebraska; d. July 1, 1964, in Cambridge, Massachusetts) to describe somewhat pejoratively the view that the function of the judge is to apply known and relatively precise rules of law in the decision of the case before him or her. Under this view, the applicable rule of law would form the major premise of the judicial syllogism and the judge's findings of fact (or the facts found by the jury) would constitute the minor premise. The judge's conclusion

Legal systems have their periods in which science degenerates, in which system decays into technicality, in which scientific jurisprudence becomes a mechanical jurisprudence.

ROSCOE POUND

would then automatically follow from these premises. In short, the law, whether of statutory or common-law origin, was treated as a self-contained system of known rules, and judicial decisionmaking was treated as a species of deductive reasoning from these preexisting rules. The highwater mark of this deductive approach to legal decisionmaking was the last few decades of the nineteenth century and the early years of the twentieth century. It is the era that Karl Llewellyn (b. May 22, 1893, in West Seattle, Washington; d. February 14, 1962, in Chicago, Illinois) characterized as the period in which the "formal style" predominated in judicial decisionmaking.

This mechanical or formal style of judicial reasoning finds an analogue in the judicial treatment of the Napoleonic Code in the nineteenth century and particularly in the period between 1840 and 1880. In addition to the desire to unify and rationalize the law of France, the adoption of the Napoleonic Code reflected notions of the separation of powers that also operated in the United States. Legislation was the domain of the legislatures and was not to be engaged in by the courts in the guise of interpretation. The sole function of courts was to apply the law given to it by the legislature. It was not surprising that, starting from these assump-



George C. Christie

tions, French courts adopted a very stylized method of judicial reasoning in which the decision flowed automatically from a statement of the applicable code provision and a concise statement of the facts. Given the broad terms in which the Napoleonic Code is framed, however, this technique often seemed somewhat strained. Eventually, the need to extend by analogy the scope of the provisions of the code to cope with the increasing complexity of French society made it impossible to deny the creative function of the judge. By the close of the nineteenth century, it came to be generally recognized that, the separation of powers notwithstanding, it was impossible to confine the judge to a stylized and mechanical role.

Toward the end of the nineteenth century, the point of view that was characterized as that of "mechanical jurisprudence" also came under increasing attack from U.S. scholars and jurists. First of all, the law is too com-

plex and dependent upon too many concrete particulars to be captured in a finite number of authoritative propositions. Law could not be made into a discipline that resembled the natural sciences. Secondly, a conceptualized view of the law impeded the ability of the law to respond to the rapid social and economic changes with which society was increasingly being confronted. This was a point that Roscoe Pound stressed. In Pound's view, it was necessary that law be consciously used as an instrument of social policy. Finally, and perhaps most

There is no way by which modern law can escape from the scientific and artificial character imposed on it by the demand of modern societies for full, equal, and exact justice.

SIR FREDERICK POLLOCK

importantly, Oliver Wendell Holmes, Jr. (b. March 8, 1841, in Boston, Massachusetts; d. March 6, 1935, in Washington, D.C.), and others stressed that the logical form in which decisions were cast did not really succeed in removing considerations of social policy from the realm of judicial decisionmaking; rather it had the consequence of simply leaving "the very ground and foundation of judgments inarticulate, and often unconscious" (Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457-78, at 466 (1897)). A rational system of judicial reasoning required the conscious articulation of the considerations of social policy that motivated the judge's decision.

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Positive Law

George C. Christie*

Positive law is a term used to describe a way of looking at law and legal institutions that is associated with the broader intellectual movement known as positivism. In the law, positivism is associated with the idea that law derives its binding quality solely because it proceeds from the dominant political authority in civil society. Hence, the term *positive law* is used to distinguish this law from either natural law or the social customs prevailing in any given society. It is one of the postulates of legal positivism that the legal order, however much it might be influenced by the moral and social orders, is analytically self-contained. Positivism, both in law and in philosophy, is a term associated with the nineteenth and twentieth centuries, but the roots of positivism go far back in the intellectual history of mankind. Most contemporary legal philosophy in the English-speaking world has developed from nineteenth-century "legal positivism."

The key figure in the rise of legal positivism was John Austin (1790-1859). The importance of Austin's work, particularly in the English-speaking world, cannot be overestimated. For Austin, who was very much influenced by Jeremy Bentham (1748-1832), law consisted of general commands, backed by a sanction for noncompliance, issued by a determinate person or group of persons to some other person or group of persons. The ability and willingness to resort to coercion in order to punish disobedience was the mark of superiority that characterized the lawmaker. Although Austin accepted that private persons could make law on the basis of the command-sanction model, in every political society there was an uncommanded commander. By this Austin meant some determinate person or group of persons who were not in the habit of rendering habitual obedience to any other determinate person or persons and who in turn were habitually obeyed by the bulk of the people in that society. This uncommanded commander was the sovereign. From this analytical framework, it followed that positive law consisted of all the direct and indirect general commands issued by this sovereign. By indirect or tacit commands, Austin meant the commands issued by subordinate ministers of state, including judges, whose commands were authorized by the sovereign and which in theory could be overturned by the sovereign if he or she wished.

Anything that could not be fitted into this analytical framework was not positive law. As Austin put it, "[a]n exception, demurrer, or plea, founded on the law of God was never heard in a Court of Justice, from the cre-

Every positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is supreme.

JOHN AUSTIN

ation of the world down to the present moment." That is not to say that a prudent legislator would not take into account notions of justice and prevailing social mores in formulating commands. But positive law itself only consisted of the commands of the political sovereign and authorized officials.

Austin's theory of law has been criticized by other positivists on the ground that much of what we call positive law cannot be broken down into commands issued by the sovereign and his or her officials to the great mass of citizens. For example, except for the criminal law, much of the law is concerned with granting people legal power, such as the power to make contracts or wills, and not with commanding the citizenry to do anything. Hans Kelsen (1881-1973), therefore, defined positive law as a set of directives to officials, principally judges, to apply sanctions to the citizenry if certain conditions are met, such as the violation of some precept of criminal law or the failure to perform under a valid contract. Instead of a sovereign at the apex of the system, Kelsen substituted a basic norm, or *grundnorm*, which was the basis of the authority of all the officials in the society. Every subsidiary norm of the system had to be traced back to this basic norm if it was to form a part of the positive law. Moral norms that could not be so traced were, therefore, not part of positive law. A typical *grundnorm* in a society with a written constitution, such as the United States, would be that the founding fathers were authorized to establish the constitution.

H.L.A. Hart reacted to the difficulties present in Austin's work by postulating that the essence of law is the notion of "rule," which states not so much what people must do but what they ought to do. Although a legal system made use of coercion, law was not the

mere institutionalization of force. Hart distinguished two kinds of rules—primary rules, which contain a set of directives, and secondary rules, which confer the power to issue primary rules and to enter into legal transactions.

A mature legal system consisted of a conjunction of primary and secondary rules. At the apex of the system was a set of three basic secondary rules: a rule of adjudication, prescribing how disputes were to be resolved; a rule of change, prescribing how the existing rules of the system might be changed; and, most basic of all, a rule of recognition, prescribing criteria for establishing whether a purported rule of law was in point of fact a rule of the system. A legal system existed whenever the officials of that system felt bound by the rules of the system when they were acting in their official capacities.

In Hart, as in the other positivists, there is again the distinction between positive law, which is generated by state officials using the rule of recognition, and other

social and ethical rules prevailing in a society. The mere fact that a rule of positive law is unjust does not deprive the rule of its legal validity. That is not to say that unjust rule should not be changed or that a legal system that is sufficiently unjust should not be overthrown. But law is one thing and morality is another.

**Professor of Law, Duke University School of Law. This essay is reprinted with permission from 8 The Guide to American Law 237-38, Copyright © 1984 by West Publishing Co.*

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Stanley Fish Comes to Duke

Stanley Fish, a prominent English scholar whose principal field has been the study of Milton, is also at the forefront of recent inquiries into the application of literary theory to law. Professor Fish has recently joined the Duke faculty as Arts and Sciences Distinguished Professor of English and Law. In the fall of 1986, he will assume the chairmanship of the *Duke English Department*. Currently, he is teaching two courses, writing a book on Milton entitled *Milton's Aesthetic of Testimony*, and preparing the sequel to his widely noted 1980 book, *Is There a Text in This Class?* At the Law School, he teaches a seminar in Professionalism, Theory, and Power in Legal and Literary Studies. The 1985-86 Duke Law Bulletin captures the essence of Professor Fish's critical endeavor:

The method of this seminar will be to study cases in law side by side with cases in literary criticism and theory in order to demonstrate how alike the two disciplines are in their procedures and in the problems they consider central to their enterprise. The similarity between the two disciplines extends to the range of problems they recognize and to the key terms in relation to which these problems are considered. The extensive debate concerning the possibility and desirability of recovering an author's intention in literary studies is matched in legal studies by a debate concerning the possibility and desirability of recovering judicial and legislative intent; and if literary critics argue as to whether or not interpretation depends on the reconstruction of historical circumstances, legal theorists dispute the nature and scope of precedent.

But, one must ask, how does a Milton scholar become interested in the law? Professor Fish received his B.A. from the University of Pennsylvania in 1959, his M.A. from Yale in 1960, and his Ph.D. from Yale in 1962. He taught English from 1962 until 1974 at the University of Cali-



Stanley Fish

fornia at Berkeley. He then joined the faculty at The Johns Hopkins University in Baltimore, Maryland. It was during his tenure at Johns Hopkins that Professor Fish began to ponder the interconnections between legal theory and literary criticism. Remarkably, the seminal event occurred during a daily basketball game Professor Fish played with Walter Benn Michaels, a noted literary scholar, and Kenneth Abraham, then a professor of law at the University of Maryland Law School. Between games, they discussed issues related to their respective disciplines. They recognized that many of the issues, terms, and problems in legal theory had rather precise parallels in literary studies. So, in 1976 they decided to share their insight with students and began jointly teaching a course given alternately at the University of Maryland Law School and Johns Hopkins. At one point, they even did a radio show explaining "The Position" as

they had come to call it. After Professor Michaels left for Berkeley, Professors Fish and Abraham continued writing and teaching in the same vein.

In 1981, the literary journal *Critical Inquiry* sponsored a symposium on "The Politics of Interpretation" from which the various segments of the book of the same name were gleaned. Ronald Dworkin, renowned professor of jurisprudence, had prepared "Law as Interpretation." This and other essays were circulated prior to their formal presentation at the conference. Several scholars vied for the opportunity to critique Dworkin's essay and Fish emerged the victor. Throughout the conference, during formal debates and heated arguments over dinner, the two explored the issues Dworkin had introduced in his essay. Fish then published a critique of Dworkin's essay entitled "Working on the Chain Gang: Interpretation in the Law and in Literary Criticism." This reply initiated a series of widely noted exchanges between the two scholars which continues to this day and includes Dworkin's "My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk About Objectivity Any More," Fish's "Wrong Again," and several unpublished pieces.

Following what have become known as the Fish-Dworkin debates, legal scholars began to correspond with Professor Fish. Professor Owen Fiss requested that Fish speak at Yale's legal theory workshop. There, Fish critiqued Fiss's work in his essay: "Fish v. Fiss." Professor Fish has written for the *University of Texas Law Review's* "Symposium on Literature and Law," has participated in a panel with Owen Fiss and Robert Cover of Yale at the American Association of Law School's 1983 meeting, and has spoken at various law schools, including: University of Florida at Gainesville, University of Toronto, Yale, Columbia, University

of Maryland, Benjamin Cardozo, Dalhousie, New York University, University of Texas, and University of Mississippi.

During the academic year 1982-83, Professor Fish and his wife, distinguished literary scholar Jane Tompkins, spent a year as visiting professors at Columbia University. The Law School is across the street from the English Department, which facilitated interaction between them. Professor Fish took Constitutional Law with Bruce Ackerman, Criminal Law with George Fletcher, and Torts with Vince Blasi. He attended the weekly legal theory workshops at Columbia and presented a paper to the law faculty.

While at Columbia, Professor Fish was approached with the possibility of a joint appointment. Although he had not considered such a move before, he thought it an attractive idea. When he returned to Johns Hopkins in late 1983, he took Contracts at the University of Maryland Law School. Last year, he and his wife began looking for a university which would enhance both their careers. Professor Tompkins was interested in a school where she could pursue her interests in feminist studies, literary theory, and American literature. Professor Fish was looking for a university with a top law school that would be interested in an affiliation. Both have been very pleased with Duke and the Durham area. In the fall 1985 semester, Professor Fish took Con-

tracts with John Weistart and Civil Procedure with Dean Carrington.

Professor Fish is a dynamic speaker with an astonishing memory for detail. His theoretical works are neither dull nor impenetrable. He explains his critical stance with humorous anecdotes and everyday language which makes his work at once accessible and enjoyable reading. Professor Fish has been immortalized as the character, Morris Zapp, in two novels by David Lodge: *Changing Places* and *Small World*. He also has been featured in a PBS documentary, *Thinking in the Twentieth Century*, and in the book, *Literary Meaning: From Phenomenology to Deconstruction* by William Ray. He will be highlighted in the upcoming edition of the University of Pennsylvania Law School's *Pennsylvania Gazette*, which is much like our *Duke Law Magazine*.

In "Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes Without Saying, and Other Special Cases," Professor Fish first proposed his thesis that "a normal context is just the special context you happen to be in, although it will not be recognized as special because so long as you are in it whatever it permits you to see will seem obvious and inescapable." (pp. 640-41). Professor Fish believes that everyone is always and already a construct of beliefs. Thus, we cannot be set "free" of our perspective because perspective (bias, ideology,

prejudice, point of view) is a condition of the human situation. This should not, however, be a source of despair. It means that texts, such as poems and statutes, do not stand apart from readers as objects possessing true natures which we scramble to decipher. They *become* in the very process of interpretation that is the way we see things in the world. We cannot step outside our beliefs and critique them for we are forever situated in them. Thus, interest and bias are not external constraints upon our freedom to act and choose; they are the very context within which such things as acting and "choosing" are possible.

Professor Fish's unique view shares some similarities with the Critical Legal Studies Movement. According to Professor Fish:

We both argue that norms, principles, and rules, rather than standing apart from interest and partisan urging, are always extensions of interest and partisan urging; where we part is Critical Legal Studies members think that something follows from that insight and I don't. To be more precise, they think either that the insight reveals the pervasive corruption of the judicial process or that the insight can serve as a vantage point from which we can begin the reform of the judicial process. I think there are no practical consequences whatsoever and that the insight is an occasion neither for breastbeating nor revolutionary hope.

ESSAYS

Federal Criminal Jurisdiction

*Sara Sun Beale**

INTRODUCTION

Since the founding of the United States, the authority to define and punish crimes has been divided between the states and the federal government. Before the Civil War, the United States exercised jurisdiction over only a narrow class of cases in which the federal interest was clearly dominant if not exclusive. Since the Civil War, federal criminal jurisdiction has been gradually expanding to subjects previously the exclusive province of the states. Because the bulk of these provisions have been intended to supplement state law and not to supersede it, the overlap between federal and state jurisdictions has been increasing.

ORIGINS

The federal government has no general authority to define and prosecute crime. The Constitution created a federal government with only limited delegated powers; federal authority was confined to matters, such as foreign relations, that are not subject to effective governance by individual states. Any power not expressly granted to the central government was reserved to the states and to the people. General police powers and the bulk of criminal jurisdiction were not granted to the federal government, and accordingly were uniformly recognized to be reserved to the states.

The Constitution explicitly authorizes the federal government to prosecute only a handful of crimes: treason, counterfeiting, crimes against the law of nations, and crimes committed on the high seas, such as piracy. Each of these offenses involves a subject, such as foreign relations, over which the federal government has exclusive authority.

All other federal criminal jurisdiction rests on a less explicit but more flexible and expansive source of constitutional authority: the granting to Congress of power to pass legislation "necessary and proper" to the implementation of any enumerated federal power (art. I, 8). The First Congress clearly assumed that the necessary-and-proper clause authorized Congress to enact criminal sanctions to effectuate various enumerated federal powers. Indeed, the first general criminal legislation included a number of offenses clearly dependent upon the necessary-and-proper clause. For example, the Constitution empowers the federal government to raise and support an army, and the legislation established criminal penalties for such conduct as larceny of federal military property (An Act for the Punishment of certain Crimes against the United States, ch. 9, 16, 1 Stat. 112 (1790)). Other sections of this legislation established penalties for conduct that would interfere with federal



Sara Sun Beale

judicial proceedings, including perjury, bribery of a federal judge, and obstruction of federal process (18, 21, 22).

Several early decisions of the United States Supreme Court confirmed Congress's discretionary authority to define federal crimes not enumerated in the Constitution. Although the federal government had only the authority delegated to it in the Constitution, the Court's expansive construction of the necessary-and-proper clause in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 416-17 (1816), established that Congress has broad discretion to employ criminal sanctions when it deems them helpful or appropriate to the exercise of any federal power (Tribe, at 227-31). In *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812), and *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816), the Supreme Court held that Congress has the exclusive authority to define new federal crimes, and thus there are no federal common law crimes (Conboy, at 306-08).

Before the Civil War, there were few federal crimes and little overlap between federal and state criminal

jurisdiction. Only the states exercised general police powers. Congress authorized federal criminal sanctions where necessary to prevent interference with, or injury to, the federal government. The principal antebellum federal crimes were (1) acts threatening the existence of the central government, such as treason; (2) misconduct by federal officers, such as acceptance of a bribe; (3) interference with the operation of the federal courts,

Since the Civil War, federal criminal jurisdiction has been gradually expanding to subjects previously the exclusive province of the states.

such as perjury; and (4) interference with other governmental programs, including obstruction of the mails, theft of government property, revenue fraud, and bribery or obstruction of government personnel. These were matters of paramount, if not exclusive, federal concern. Since the federal government's programs and activities were relatively few, the last category of cases was correspondingly narrow. Federal law did not reach crimes against private individuals, which were the exclusive concern of the states. The only major exception to this pattern came in geographic areas under exclusive federal maritime or territorial jurisdiction, where Congress exercised general police powers because no state had jurisdiction. Only in those areas where federal jurisdiction was exclusive, as in the District of Columbia, did Congress adopt criminal penalties for antisocial conduct—such as murder or robbery of private individuals—that posed no direct threat to the central government.

THE EXPANSION OF FEDERAL JURISDICTION AFTER THE CIVIL WAR

After the Civil War, Congress significantly expanded the scope of federal criminal jurisdiction. For the first time, Congress sought to extend the federal criminal law to a variety of subjects clearly within the scope of the state's general police powers. Although the Supreme Court's decisions rendered the civil rights legislation largely ineffective, the Court upheld the bulk of this new federal legislation, which was intended to complement existing state criminal laws.

CIVIL RIGHTS LEGISLATION

The most immediate consequence of the Civil War was the ratification of the thirteenth, fourteenth, and fifteenth amendments to the Constitution, which abolished slavery and forbade the states to deny to any citizen the right to vote, the privileges and immunities of federal citizenship, due process, and equal protection of the laws. Each amendment gave Congress enforcement authority, and Congress implemented them by

passing a series of civil rights statutes between 1866 and 1875 (Bernard Schwartz, vol. I, at 99-172, 443-791). The Reconstruction legislation, however, not only implemented the new prohibitions against unconstitutional state action, but also purported to extend federal jurisdiction to reach private conduct clearly within the realm of the states' traditional police powers. The Supreme Court promptly nullified many of the key provisions of the legislation, holding that the civil rights amendments had given Congress no new authority to criminalize the acts of one private citizen against another, and the provisions that were not invalidated or repealed remained "a dead letter on the statute book" for more than sixty years (Bernard Schwartz, vol. I, at 100). Not until the middle of the next century did decisions such as *United States v. Guest*, 383 U.S. 745 (1966), signal a greater willingness to uphold portions of the Reconstruction legislation proscribing private conspiracies to interfere with rights guaranteed by the fourteenth amendment.

REGULATION OF THE MAILS AND COMMERCE

The most important post-Civil War development was the enactment of the first federal criminal penalties for the misuse of facilities under federal control in a manner that caused injury to private individuals, not to the government itself. The first significant step in this direction was the adoption of criminal penalties for the misuse of the mails—facilities provided by the government—to effectuate fraudulent schemes or to distribute lottery circulars and obscene publications (An Act Relating to the postal Laws, ch. 89, 16, 13 Stat. 504 (1865); An Act to revise, consolidate, and amend the Statutes relating to the Post-office Department, ch. 335, 148-149, 300-01, 17 Stat. 283, 302, 323 (1872), commonly known as the Mail Fraud Act).

The next step was the adoption of penalties for misconduct involving the use of interstate facilities, such as railroads, which are subject to federal regulation under the commerce clause. The scope of the earliest provisions was very narrow. For example, the interstate transportation of explosives and of cattle with contagious diseases was made criminal. Some of the latter provisions were far broader. In 1887, Congress passed the Act to regulate Commerce, ch. 104, 24 Stat. 379 (1887), which established the Interstate Commerce Commission and authorized criminal penalties for willful violations. The Sherman Act of 1890, 15 U.S.C. 1-7 (1976), outlawed attempts to monopolize and conspiracies to restrain interstate commerce. The Interstate Commerce Commission Act was particularly significant because it set the pattern for subsequent legislation that established a federal regulatory framework, an administrative agency, and a comprehensive scheme of civil and criminal sanctions.

No single factor explains the new congressional willingness to expand the scope of federal criminal jurisdiction. The unprecedented crisis of the Civil War had forced supporters of the Union to adopt a more

flexible and expansive interpretation of the federal government's powers, and the expanded concept of federal power continued to influence the postwar Congress. In a few instances specific wartime precedents paved the way for postwar legislation. For example, the postmaster general had reported to Congress during the war that he was seizing incendiary, treasonous, and obscene publications; the first legislation regarding mail fraud and obscene mailing was adopted a few years later. Another factor that encouraged the passage of some of the postwar legislation was the growth of a strong and politically active antivice movement, which campaigned for legislation at the state level and then for complementary federal legislation. Anthony Comstock, a well-known proponent of antivice laws, played a leading role in the adoption of the federal laws forbidding the transportation of obscene publications in the mails and in interstate commerce.

Clearly, the most significant factor influencing Congress was the dramatic postwar economic expansion and growth in interstate commerce, fueled by the development of a national rail system and, to a lesser extent, by the earlier development of the telegraph system and large waterways such as the Erie Canal. The unprecedented growth in interstate transportation and commerce created new national problems that demanded new national solutions (U.S. Congress, 1886, at 3-28, 175-81).

The constitutionality of many of the new criminal laws was challenged because they allowed federal prosecution of conduct—such as fraud—that was traditionally subject only to state regulation. The first case to reach the Supreme Court, *In re Rapier*, 143 U.S. 110 (1892), involved criminal penalties for misuse of the

Reconstruction legislation, however, not only implemented the new prohibitions against unconstitutional state action, but also purported to extend federal jurisdiction to reach private conduct clearly within the realm of the state's traditional police powers.

mails. Although the Court upheld federal authority to punish misuse of the mail facilities furnished by the government, that rationale did not apply to interstate commerce, which is regulated, but not created, by the federal government. The first decision sustaining federal criminal jurisdiction under the commerce clause came in the *Lottery Case (Champion v. Ames)*, 188 U.S. 321 (1903), in which a sharply divided Court upheld the

federal prohibition against transportation of lottery tickets across state lines. Since Congress, like the states, might deem wide-scale gambling by lottery to be injurious to public morals, the majority held that Congress should be able to employ its power over interstate commerce to assist the states in suppressing lotteries. The Court emphasized that the federal prohibition in ques-

Prohibition cases accounted for more than one-half of all federal prosecutions every year between 1922 and 1933.

tion "supplemented the action" of the states which might otherwise be "overthrown or disregarded by the agency of interstate Commerce" (356-57).

In the two decades after the Supreme Court's decision in the *Lottery Case*, Congress enacted several more criminal prohibitions involving interstate commerce. The most important were the prohibition against the distribution in interstate commerce of adulterated or misbranded food or drugs (Federal Food, Drug, and Cosmetic Act of 1906, ch. 3915, 34 Stat. 768); the Mann Act of 1910, as amended, 18 U.S.C. 2421-24 (1976) & Supp. IV 1980), which prohibited the interstate transportation of women for immoral purposes; and the Dyer Act of 1919, ch. 89, 41 Stat. 324, as amended and codified, 18 U.S.C. 2311-2313 (1976), which prohibited interstate transportation of stolen motor vehicles (Conboy, at 319-21).

The other significant legislation passed during this period was a comprehensive federal provision dealing with narcotics, the Harrison Act of 1914, ch. 1, 38 Stat. 785 (superseded by the Internal Revenue Code of 1939), which included criminal provisions. The Harrison Act's detailed regulatory scheme, including the criminal penalties, was upheld as a proper exercise of the power to tax, despite the fact that it was intended to accomplish a regulatory purpose in addition to raising revenue (*United States v. Doremus*, 249 U.S. 86 (1919)).

PROHIBITION

The effort to prohibit the sale and distribution of liquor culminated in 1919 with the ratification of the eighteenth amendment, which gave "concurrent" enforcement power to the states and the federal government. The express constitutional grant of concurrent jurisdiction was without precedent. In practice, the enforcement burden was borne largely by the federal government, and it resulted in a phenomenal increase in the number of federal prosecutions. Prohibition cases accounted for more than one-half of all federal prosecutions every year between 1922 and 1933. In 1932, the peak year, approximately sixty-six thousand of the ninety-two thousand federal criminal cases involved

Prohibition (Rubin, at 497). In December 1933, the eighteenth amendment was repealed, and the only new cases involved the federal provision prohibiting the importation of liquor into a state in violation of the state's laws.

THE CONTINUING EXPANSION OF FEDERAL JURISDICTION AFTER PROHIBITION

Federal jurisdiction never receded to its relatively narrow pre-Prohibition scope. In 1933, the Senate authorized a special committee to investigate racketeering, kidnapping, and other reforms of crime; the committee reported that "the prevalence, atrocity and magnitude of the crimes then being committed and the apparent inability of the then existing agencies to cope with them, constituted the main reason" for congressional action in "a field which had, until then, been regarded as a matter primarily of local or State concern" (U.S. Congress, 1937, at 38). By 1937, seventeen statutes proposed by the committee had been enacted, and the committee's work ultimately led to the adoption of federal criminal penalties for interstate transmission of extortionate communications, interstate flight to avoid prosecution, interstate transportation of stolen property, bank robbery, sale, or receipt of stolen property with an interstate origin, and extortion or robbery affecting interstate commerce, as well as the first federal firearms legislation (40-54). The federal securities laws, including criminal as well as civil sanctions, were also enacted during this period.

Congress's authority to adopt criminal legislation under the commerce power was already well established, but the new legislation demonstrated Congress's growing willingness to assert jurisdiction over an

Federal jurisdiction never receded to its relatively narrow pre-Prohibition scope.

increasingly broad range of conduct clearly within the states' traditional police powers. The proponents of the legislation candidly recognized that much, if not all, of the conduct involved was already prohibited by the criminal codes of most states, but they argued that the states' enforcement had been ineffective. The new federal criminal legislation was adopted during the same sessions in which Congress enacted a sweeping program under the commerce clause in an effort to combat the Depression.

In the decades after the 1930's the scope of the federal government's criminal jurisdiction continued to expand. The Mail Fraud Act and the prohibitions against extortion or robbery affecting interstate commerce were given particularly broad interpretations, and they proved to be adaptable to a wide range of conduct.

New legislation was also adopted. Of particular

importance were the criminal provisions adopted to secure compliance with the expanding network of federal regulations. For example, beginning in 1935, Congress attempted the comprehensive regulation of national labor relations, and it subsequently established criminal penalties for conduct such as extortion or bribery of union officials and embezzlement or graft in connection with welfare and pension benefit funds. Similarly, criminal penalties were included in the regulatory schemes dealing with such matters as occupational health and safety, water pollution, and coal mine safety.

Nationwide concern with organized crime led to the adoption of several significant statutes between 1961

Nationwide concern with organized crime led to the adoption of several significant statutes between 1961 and 1970.

and 1970. The first provision, the Travel Act of 1961, 18 U.S.C. 1952 (1976), authorized criminal penalties for interstate travel intended to facilitate gambling, narcotic traffic, prostitution, extortion, and bribery—illegal activities frequently associated with organized crime. In 1968, Congress authorized criminal penalties for extortionate credit transactions because loansharking was providing funds for organized crime. The Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922 (codified in scattered sections of U.S.C.), included provisions intended to help in the investigation of organized crime, and penalties for syndicated gambling; the most controversial portion of the bill was its Title IX, also called the Racketeer Influenced and Corrupt Organizations Act (RICO) of 1970, as amended, 18 U.S.C. 1961-1968 (1976 & Supp. III 1979). In order to prevent organized crime from infiltrating legitimate businesses, RICO made it a federal offense to invest funds derived from racketeering activity into any enterprise in interstate commerce (Bradley, at 839-45).

In most instances, the new federal criminal provisions were intended to supplement, not supplant, related state criminal provisions, and accordingly, in a growing number of cases the same conduct could be prosecuted

[I]n a growing number of cases the same conduct could be prosecuted under either state or federal law, at the prosecutor's discretion.

under either state or federal law, at the prosecutors' discretion. Successive federal and state prosecutions were also permissible because the Supreme Court interpreted the double jeopardy clause as a bar only to re prosecution by the same sovereign (*Bartkus v. Illinois*, 359 U.S. 121 (1959)).

CONCLUSION

Despite the absence of any general police power, Congress has employed various federal powers—particularly the commerce clause, the power to tax, the postal power—to expand federal criminal jurisdiction dramatically. This development has been piecemeal, and concern has been expressed that federal jurisdiction extends to many cases where there is no significant federal interest (Friendly, at 55-61). The substantial overlap of federal and state law also permits the imposition of different sentences on persons who engage in the same conduct, depending upon whether they are prosecuted under state or federal law, leaving largely unfettered discretion in the hands of the federal prosecutors, who decide whether to bring federal charges (Ruff, at 1171-74).

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The Coming Battle over the Supreme Court*

Walter Dellinger†

Before 1986 is over, we will have the oldest Supreme Court bench in American history: five of the Justices will be 80 or older before the next Presidential election. It is widely assumed that the President, acting largely at the direction of Attorney General Edwin Meese, may have an opportunity to reshape the Supreme Court and influence the nation's jurisprudence well into the next century. The President and his spokesmen have not been bashful about asserting that the President will utilize his power by appointing known conservatives who may sharply alter the Court's currently precarious moderate balance.

But why should the Senate concur in such choices? Article II of the Constitution, which contemplates a critical Senate role in selecting Justices, reads: "The President . . . shall nominate, and by and with the Advice and Consent of the Senate shall appoint . . . Judges of the Supreme Court. . . ." Some have read this provision to confer only a limited role on the Senate. Richard Nixon, for example, claimed in 1970 that the President has "the constitutional responsibility to appoint members of the Court" that should not be "frustrated by those who wish to substitute their own philosophy or their own subjective judgment for that of the one person entrusted by the Constitution with the power of appointment." Many members of the Senate have in recent years apparently acquiesced in the notion that the Senate should presumptively concur in a President's choice for the Supreme Court. Some Senators have expressly stated that a candidate's philosophy is not a proper criterion for the Senate to consider, and implied that a President's nominee should not be rejected unless it can be shown that he or she is either corrupt or unfit.

Professor Laurence Tribe has entered this fray with a timely and helpful book (*God Save This Honorable Court*). Although he fritters away too many pages with a summary recounting of cases designed to demonstrate the obvious point that Supreme Court decisions have been important in the past and are likely to be important in the future (one chapter consists of a capsule summary of numerous decisions handed down by a five to four vote), he is essentially right on the central point: the Senate is constitutionally entitled and obliged to make its own independent judgment about whether confirmation of a Supreme Court nominee would be in the best interest of the country.



Walter Dellinger

The question of the degree to which the Senate should independently evaluate Supreme Court nominees is necessarily intertwined with another issue: whether either the President or the Senate may properly take into account a prospect's judicial and political philosophy. If a nominee's philosophy is not a proper concern, then the Senate is limited to a rather ministerial review of the nominee's formal credentials. But why should either the President or the Senate fail to take account of a prospect's social, economic, political, or judicial views when exercising their judgment whether to nominate or to confirm?

Presidents generally have, and should have, taken into account a candidate's general philosophical orientation in making appointments. When President Washington nominated the first group of Supreme Court Justices, he chose from those who had supported with some enthusiasm the adoption of a Constitution that created an overarching national government, passing over those who had only reluctantly accepted these incursions on the previous independence of the states.

Should Washington have been indifferent to his knowledge of which side of this great philosophical divide a potential nominee had previously chosen?

When Lincoln debated Douglas, the great constitutional issues of the era concerned the compatibility of the Constitution with the institution of slavery. Steven

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Douglas argued that a President should nominate Justices with blissful indifference as to how a prospect stood on the fundamental question of the rightness or wrongness of slavery and the power of Congress to control its spread. Lincoln, on the other hand, made it clear that he would nominate Justices who viewed slavery as a variant institution, grudgingly granted only limited protection by the Constitution. Similarly, when Franklin Roosevelt chose nominees, he selected from among those who appeared to share his view that the Constitution did not pose insuperable barriers to the ability of the national government to regulate the national economy. The ability of elected Presidents (and elected Senators) to exert some influence on the future course of the nation's jurisprudence is an appropriate (and appropriately limited) popular check on the exercise of the power of judicial review, without which that institution might not be acceptable in a constitutional democracy.

Appointing Justices who assert that they will confine themselves simply to "enforcing the Constitution as the Framers wrote it" may seem an appealing way to avoid social and political considerations in the appointment process—but only to those who have never read the Constitution. The Framers left us no list of what is included in the "privileges and immunities" of citizens, or of the content of the "liberty" that the states may not, without "due process," infringe; they left us no definition of the concept of equality that would provide a detailed guide for determining what does and does not constitute "Equal Protection of the Laws." In grappling with these and similar issues a Justice must necessarily draw upon a wide variety of sources. As Charles Black of Yale once wrote, "it has been a long time since anybody who thought about the subject to any effect has been possessed by the illusion that a judge's judicial work is not influenced and formed by his whole lifetime, by his economic and political com-

prehensions, and by his sense, sharp or vague, of where justice lies in respect of the great issues of his time."

If the President may take a candidate's philosophy into account in determining whom to nominate, is there any reason why the Senate may not also take this into account in deciding whom to confirm? Nothing in the constitutional text would suggest a more restricted role for the Senate. Surely the agent charged with giving "advice" should take into account the same range of considerations the advisee may consider. By requiring "advice," as well as "consent," the Constitution may even indicate that the Senate, or its Judiciary Committee, could properly suggest in advance to the President the names of those the Senators believe should be considered. This would not be unprecedented: after the Senate rejected two of his nominees Grover Cleveland sought the Senate's advice before successfully submitting a third name.

Although Professor Tribe curiously devotes only a paragraph to the consideration of the Appointments Clause by the Constitutional Convention, those debates lend significant support to the inference from the text that Senators should make their own independent judgment, largely unfettered by the President's view, about whether to confirm a nominee. The original Virginia Plan, introduced at the Convention on May 29, 1787, provided that all judges would be appointed by the national legislature. By June 19, the Convention had decided that the whole legislature was too numerous for the appointment of judges, and lodged that power exclusively in the Senate acting alone. Attempts to confer the power on the President to the exclusion of the Senate were solidly defeated. George Mason stated that he "considered the appointment by the Executive as a dangerous prerogative. It might even give him an influence over the Judiciary Department itself." Only

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near the end of the Convention was it agreed to give the President *any* role in the selection of judges; even then the President's power to nominate was carefully balanced by requiring the concurrence of the Senate. That final language was not seen to dislodge the Senate from a critical role in the process. Gouverneur Morris paraphrased the final provision as one leaving to the

Senate the power "to appoint judges nominated to them by the President."

Though he slights the support he might have found in the Constitutional Convention debates, Tribe adds fresh arguments that prudential and institutional considerations counsel an active Senate role. Since a third of the Senate is elected every two years, the Senate reflects the popular will drawn from a series of elections over time rather than the single snapshot that produces the election of a President. The Senate contains members from every state and representatives of both political parties, and therefore brings to the appointment process a more diverse range of views than is present in the chief executive acting alone.

Throughout the nineteenth century the Senate conceived its role broadly, declining to confirm more than one of every four Presidential nominees. It rejected George Washington's nomination of the able John Rutledge, leading to the subsequent appointment of the more strongly nationalist John Marshall, our greatest Chief Justice. The Senate rejected five of President Tyler's six nominations, and three of Filmore's four. Since 1900, however, only one in thirteen nominees has been rejected. Many members of the Senate have come to view their role as more restricted than the President's. When voting to reject a nominee, Senators have thought it necessary publically to rationalize their

sons who agree with his philosophy, since their job is to carry out his wishes. This is decidedly not the case with Supreme Court Justices. When asked to confirm a judicial nominee, the Senate should act as it does when asked to ratify a treaty. When voting on a treaty such as SALT II, no Senator would assert that the Senate's role is limited merely to determining whether the negotiators at Geneva were corrupt or incompetent. On the contrary, each Senator asks whether, in light of all relevant information, he or she believes that voting to "advise and consent" is in the overall interests of the United States.

I do not mean to suggest that a Senator should attempt to impose his or her own philosophy on the Court. In deciding whether to consent to a Supreme Court nominee's appointment, a Senator certainly ought to probe for evidence of intelligence, integrity, and open-mindedness—a willingness to be persuaded by cogent argument. Whether a Senator will also take philosophy into account should depend to a large degree upon whether the President has done so in making the nomination. A President may nominate a person of considerable ability whose prior career does not reveal a sharply defined constitutional philosophy. In such cases the Senate will have little basis for resting its judgment upon the nominee's philosophical views. But when a President does attempt to direct the Court's future course by submitting a nominee who is known to be committed to a particular philosophy, it should be a completely sufficient basis for a Senator's negative vote that the nominee's philosophy is one that the Senator believes would be bad for the country. In making this judgment, a Senator should consider the present composition of the Court, and how this appointment would affect the Court's overall balance and diversity. As the contributions of Justices with backgrounds as diverse as Hugo Black, John Harlan, and Thurgood Marshall make clear, a thoughtful court should draw upon a rich diversity of backgrounds and experiences.

Those who framed the Constitution recognized that the selection of Justices was too important to be left to the discretion of a single individual. A critical question for our time is whether members of the Senate are willing to discharge the responsibility for independent judgment entrusted to them by the Constitution.

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vote on the grounds of lack of ethics or competence, rather than on the more honest basis of objections to the nominee's philosophy. And even when a majority of the Senate mustered the courage to reject Nixon's 1970 nomination of G. Harold Carswell, nearly half of its members did not. Forty-five Senators voted in favor of Carswell, widely considered the least qualified nominee in this century.

Some Senators may be confused by an erroneous analogy to the Senate's more limited role in confirming nominees for executive branch positions. The President is entitled to have in his administration per-

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Women in the Courts

Anne T. Wilkinson*

The federal bench has long been a stronghold of white males.¹ It was not until 1979 before all fifty states had had a woman serving at some level in their judicial system.² Before President Carter's Administration, only eight women had ever served on the federal bench in the entire history of the nation.³ The Carter legacy of appointing twenty-nine women to district courts and eleven to appeals court seats thus attains great significance.⁴

President Reagan's record is more in line with those of other Presidents. Indeed, in his first 121 federal judicial appointments, only nine were women. Not one was seated at the court of appeals level.⁵

This paper will outline the rationale for increasing the number of women on the bench. Then, it will turn to difficulties women encounter in court and along the path to a judicial position. Finally, several remedies for these problems are suggested.

WHY SHOULD WE CARE?

The rationales for increasing the number of women on the bench are various: to redress past and continuing under-representation, to legitimate women's place in the law, to better reflect society's pluralism, to increase judicial awareness of hidden gender issues, and to raise judicial consciousness of gender bias.

Aside from redressing the historic under-representation outlined above, more women on the bench will help legitimate the presence and participation of women in courts. To the public, judges are the most respected members of the legal community. Indeed, for many, judges symbolize the court and the law. The message that women are active participants in the law will be carried far afield because judges are also likely to receive media coverage.



Anne T. Wilkinson

A more representative judiciary is "more likely to win the confidence of the diverse groupings in a pluralistic society."⁶ The judiciary's strength lies with public acceptance and confidence in its decisions, especially in a democracy where the people grant the power to govern to group representatives. The ruled must believe in the fairness and justice of the rulers. If women are unfairly blocked from attaining proportionate representation, this faith will be betrayed.

A more "just" justice results from a broader spectrum of responsible opinions and interests. The fact that most judges agree most of the time reveals the common conditioning and socialization processes they have undergone.⁷ By their mere presence and added perspective, women can heighten judicial sensitivity to gender-based issues embedded within substantive and social questions.

Assume the clearest rules, the most enlightened procedures, the most sophisticated court techniques; the key factor is still the judge. . . . [R]ules are not self-declaring or self-applying. Even in a government of laws, men make the decisions.⁸

Even though judges aspire to be as impartial as humanly possible, their actions are sometimes based upon false, often unstated premises about the individual capabilities, interests, goals, and social roles of women.⁹ No one suggests that the mere fact of being a woman or a person sensitized to gender bias alone would change case outcomes; there are no such simple correlations.¹⁰ However,

My gender—or, more properly, the experiences that my gender has forced upon me—has, of course, made me sensitive to certain issues. . . . So have other parts of my background. . . . [N]obody is just a woman or a man. . . . The concept of a collegial court is to bring together people who will have different life and legal experiences, who may have different views of law and facts. If all the judges were the same, why have seven?¹¹

Finally, proportionate representation of women on the bench will improve the courtroom environment for their fellows. Complaints about inappropriate comments to women, forms of address which do not include women, and a "men's club" atmosphere are frequent.

Inappropriate comments to women come from litigants, witnesses, other counsel, and the court. They include remarks about physical appearance, endearing forms of address, and references to women as "girls."

The same compliment about her appearance which a woman would cherish in private takes on a differ-

ent meaning in the courtroom. Instead of focusing on an attorney's mental and verbal abilities, such remarks reduce her to an ornament. Calling women litigants, witnesses, and lawyers by their first names, by endearing terms, or referring to them as "girls" when men are addressed more formally puts women attorneys in a double bind:

If she objects, she risks alienating the judge or jury as a "women's libber" or someone who makes a mountain out of a molehill. If she lets it go, she risks being perceived as weak and incapable of challenging an effort to undermine her or her clients' credibility. . . . [She risks] disserv[ing] her client.¹²

More than personal embarrassment and anger are involved for the woman. Whether the remarks are unintentionally sexist or deliberately made, their consequences are the same: her status as attorney or witness is undercut, she is less commanding of respect. It affects self-image, composure, and performance.¹³ These slights are not mere molehills; "words are important. We get paid for words."¹⁴ These types of remarks force a woman attorney to shift attention from her case to evaluate the proper response to a comment. Even if the case outcome is not altered, the litigation process is negatively affected.

A second area of courtroom environment which needs improvement is the use of forms of address which do not include women. Judges continue to use such phrases as "Good morning, gentlemen," "You may be seated, gentlemen," and the like.¹⁵ Court correspondence uses salutations such as "Gentlemen", or "Dear Sir." Texts or opinions employ only masculine pronouns where suitable neutral equivalents are available. These forms of address can make women feel invisible, or like intruders in the legal process.

A hostile climate for women also is created by a "men's club" atmosphere in court. This atmosphere comes about whenever judges talk only to male attorneys during a team conference at the bench or in chambers; listen attentively to men,

but slump or fidget when women speak; use or permit sexist or "locker room" humor; assume that any woman telephoning is a secretary, not a lawyer; display memorabilia in chambers with naked women; and challenge the status of a woman but not a man.¹⁶ Even informal banter can exclude women, for instance, if the topic is always sports.

Also, a "men's club" environment is created by dark leather-and-oak decor as well as oversized tables, chairs, and podiums.

In some federal courts there are rules that a lawyer must use the podium. I've yet to find [one] that I can use. It's like being forced to wear boots that are too big. You are immediately uncomfortable because of a silly rule. . . .¹⁷

A 1978 survey of women in the Association of Trial Lawyers of American (ATLA) revealed that over 25% had been asked to perform nurturing services for men (for instance, getting everyone coffee). A substantial majority felt ignored and avoided.¹⁸

Increasing the number of women in the judiciary, to summarize, can benefit the law in several main ways: by making the bench more representative, legitimizing women's place in the law, and fostering a more hospitable atmosphere for women in the courtroom and in society generally. Finally, more women, with their unique life experiences, can lead to a more "just" justice.

WHY ARE THEY NOT THERE?

Dramatic increases in the number of women attorneys did not occur until the 1970's. Professor Beverly Blair Cook likens the traditional male route to judicial appointments to "a Chinese box puzzle," a set of nested boxes with each box containing those persons eligible to move into the next-smaller box.¹⁹ Women are represented either not at all, or else in vastly disproportionate numbers in each "box:" prestigious law schools, clerkships, partnerships, the litigation bar, and Bar Association and partisan political activities.

Most law schools did not ever

absolutely bar women from attendance. The last ABA-approved school to admit women did so in 1972.²⁰ By 1975, women represented 10% of the students at nearly all law schools and 21% in two-thirds of them,²¹ compared with only 4.3% of law students nationwide ten years earlier.²² In 1983, women law students had increased to 37% nationally.²³

By excluding women or setting a low quota for their admission [the fifteen law schools ranked as elite by three or more evaluative reports] cut off women from opportunities for clerkships with appellate judges and from associate positions with elite firms.

A degree received from a night or part-time law school . . . was a weaker investment in future legal opportunities than a degree from a better school. . . . By the early 1980's the elite law schools were just exceeding tokenism for women students, while some approved non-elite schools were close to equality.

Twelve of the fifteen elite law schools [still] admit less than the national average percentage of women.²⁴

After graduation from law school, the next "box" contains clerks from prestigious benches, especially the U.S. Supreme Court. Before 1971, only three women had served as Supreme Court clerks in the nation's entire history.²⁵ Between 1971 and 1976 fourteen additional women served. Women had only reached 21.2% of the Supreme Court clerks in 1983.²⁶

The proportion of women law clerks on the Supreme Court has not increased [with] the proportion of women law graduates. Even taking into account the lower percentage of women finishing at the elite schools from which clerks are drawn, there has clearly been some barrier to the fair consideration of available women.

The three women hired for the 1980 term attributed the underrepresentation of women to covert prejudices institutionalized by the system of [using law professors, or

small groups of selected lawyers to channel] candidates to the Justices.²⁷

Aside from this channeling system, barriers also are created in the minds of the interviewers of women clerkship applicants:

[M]y wife . . . entered the job market last fall. We were appalled when, in interviews with two appellate division judges for . . . clerkships, she was asked:

- (1) Did she have my permission to be doing this?
- (2) Would she be able to handle the job while being a wife and step-mother?
- (3) Was she planning to have children?²⁸

Partnerships in large firms are traditionally excellent channels to judicial appointments. White male candidates most often moved to the federal bench from private practice (49.6%).²⁹ Prominent law practices of the kind which serve as incubators for federal judges are not widely staffed by women attorneys. In fact, as of 1980, more than one-quarter of the nation's fifty largest firms had no women partners, leaving this "box" nearly empty.³⁰

While law schools and clerkships can change their gender composition quickly, it takes a generation or more to equalize personnel ratios in firms with long tenure and little turnover.

Just as women as "outsiders" first found places at unapproved and less elite law schools, they find opportunities to practice in the less lucrative and visible law areas. Therefore, the impact of women law graduates is . . . found in . . . positions with rapid turnover.

Women made up 2.8% of the total number of partners in [the fifty largest U.S. law firms] in 1981. . . . The connection between graduation from an elite law school and an invitation to join a prestigious law firm is not as close for women as for men. . . . Of Harvard Law School graduates from 1974-1981, only 1% of the women . . . had become partners by 1983, in contrast to 25% of the male graduates.³¹

Furthermore, women have less

litigation experience, a primary means of gaining attention for male judicial candidates.

Women were dissuaded from litigation by . . . the cultural belief that modest and refined women could not speak authoritatively in public places. Their response was a retreat to specialties assigned to their sex—matrimony, probation, and real estate law and to those agencies with least visibility, income, and prestige—legal aid societies, government bureaus, family practices, . . . law libraries . . . and back room research for very large firms.

In the Association of Trial Lawyers of America (ATLA) in 1978 only 2% of the members were women; . . . in 1983 6%. . . . [O]nly eight states in 1978 had more than 4% women in litigation. . . . The prestigious American College of Trial Lawyers (ACTL), an invitational group limited to 1% of practicing lawyers in each state, elected its first woman member in 1979. ACTL now has *four* women members. . . .³² Trial experience and reputation count heavily in the Bar Association ratings scheme for judicial candidates.

A 1970 study showed that law school admissions committees held pervasive beliefs that women were motivated by desires to help the poor and oppressed.³³ This is a major area of "women's work" in the law.³⁴

So it goes. Women are also not as likely to be selected as high-profile officers, trustees, or committee members in Bar Associations. No woman has been elected as an Assembly Delegate, to represent one of the fifteen districts nationally at the ABA House of Delegates. 1982 was the first time a woman served on the ABA Board of Governors.³⁵ Similarly, respondents to the Task Force on Women in the Courts survey said that county Bar Associations in New Jersey "seek out male but not female attorneys for active involvement and leadership positions."³⁶

Bar activities give you recognition among other lawyers, and the support of other lawyers. As a judi-

cial candidate, you are more likely to get newspaper endorsements if you have a committee of lawyers who have been president of the Bar, lawyers recognized by the press as people who know which lawyers should be on the bench. You don't get that kind of exposure if you haven't been active in the Bar.³⁷

Furthermore, Bar Association functions may be inhospitable to women—offensive programs, some including strippers, were mentioned by respondents to the New Jersey Task Force Report on Women in the Courts survey.³⁸ In the past, many Bar Association and firm activities were held in private clubs that discriminated on the basis of sex.³⁹

Women are not as likely to be involved in partisan politics either.⁴⁰ Patronage plays a big role in federal judgeship selections.⁴¹ Parties traditionally have assigned women to the routine, low-profile "housekeeping" jobs.⁴²

[W]omen are blocked from achieving office not merely by socialization but also by situational and structural restraints. . . .

[F]emales generally display lower levels of political activity than males. The one exception [is] significant speechmaking where women were considerably more active than men. . . .

Women have greater experience with non-partisan political groups such as citizens' committees, community action groups, or the League of Women Voters.

In effect, . . . different "feeder" mechanisms may exist for advancing candidacies of women. . . . [However] what the women lacked in political credentials, they compensated for by their professional scholarship. . . . Our data . . . revealed a more prolific, though not statistically significant, publication record among women nominees.⁴³

To recapitulate, women are not proportionately represented in the judiciary. More women in the judiciary can benefit the legal system and society by making the bench

more representative, legitimizing women's place in the law, and ameliorating gender bias. However, women are not advancing proportionately along the traditional male "nested box" route to judicial candidacy.

HOW CAN WE CHANGE?

One identified problem is a lack of judicial sensitivity to gender bias.

Women litigators concerned about discriminatory treatment from professional colleagues often are advised to let time, retirement, and death take care of the problem. Older practitioners and judges, it is said, cannot be expected to change their long-held assumptions. . . . This is simply untrue. Given the fluid nature of the law, a considerable openness to change is essential for anyone in the legal profession. For example, when the revised bankruptcy code took effect, no one suggested that those who had practiced under the old code . . . be excused from learning the new one.⁴⁴

Of course, gender bias is learned and practiced on a much more unconscious level than statutes. It is often subtle, with deep sociological and cultural implications. Frequently, it is expressed in ways which seem so natural that the element of discrimination is not obvious. Judges have said that they did not perceive themselves to be sexist until their sexist behavior was pointed out to them.⁴⁵

Judges are human too. Still, they are obliged to treat those who appear in court with courtesy and respect, and to maintain the decorum and dignity of the court.⁴⁶ Insulting, belittling, and inappropriate comments to women diminish this dignity. Judges should also be aware of and guard against the traditional "men's club" atmosphere in court. Judges should stop any sexism that they observe, either by a comment in open court, or in a side-bar or chambers conference. Sanctions should be imposed against a lawyer or another judge for particularly egregious behavior.⁴⁷

Forms of address which do not include women can also improve.

Some men are uncomfortable with the "Ms." designation for women. A solution employed in Pennsylvania is to call all lawyers by title and surname, for instance, "Attorney Jones." This practice is used for all correspondence, both in court and law firms.⁴⁸ Changes in forms and form letters to effectuate gender-neutral references can be implemented when new supplies are ordered. Similarly, these suggestions may be applied to update model jury charges when they are reprinted.

The construction "he/she" should be avoided in the texts of opinions. While gender neutral, it is extremely awkward. Sentences can be revised in various ways: to omit the pronoun completely, to repeat the noun, to alternate use of feminine and masculine pronouns, or to use plural pronouns.

A major problem is the disproportionate number of women in the courts. Much can be done to improve the gender representativeness of the bench. Debate over affirmative action programs has raged because their implementation seems too politically motivated and fundamentally at odds with merit-based individual advancement. Current placements, however, already are based on political processes—whether elective or appointive through patronage.

Affirmative action is not inconsistent with merit recruitment; the problems are how to define "merit" and whose definition is to prevail. While women do not score as highly in traditional Bar Association ratings for judicial candidates, it does not necessarily follow that they have less "merit." First of all, society in general, and Bar Associations in particular, need to validate that criteria traditionally used in judicial selection processes do predict accurately a judge's fairness, honesty, and legal knowledge. Second, it is unlikely that a uniform opinion could ever be reached as to what a "good" judge is. Nor does society want judges who are mirror images of each other. This is why the law provides for juries and several-judge panels for important decisions. It

considers that many viewpoints will result in more "just" judgments.

If the current "boxes" are not validated, then recruitment for women candidates for the judiciary must differ from the usual recruitment patterns for white men.⁴⁹ The traditional measures of performance and professional success are not readily available to women, resulting in a dearth of candidates in each smaller "nested box."

If we, as a society, believe that all humans are created equal, then women are as inherently qualified to serve in the federal judiciary as men. Institutional and social barriers work to prevent their equal consideration as candidates. Fortunately, remedial suggestions and gender-bias sensitivity are not difficult to implement.

**This paper by Anne T. Wilkinson, J.D. '86, was prepared for the fall 1985 course in Federal Appellate Practice taught by Judge Harry Edwards of the Court of Appeals for the D.C. Circuit. In addition to the paper requirement, students briefed and argued cases which were currently pending before the D.C. Circuit. They prepared and discussed extensive readings about federal appellate practice, procedure, and philosophy:*

1. Esther Morris was the first woman to serve in a judicial capacity (Justice of the Peace, Wyoming Territory, 1870). She was not an attorney. Florence Allen became the first woman on a federal bench in 1934 (Sixth Circuit Court of Appeals). Finally, in 1981, the first women were appointed to the U.S. Supreme Court: Sandra Day O'Connor.

2. Carbon, *Women in the Judiciary: An Introduction*, 65 JUDICATURE 285, 285 (1982).

3. Martin, *Women on the Federal Bench: A Comparative Profile*, 65 JUDICATURE 306, 308 (1982).

4. Slotnick, *Gender, Affirmative Action, and Recruitment to the Federal Bench*, 14 GOLDEN GATE U. L. REV. 519, 525 (1984). The Omnibus Judgeship Act of 1978 created 117 new district and 35 appeals court positions. Carter was therefore in an excellent position to pay off both patronage obligations and campaign promises to make the federal judiciary more representative.

5. Slotnick, *supra* note 4, at 565.

6. Goldman, *A Profile of Carter's Judicial Nominees*, 62 JUDICATURE 246, 253 (1978).

7. The traditional path to the bench will be discussed below.

8. Rosenberg, *The Qualities of Justices—Are They Strainable?*, 44 TEX. L. REV. 1063 (1966).

9. See generally Schafran, *How Stereotypes about Women Influence Judges*, 24 JUDGES J. 12 (Winter, 1985).

10. The author agrees with Danelski's conclusion that values instilled from life experiences are the key variables for judicial decisionmaking. Discussed in Grossman, *Social Backgrounds and Judicial Decision-Making*, 79 HARV. L. REV. 1551, 1560 (1966).

11. Abrahamson, *The Woman Has Robes: Four Questions*, 14 GOLDEN GATE U. L. REV. 489, 493-94 (1984). The jury is another example of the law's distrust of a single viewpoint. Collective judgment is felt to arrive at a "truer" justice.

12. Schafran, *Women as Litigators*, 19 TRIAL 37, 38 (Aug. 1983).

13. See, e.g., New Jersey Supreme Court Task Force, *Women in the Courts*, at 14, 17 (June, 1984) (First Year Report) [hereinafter cited as Task Force Report]. For a particularly egregious example of verbal and physical abuse in the court, see Geiler v. Commission on Judicial Qualifications, 10 Cal. 3d 270, 110 Cal. Rptr. 201, 515 P.2d 1 (1973).

14. Attorney Carole L. Chiamp, quoted in Atkinson & Darlow, *Women in the Courts*, 63 MICH. B.J. 458, 461 (1984).

15. See, e.g., Task Force Report, *supra* note 13, at 89, 109.

16. See, e.g., Task Force Report, *supra* note 13, at 90 (questions like: "How long have you been in practice?"; "Are you really an attorney?"; "How does it feel to be represented by a woman?").

17. See, e.g., Task Force Report, *supra* note 13, at 90. (questions like: "How long have you been in practice?"; "Are you really an attorney?"; "How does it feel to be represented by a woman?").

18. Attorney Victoria C. Heldman, quoted in Atkinson & Darlow, *supra* note 14, at 461. Psychological and sociological studies have shown that stature can play a large role in perceived authoritativeness and credibility. When a person is dwarfed by furnishings, they lose ground before the battle even starts.

19. Cook, *The Path to the Bench: Ambitions and Attitudes of Women in the Law*, 19 TRIAL 49, 51 (1983).

20. *Id.* at 49.

21. FUCHS-EPSTEIN, *WOMEN IN LAW* 50 (1983).

22. FOSSUM, *Women in the Legal Profession*, 67 ABA J. 580, 580 (1981).

23. FUCHS-EPSTEIN, *supra* note 20, at 53.

24. Barr, *Women in the Law: A Male Perspective*, 63 MICH. B.J. 469, 469 (1984).

25. Cook, *Women Judges: A Preface to Their History*, 14 GOLDEN GATE U.L. REV. 573, 588-90 (1984). Duke University School of Law is among

these elite institutions. One study found that women who made it to the bench were more likely to have graduated from private or Ivy League law schools and to have attained educational honors. The author of the study posited that attendance at these institutions could be a means by which a woman attorney attained professional prominence. Slotnick, *supra* note 4, at 540-42.

26. In 1944, 1966, and 1968, women clerked for Justices Douglas, Black, and Fortas, respectively.

27. Cook, *supra* note 24, at 593.

28. *Id.* at 573, 588.

29. Task Force Report, *supra* note 13, at 8. Judge Dolores K. Sloviter of the Third Circuit Court of Appeals said in a 1984 speech to the National Association for Law Placement:

Five years ago, when I was being evaluated by the American Bar Association for this judgeship, despite the fact that I had been the first female to have moved, on her own, up to partnership in a large Philadelphia law firm [and] . . . had been the first female to have been made a full professor in a Philadelphia law school, I was asked how I would care for my then and still vigorous husband, because, I was told, that was expected to be a woman's role; I was asked how I would care for my child; . . . and I was told that every lawyer and every judge believed women were less productive in the law than men. . . .

Quoted in Schafran, *supra* note 9, at 17.

30. Slotnick, *supra* note 4, at 553.

31. The problem is truly endemic: See, e.g., Lewin, *Partnerships Elude Women*, N.Y. Times, May 29, 1984 at 28N; Low, *Women Partners Still Rare in L.A. Firms*, Los Angeles Daily J., Nov. 167, 1983 at 5; Stewart, *Are Women Lawyers Discriminated Against at Large Law Firms?*, *Atlanta Case Raises Questions of Men's Club Attitude in Naming New Partners*, Wall St. J., December 20, 1983 at 1; ———, *Women in the Courts*, NEW JERSEY L.J., December 8, 1983, at 1, 13.

The latter article reported that many respondents to the New Jersey Task Force on Women in the Courts survey felt that women were not being hired, promoted, or paid on the same basis as men for professional legal jobs. These opinions are all the more striking because they were raised sua sponte—the Task Force had not inquired along these lines.

32. Cook, *supra* note 24, at 596-97.

33. Cook, *supra* note 18, at 49 (emphasis added).

34. Slotnick, *supra* note 4, at 559.

35. Even when a woman receives a judicial post, she is usually assigned to a limited jurisdiction court specializing in such "women's" matters as domestic relations, minor probates, juvenile, and prostitution crimes. Cook, *supra* note 18, at 50.

36. There is a "fast track" to the prestigious court which is not readily available to women. The backgrounds and professional lives of the U.S. Supreme Court Justices fit a narrow spectrum. Justice O'Connor fits the male pattern of elite university and law school, but she lacked other credentials of her fellows because those opportunities were barred to women previously. Cook, *supra* note 24, at 586.

37. Davis, *Editorial: Women in the Legal Profession*, 68 WOMEN LAW. J. 153 (1982).

38. *Women in the Courts*, *supra* note 30, at 13.

39. Judge Cornelia G. Kennedy, quoted in Kotsis & Karr, *Comments from Six Michigan Women Judges*, 63 MICH. B.J. 490, 491 (1984).

40. Task Force Report, *supra* note 13, at 91.

41. The National Association of Women Judges helped gain ABA approval recently for a resolution declaring it "inappropriate" for a judge to belong to a club that has discriminatory membership policies. This type of club membership, the resolution states, "may give rise to perceptions that the judge's impartiality is impaired" (thereby violating Canons 1 and 2A of the ABA Code of Judicial Conduct). Discussed in Ginsburg, *Some Thoughts on the 1960's Debate Over Special Versus Equal Treatment for Women*, Speech for the National Association of Women Judges (Sept. 23, 1984) (on file with the author).

42. Slotnick, *supra* note 4, at 543.

43. See generally Slotnick, *Reforms in Judicial Selection: Will They Affect the Senate's Role?*, 64 JUDICATURE 114 (1980).

44. Cook, *supra* note 18, at 50.

45. Slotnick, *supra* note 4, at 545-47, 554 (quotation marks omitted).

46. Schafran, *supra* note 12, at 37, 41.

47. Barr, *supra* note 23, at 471.

48. This obligation arises under Canon 3 of the ABA Code of Judicial Conduct.

49. See Canon 3B(3) of the ABA Code of Judicial Conduct.

50. Reported in Task Force Report, *supra* note 9, at 89 ("Counsel" or "Counselor" were other suggestions).

51. For instance, more than twice as many women (12.1%) as men (5.6%) were law school professors at the time of their judicial appointment. Slotnick, *supra* note 4, at 553.

EDITORIAL CONFERENCES

*A Conference Report***Economists on the Bench****I. PURPOSE AND SCOPE OF THE CONFERENCE**

L*aw and Contemporary Problems* presented a two-day conference on the use of economics in judicial decisionmaking. The "Symposium on Economists on the Bench" was held April 11-12, 1986, with Professor Culp serving as special editor. Participants included judges, law professors, and economists. Included in the group of judges were the Honorable Steven Breyer, formerly of Harvard Law School and now a member of the First Circuit, the Honorable Frank Easterbrook, formerly of the University of Chicago and now a member of the Seventh Circuit, the Honorable John Gibbons, presently of the Third Circuit, and the Honorable Patrick Higginbotham of the Fifth Circuit.

In introductory remarks to the conference, Professor Culp distinguished between the two major issues related to economics and law: the importance of economic theory in law and legal issues, and the importance of economics in judicial decisionmaking. The conference focused on the latter and was concerned with presenting viewpoints and fostering discussion on the methods, the extent, and the significance of the use of economics in deciding cases and writing opinions. This distinction is essential because participants agreed on the pervasiveness and importance of economics in legal issues.

Although Professor Culp sees the role of economics in judicial decisionmaking to be expanding, he argued that economic theory is currently not applied as much as it could be due to uncertainty on the part of judges on *how* to apply it to legal situations. "This is partly a problem of skill," said Professor Culp, "because even though a judge may be conversant with the language of economics, he may struggle in trying to apply economics to particular facts." As Professor Culp explained, it also is "not possible to use economic theory to answer certain types of questions [raised by a case]." As familiarity with economics increases, however, Professor Culp suggested, so will its role in judicial analysis. Professor Culp believes that the conference will contribute to this increase by attempting to answer two questions: (1) How is economics used in decision-making today?, and (2) In which areas of the law is economics useful, and in which is it not?

II. STRUCTURE AND PARTICIPANTS OF THE CONFERENCE

The symposium was divided into four major topics: (1) How Should Economically Sophisticated Judges Use Economics?; (2) Evaluating the Work of Economically

*Jerome Culp*

Sophisticated Federal Judges; (3) Impact of Economically Sophisticated Judges on Economically Sensitive Areas of the Law; and (4) Impact of Economically Sophisticated Policy on Efficiency and Equity. Eleven of the participants were asked to prepare papers and nine others were asked to comment upon those papers. At the end of each session, time was allotted for discussion.

The first topic concerned the normative question of how economics should be used by economically sophisticated judges. Mario Rizzo of the New York University Department of Economics and Frank Arnold from the ICF, Inc. presented a paper on "The Use of Economics in Interpreting Statutes." Judge Willis Whichard of the North Carolina Court of Appeals wrote and spoke on the use of economics in common law adjudication. Comments were offered by William Darity, Jr., of the University of North Carolina's Economics Department and by Dean Carrington.

The second part of the symposium was devoted to evaluating the work of economically sophisticated fed-

eral judges. Professor Culp argued that judges who adopt the economic perspective of Richard Posner will view their judicial role differently from traditional judges. In particular Professor Culp argued that Posner requires judges to make different assumptions about the world than would a traditional judge. The assumptions made by such a judge will alter the judicial process.

Judge Scalia was discussed by Kip Viscusi of Northwestern University's Department of Economics as an example of a judge applying economics to regulatory issues. The case chosen by Professor Viscusi was the National Highway and Traffic Safety Administration (NHTSA) bumper standard. Professor Viscusi emphasized the use of economics to be less appropriate in regulatory or administrative law decisions than in common law decisions, where maximizing wealth between two private parties makes more sense. Following the papers by Professors Culp and Viscusi was a comment by the Honorable Frank Easterbrook of the Court of Appeals for the Seventh Circuit, an effective and ardent user of economics in his numerous writings on the law of corporations and the Constitution. Judge Easterbrook was not convinced that Posnerian judges were as different as Culp suggested.

The final papers in this section were by Professor Howard Latin of Rutgers Law School, evaluating the decisions of Judge Steven Breyer of the First Circuit, and Eleanor Fox of New York University Law School, examining the work of Chairman Miller of the FTC. Breyer is an extremely economically sophisticated scholarly judge. Latin found that Breyer did not explicitly refer to much economics in his [appellate] decisionmaking. Similarly, Professor Fox found that Chairman Miller used economics but not so differently than his at least initially less economically sophisticated predecessor.

The third portion of the conference analyzed the impact of economically sophisticated judges on economically sensitive areas of the law. Louis Kaplow of Harvard Law School discussed antitrust policy, which was commented upon by Judge John Gibbons from the Third Circuit Court of Appeals. Professor Kaplow questioned whether in the antitrust area economics was simply a different kind of political perspective. Several members of Duke's faculty gave papers and comments: Richard Schmalbeck and Chris Schroeder presented papers on "Tax Policy" and "Tort Law," respectively. Charles Clotfelter of the Economics and Public Policy Department, and Thomas Rowe of the Law School commented on their papers. Both papers concluded that economics has an important role to play but that its use is not as widespread or as influential as it might appear initially.

The final topic of the conference was the impact of economic policy on efficiency and equity in judicial decisions. Professor Robert Cooter of the University of California at Berkeley spoke on "Liberty, Efficiency and Adjudication." Patricia Wald, Judge of the Court of

Appeals for the District of Columbia, gave a paper on the limits of economic analysis in judicial decision-making. Comments were given by Judge Breyer, Judge Patrick Higginbotham of the Fifth Circuit, and Professor Daniel Graham of Duke's Economics Department.

III. THEMATIC ISSUES

Several issues recurred throughout the conference, both in the participants' prepared papers and in the discussions. The following issues are particularly representative of the predominant concern of the symposium: economics' use of assumptions in predicting human behavior; whether the central goals of economic price theory—wealth maximization and efficiency—should be society's exclusive goal; and whether the use of economic analysis in statutory interpretation constitutes a new breed of judicial activism which substitutes one set of values for those of the legislature as embodied in a statute. The conclusion reached was that in time each of these concerns must be better resolved before the proper role of economics in our legal system can be more firmly established.

Several of the conference participants questioned whether efficiency or wealth maximization should be society's only goal. Most individuals would agree that encouraging the production and protection of wealth is a legitimate goal of the state, but there is considerable dispute as to whether wealth maximization should be society's goal, even to the exclusion of other competing objectives, such as wealth distribution and the providing of social services or a safety net for society's members. First, basic constitutional principles of a republican government dictate that such broad policy choices are to be left to the legislature, the most politically responsive branch. (See the subsequent discussion.) Second, the diversity of legal rules and statutes as well as the spirited debate in forming political choices indicate that the goals of society and government are best seen as pluralistic, competing, and multifaceted, rather than monolithic and one-dimensional.

Because of economics' assumptions and the, as yet, politically unratified social policy of wealth maximization, Judge Wald referred to Law and Economics as "a deadly serious movement" which adopts a "seductively more organized . . . framework" but which must be guarded against until its assumptions are more fully explored. Judge Gibbons characterized the increasing use of economic analysis in judicial decisionmaking as a political movement rather than as a series of scientific discoveries which objectively determine what society's goals will be and what particular legal rules best encourage these goals. Gibbons believes that wealth maximization is a value or political choice since it cannot be scientifically proven to be society's goal. By assuming wealth maximization to be society's natural goal, Judge Gibbons believes that the Law and Economics movement ignores the important moral dimensions which necessarily accompany every non-scientific political value choice. Because wealth maxi-

mization is simply assumed to be society's goal, several of the conference participants—practicing judges and theoreticians—believe that the Law and Economics movement either inadvertently curtails more probing discussion about society's goals and duties or, worse, seeks to use economic theory to effectuate its own political agendas.

Judges Wald and Gibbons both expressed concern with the use of economics in the legislative task of statutory construction. Economically sophisticated judges who ascribe the goal of wealth maximization to Congress, and interpret statutes accordingly, actually are a new type of judicial activist who substitute their own theories of law for the intent of Congress.

Judge Wald warned against the separation of powers problem that arises when judges imbue themselves with law-making powers in their choice of economic goals as the goals of the legislation they are charged with interpreting. Judge Wald pointed out that the assumption of the efficient marketplace is flawed if bargaining between interest groups and the legislature results in statutes that will be reinterpreted by economically sophisticated judges.

Judge Gibbons also questions the legitimacy of judicial activism contradicting legislative consensus. In discussing the Supreme Court's use of economic analysis in its decisionmaking, Judge Gibbons criticizes the Court's application of economic theory to judicially legislate by amending statutes and imposing procedural barriers that go beyond the legislative mandate. For example, the Court has stiffened standing requirements in civil rights and antitrust cases. These "door-closing devices" used by the Court contravene Congress's intent.

The Chicago School, elaborates Gibbons, assaults decisions which uphold private enforcement of anti-trust laws as contrary to the goal of wealth maximization. Such criticism ignores the essential fact that Congress has provided for private enforcement, and the task of the judiciary is to enforce Congress's prescriptions.

Economic analysis works in a prospective, *ex ante* fashion—it seeks to find the legal rule that will be the most efficient and create the most wealth for society. The function of judicial decisionmaking seems to be historically and constitutionally dissimilar to the methodology of economics. The judge's historical and constitutional function is to advocate a concrete dispute and deliver justice to the parties before the court—his method is to proceed *ex post* and decide the legal consequences of past events between specific parties. Economic decisionmaking rules for the ages, judicial decisionmaking decides concrete "cases and controversies" and rules for the parties. Judge Wald saw the Law and Economics movement to embody "a subtle denigration of delivering justice to the parties."

IV. CONCLUSION

The symposium was characterized by lively, informal presentations and discussions. The issues were both practical and theoretical, political and moral, controversial and inevitable.

The role of economics in judicial decisionmaking has been neither comprehensively evaluated nor fully recognized, but the Symposium of Economists on the Bench brought together its most vocal proponents and critics to explore its usefulness and its appropriateness.

*A Conference Report***Medical Malpractice Conference**

In conjunction with work on the Spring, 1986 Law and Contemporary Problems issue of the same title, Professor Clark Havighurst from Duke Law School co-sponsored a 1985 conference entitled "Medical Malpractice: Can the Private Sector Find Relief?" in Washington, D.C. The other co-sponsor was Randall Bovbjerg, now with the Urban Institute. He was a Research Attorney under Mr. Havighurst at Duke Law School from 1974-1977. Following are abstracts of the presentations at that conference, keyed to the agenda.

**SESSION I: MALPRACTICE STATUS REPORT:
WHERE WE STAND AND WHAT WE KNOW**

**A. The Malpractice Crisis of the 1970's
and Its Aftermath**

Glen O. Robinson, University of Virginia School of Law

A decade ago tort law was widely denounced for creating a "crisis" in medical malpractice insurance. Some thought the entire health care delivery system was threatened by the huge increases in insurance premiums and the departure of many insurance carriers from malpractice underwriting. The proximate causes of those events were an unexpected rise in legal claims and recoveries, problems in insurance practices, and exogenous problems in the economy.

Liberalization of liability rules was widely blamed for producing the escalation of malpractice claims leading up to the crisis; thus reform of those rules became the focus of political attention throughout the 1970's. These reforms, however, were less thoroughgoing than they may have appeared and in most instances did not change underlying tort principles. Subsequent court rulings have undercut some of the reforms.

By the end of the 1970's, the momentum for institutional change and legal reforms was spent. Whether the changes and reforms solved the underlying problems, or merely appeared to do so, they did dissipate the crisis atmosphere for a while.

B. Developments in Liability Insurance

James R. Posner, Ph.D., Marsh & McLennan, Inc., New York

Insurance and other payment mechanisms in malpractice have changed considerably over the past ten years. More than thirty professionally-sponsored insurance companies were formed in response to the malpractice crisis of the 1970's. They now account for over one-half the premium volume and are likely to be around permanently. To remain economically viable, however, many of these companies must expand across

state lines, add new lines of insurance, and consolidate among themselves.

In eight states, patient compensation funds were established to control the large premium increases. Most were established on a "pay as you go" basis and still have not set their charges on an actuarial basis. Some of these funds have encountered financial problems (the most severe of which was a complete collapse in Florida).

A significant number of larger hospitals have established trust funds or formed captive insurance companies to pay for their primary layer of coverage. With financial incentive to control their liability, these hospitals embarked on risk management and quality assurance programs, and paid increased attention to claims management and legal defense.

In the mid-1970's, the claims-made method of insurance underwriting was adopted by about twelve of the physician-sponsored companies and the St. Paul Company. Suddenly in 1984, changes in the reinsurance market propelled claims-made toward fifty percent of the total premiums written.

Moving beyond traditional perceptions of risks associated with surgery and anesthesia, the early 1980's saw an increased awareness of risks associated with

More than thirty professionally-sponsored insurance companies were formed in response to the malpractice crisis of the 1970's.

birth trauma. Also, liability was expanded to hospitals as corporate entities.

The nature and severity of the current malpractice situation are widely misunderstood. Large premium increases, court awards, and jumps in the frequency and severity of claims are cited in the press. On closer analysis, however, these exist mainly in a few geographical areas and medical specialties. About 50% of the malpractice premiums are written in five states. Differentials in the premiums paid among medical specialties within a given state are often 10:1, with obstetricians now at the top. Although hospitals spend about 1-2% of their patient revenues for malpractice insurance, physicians in a high-risk specialty may spend 10% or more of their gross income on insur-

ance in a few metropolitan areas.

In 1984, an upswing in premiums started after a "soft" insurance market of four to six years (instead of the typical two to four year cycle). High investment yields and the influx of new carriers led to continued

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price-cutting in the early 1980's. In late 1984 and in 1985, the strong dollar reduced the amount of insurance and reinsurance capacity available from London. Losses in the U.S. forced companies to raise premiums. Even still, there is a twenty percent difference between premiums and insurance company costs.

In early 1985, the numbers of companies willing to write malpractice insurance shrank; lower liability limits of insurance are now available and insolvencies are expected. Joint limits and risk management programs between physicians and hospitals are two suggestions for change in the way insurance is provided. Periodic payments are accepted in some jurisdictions,

leading to savings of ten to twenty percent.

Outlays for malpractice premiums and self-insurance costs are two to four billion dollars per year. Total cost of hospital and physician care is well over \$300 billion per year. Although both the dollar amounts and the percentage of the total health cost for malpractice have increased, most of the added expense is absorbed by patients and third-party payers. Recent premium increases for malpractice insurance are not a significant cause of increased health care costs.

The occurrence of "compensable injuries" drives malpractice costs. Change to a "no-fault" system would lead to greater outlays than the present system because many more compensable injuries occur than are now compensated.

The quality of medical care is high in the aggregate compared to other institutions in our economy. The probability of a very serious mistake is about 1:100,000 hospital patients, even lower in the doctor's office. Negligence by individual physicians is a less important causal factor than "system failures," mistakes from the interaction of a number of individuals and/or policies.

C. The Implications of Prospective Payment for Hospitals

John B. Reiss, Esq., Dechert, Price & Rhoads, Philadelphia, Pa.

Malpractice standards for physicians and hospitals involve several elements: the provider-patient relationship, standards of care, corporate negligence, and the doctrine of respondeat superior. Changes in payment systems alter practice standards in HMO's, PPO's, and PRO's. These payment systems and prospective payment by diagnosis-related group under Medicare encourage efficiency and decrease costs. Although liability risks may increase, pressures for changing and clarifying medical standards may ultimately reduce uncertainty.



Clark Havighurst



Randall Bobbjerg

SESSION II: EVALUATIONS OF THE CURRENT MALPRACTICE SYSTEM

A. *The Case Against*

Jeffrey O'Connell, University of Virginia School of Law

The erratic character of the malpractice litigation process is exacerbated by noneconomic damages, such as loss of consortium or pain and suffering. These items make possible the "big hit;" yet there is no formula for translating them into pecuniary terms.

Damage awards paid by tortfeasors frequently duplicate amounts paid to the victims from collateral sources. Sometimes the collateral source recovers the amount paid to the victim by subrogation. The medical malpractice tort system returns about 28 cents of the

The medical malpractice tort system returns about 28 cents of the premium dollar to injured patients, of which only 12.5 cents reimburses the victim for economic losses uncompensated by other sources.

premium dollar to injured patients, of which only 12.5 cents reimburses the victim for economic losses uncompensated by other sources.

The tort system does not, therefore, provide a fair and rational method for compensating victims of medical malpractice. Yet, society pays high costs for operating this lottery. For instance, providers often feel they must settle rather than litigate, because they fear the jury's award.

The legal process requires each party to assume stances opposed to what they want. Patients must accuse providers who may be needed for continued care. They also are induced to remain as sick as possible for larger legal recoveries. On the other hand, providers must deny culpability for an outcome they may believe they are responsible for.

B. *A Contrary Perspective*

Patricia M. Danzon, Ph.D., Center for Health Policy Research and Education, Duke University

True, the malpractice system is costly and imperfect but these defects are often exaggerated. Detailed analysis of the disposition of more than 6,000 malpractice claims shows that the courts and the settlement process follow the precepts of the law of negligence and damages to a fair degree. Two-thirds of cases are closed within two years of filing. On average, claims settle for 74% of their potential verdict. One obtains a very biased perception of the malpractice system as a whole from the few highly publicized but atypical

cases that win huge jury verdicts. On the whole, the system is fair, but in individual cases it is not because of large variability in awards for similarly situated plaintiffs.

Malpractice insurance premiums account for between 1% and 2% of the nation's \$350 billion health care bill. For physicians, malpractice insurance premiums average around 3% of gross income (1982 data), ranging from 1% to 2% for general practitioners and up to 6% for high-risk surgical specialties. These percentages have increased only slightly since 1970.

Estimates of defensive medicine have never successfully distinguished between overutilization that results from fee-for-service health insurance and additional utilization due to the malpractice threat. Moreover, some defensive medicine is precisely the increased care which the malpractice system is intended to encourage. An added benefit from patients' discretionary right to sue is that doctors may be more aware and careful of the psychological side of health care.

Although malpractice insurance returns only 40 cents on the premium dollar as compensation to plaintiffs (compared to 80 cents through first-party insurance), the difference should be viewed as the cost of operating a system of quality control.

Since contingent fees are only paid if the plaintiff wins, this payment system helps insure legal services for the impecunious plaintiff. Without this system some valid claims would not be brought because the patient could not afford the risky investment. On the other hand, there might be more suits under a fee-for-service system because attorneys would have no incentive to decline weak cases.

The real cost of malpractice, injuries that occur due to medical negligence, exceeds the costs of the malpractice liability system. Rough estimates suggest a

[A] twenty to thirty percent reduction in the incidence of negligent injury would justify the costs of operating the fault-based system.

twenty to thirty percent reduction in the incidence of negligent injury would justify the costs of operating the fault-based system.

SESSION III: PROSPECTS FOR REFORM THROUGH LEGISLATION OR JUDICIAL ACTION

A. *Suggested Reforms of the Fault-Oriented System*

Patricia M. Danzon, Ph.D., Center for Health Policy Research and Education, Duke University

The tort system can be made more cost-effective. Tort liability recoveries probably exceed the financial

protection patients would choose at the time they choose a provider. Damage awards should be restructured to resemble the insurance people buy voluntarily.

Payment for economic loss should follow a schedule based on age and injury severity and not be determined on a case-by-case basis. Collateral insurers should have full subrogation rights. Payments for pain and suffering should be eliminated, except in cases of permanently disabling injury, which then should be a modest, fixed amount. Payment should be made peri-

The statute of limitations should be relatively short, running from the time of the injury.

odically, but the amount should be determined at time of trial, to preserve incentives for rehabilitation. An uninsurable fine in cases of gross negligence should replace punitive damage awards.

The statute of limitations should be relatively short, running from the time of the injury, not from its discovery. The standard of care should recognize different standards for alternative delivery systems (e.g., HMO's) and should recognize unreasonable cost as a defense.

The fault-based rule of liability should be retained. To replace it with a no-fault rule of compensation for all iatrogenic injuries could reduce deterrence and lead to a fifty-fold increase in the number of claims. Compensation can be achieved more efficiently by expanding existing insurance programs. Tort reform and private contractual alternatives are complements, not substitutes, for one another.

B. Proposals in State Legislatures

Elvoy Raines, J.D., American Society of Law and Medicine, Boston, Mass.

Would-be reformers of state medical malpractice legislation continue to neglect key factors in achieving political success, especially the careful management of goals, strategies, leadership, timing, and funding. Additionally, they have ignored the essentials of research, education, and continuous publication of the issues in shaping public policy.

Health care providers must use empirical evidence, not anecdotes, when they testify before legislative committees. Consumers, also, are not properly mobilized about the issues.

C. Federal Actions and Proposals

John S. Hoff, Esq., Swidler, Berlin & Strelow, Washington, D.C.

The Moore-Gephardt Bill (H.R. 5400) would reform the present fault-oriented medical malpractice system. It is not a no-fault program. Rather, it encourages providers to offer payment to compensate for net eco-

nomical loss without requiring them to do so where they believe they are not at fault. It thus preserves the fault system, but without the use of litigation.

The proposal redirects money now wasted on transaction costs and windfall recoveries for a few successful plaintiffs towards fair, certain, and prompt compensation for more victims of malpractice. The advantage to providers is that they avoid suits and payment of noneconomic damages.

The mechanics of the proposals are:

- (a) a provider option to make tender of payment of noneconomic loss within 180 days of a bad occurrence (this is pro-plaintiff: an incentive for providers to seek out problems);
- (b) the payment of net economic loss as it accrues, not in an estimated lump sum;
- (c) the foreclosure of a patient's ability to bring a tort action if a tender is made;
- (d) (perhaps) a patient's right to arbitrate fault, with damages limited to net economic loss, where a provider does not make a tender;
- (e) a provision for third parties to receive benefit of the tender; and
- (f) (perhaps) a patient's right to accept or reject any offer made. (If patients reject an offer, they may use the tort system, but cannot collect net economic loss. Damages for noneconomic loss would be subject to a maximum limit.)

The bill will not adversely affect deterrence since substantial payment would be required to foreclose tort action. Furthermore, there are more significant non-tort controls in the bill than in current automobile or workmen's compensation statutes.

SESSION IV: PROSPECTS FOR REFORM THROUGH PRIVATE CONTRACT

A. The Market and Policy Environment for Private Reforms

Clark C. Havighurst, Duke University School of Law

Since the late 1970's, active antitrust enforcement in the field and a deregulatory mood in Congress have shifted responsibility for health care providers' performance away from the industry's self-regulatory mechanisms and political institutions. This decentralization of decisionmaking has given consumers a greater say in the direction taken. Consumer interests are asserted by employers, unions, insurers, and organized health plans.

Consumers are stimulating the alteration of private financing and delivery mechanisms, as well as price competition. What used to be a monolithic health care

Consumers are stimulating the alteration of private financing and delivery mechanisms, as well as price competition.

system is fast becoming a dynamic, competitive industry.

Alterations in the health care marketplace have broken down the idea that there is one right way to treat a medical problem, discoverable only through the profession's accepted practice and collective wisdom. Because consumers consider cost alongside quality, hospital stays are shorter, occupancy rates are down, and professional styles of practice are changing. Physicians' myopic tendency to underweigh costs and other side effects, and to undervalue alternatives, such as prevention, is being corrected.

The health care industry's new competitiveness offers consumers opportunities to bypass the legal system's monopoly over making and administering rules allocating costs of iatrogenic injuries. Contractual modification of tort rights is promising in the new health care marketplace where consumers have many allies and new ways to protect themselves. Private ordering will result in experimentation and the satisfaction of differing consumer preferences. For consumers to surrender legal rights voluntarily, providers must offer concessions perceived to be a fair exchange.

A major inducement for patients to enter into these contracts is lower prices, reflecting not only the surrender of unneeded financial protection but also the

Private ordering will result in experimentation and the satisfaction of differing consumer preferences.

efficiencies achievable in care when penalties for departing from traditional methods are mitigated. Since the public increasingly accepts consumer economizing on alternative forms of health care delivery and treatment, economizing on legal rights and remedies should also be tolerable.

B. The Case for Reform through Private Contract

Richard A. Epstein, University of Chicago Law School

If permitted, contractual terms for medical liability would partly depend upon the structure of the medical provider. Health Maintenance Organizations (HMO's) have many of the organizational properties associated with large industrial firms. Before the advent of workers' compensation statutes, many such industrial firms adopted compensation systems, displacing common law rules. Small firms could not afford to introduce these systems because of their high fixed costs.

Similarly, HMO's, full-service organizations with high patient flows, could introduce complex internal structures to handle malpractice cases. They might experiment with different damage awards (e.g., repair-and-replacement damages or maximum lump sum

HMO's, full-service organizations with high patient flows, could introduce complex internal structures to handle malpractice cases.

payments). They could also provide for binding arbitration to replace court trials.

HMO's seem to have several built-in advantages to respond to the risks of medical liability. If the malpractice problem continues unabated, a shift from fee-for-service to group contracts for medical care should occur.

C. The Enforceability of Broad "Exculpatory Clauses"

Glen O. Robinson, University of Virginia School of Law

Efficiency does not necessarily imply provider liability. Other things being equal, the efficient allocation of accident costs would be that chosen by the provider and patient in an initial bargain.

The central question is whether "other things are equal" in a contract between provider and patient. Efficient and fair bargains are possible, if the following concerns about contractual risk allocation are addressed: (1) asymmetry of bargaining power and limitations on patient choice; (2) patient information problems (both ignorance and inability to understand risk); (3) loss of deterrence (moral hazard); and (4) problems of social welfare and morality.

The assumed conditions underlying each of the above concerns do not necessarily exist. Where they do exist, protections for the patient are available. Institutional arrangements can correct the first three concerns. The fourth concern is too vague to be intelligible, but it, too, is amenable to resolution by practical measures.

The *Tunkl* court rationale for striking down an exculpatory clause in a contract signed as a condition for admission involved "private" vs. "public" interests. The court listed five factors to determine a public interest. Despite the California court's reasoning, medical malpractice is no different from other areas; there is no overarching morality in medicine which prevents contracting.

D. The Enforceability of Other Limitations on Plaintiffs' Rights under Existing Law

Joseph N. Onek, Esq., Onek, Klein & Farr, Washington, D.C.

An arbitration clause is likely to survive judicial challenge because of its benefits to plaintiffs, defendants, and society. However, matters such as equality of bargaining power, revocability, notice, availability of alternatives, and the scope of arbitration should be carefully considered in drafting these provisions.

Limitations on pain and suffering damages meet

with considerable judicial hostility. The societal quid pro quo is not obvious without legislative factfinding about insurance rates. An individual quid pro quo is introduced by offering lower costs to patients waiving or agreeing to limit such damages. In that case, courts focus upon the availability of alternatives, both in the market and from the particular provider. This inquiry may point up antitrust problems.

Even if alternatives are available, however, a damage limit provision still could be struck down as against public policy (unless legislative approval exists). Also, the difference in price, if large enough to constitute a real quid pro quo, might be thought to render the agreement less than fully consensual.

Contractual adoption of a gross negligence standard for liability faces the same problems as an agreement to limit damages. The provider must thoroughly explain the contract to patients to prevent a finding of an asymmetry of information.

SESSION V: ALLOCATING RIGHTS AND RESPONSIBILITIES BY PRIVATE AGREEMENT

A. Changing the Forum

James A. Henderson, Cornell Law School

Binding arbitration is preferable to litigation as a means of dispute resolution. While the substantive tort law remains the same, the change in forum works real savings in transaction costs of time, convenience, and expense. Although badly injured claimants tend to choose jury trials ex post, the assumption here is that health care recipients, choosing ex ante as a group, would prefer arbitration.

Today, more than two-thirds of the states have statutes authorizing agreements to submit private disputes to binding arbitration. In a smaller number of states, statutes specifically authorize agreements to arbitrate medical malpractice claims. The validity of these agreements usually depends on general contract principles.

From the provider's perspective, the least vulnerable agreements are those between a prepaid health benefits provider and the representative of a group of recipients, where the contract terms are fair on their face and were negotiated at arm's length. On the other hand, the most vulnerable agreements are those entered into individually by a patient seeking emergency medical treatment, where the contract is unfair on its face, signed in haste, and health care is conditioned upon its acceptance.

A badly injured health care recipient may try to escape an agreed-upon arbitration agreement to get a jury trial. The issue is whether, when the agreement was made, the patient was adequately informed of its relevant implications and was in a position to exercise free choice. Claimants also may argue that even if the agreement to arbitrate is valid and binding, they did not sign and thus are not bound; the agreement does not cover the wrongs done to them; or the agreement does not extend to the defendants.

Examples of "unfair" contract provisions include:

where the provider may opt out of the agreement, but not the recipient; the panel of arbitrators is "stacked" against the recipient; or the agreement applies to all disputes except the provider's claims against the recipient for unpaid fees.

B. Limiting Recoveries

William H. Ginsburg, Esq., Wood, Lucksinger & Epstein, Los Angeles, Cal.

Past attempts by medical care providers to contractually limit their malpractice liability have been struck down by the courts as against public policy. Some problems may be cured by limiting damages reasonably, not totally. Other answers are: bargaining by a sophisticated, powerful entity (such as the state or General Motors) for the potential patients; presenting consumers with meaningful alternatives (such as "spot" insurance, similar to that for air travel); guaranteeing no-fault payments upon certain outcomes of a procedure; and offering affordable health care providers who will serve *without* limiting their liability. Factors weighing against limiting liability are that it is a necessity and for many consumers, particularly those of low income, actual choices are very limited.

National legislation is the best way to overcome judicial precedent and permit private agreements according to uniform minimum standards that offer meaningful choice. Pending such legislation, several contractual limitations on liability presently have a chance of courtroom success: (1) abrogating the collateral source rule, (2) discounting damages to present value, (3) paying periodically or structuring payments, guaranteed by a major insurance company, (4) install-

National legislation is the best way to overcome judicial precedent and permit private agreements according to uniform minimum standards that offer meaningful choice.

ing a voucher system for insurance on future medical payments as incurred, (5) paying lost earnings as incurred, (6) limiting noneconomic losses, (7) providing the right to offer reparative care first before litigating, and (8) eliminating punitive damages.

C. Altering the Standard of Care

Clark C. Havighurst, Duke University School of Law

Pretreatment agreements between providers and patients might alter the standard of care applicable in any subsequent legal action for medical negligence. Anomalous as it may seem, such contractual provisions would probably not convert tort suits into contract actions. Most courts would continue to apply the

shorter statutes of limitations and more liberal damage measures that apply to negligence actions.

There are several reasons to alter the legally binding standard of care. Because tort law mainly uses prevailing ("customary") medical practice, courts may be forcing physicians to adhere to an uneconomical standard. Many clinical practices, habitual among physicians, have never been tested scientifically for efficacy or cost-effectiveness in comparison with other measures. Because passive third-party payers have long paid unquestioningly for whatever a significant body of medical opinion would support, doctors and patients have not had to count costs. Moreover, many physicians feel pressure to practice "defensively," taking every step, however inefficient, whose omission might subsequently be criticized by a plaintiff's attorney. Aside from lower costs, patients also would benefit from being subjected to fewer tests and procedures by an agreement allowing good faith departures from prevailing medical practice.

Pretreatment agreements between providers and patients might alter the standard of care applicable in any subsequent legal action for medical negligence.

Drafting a contract redefining a provider's obligation to the patient is not easy. One possible approach is to provide that physicians not be required to abide slavishly to custom, but to act reasonably and prudently. The physician's actions should be judged by all the circumstances, including the need to consider cost factors. A prepaid group practice or HMO might reserve the right of its doctors to depart in good faith from customary practice in reliance upon scientific studies of cost-effectiveness. Another contractual provision might prescribe the kinds of evidence or witnesses that could be introduced or provide for non-partisan experts.

Finally, the threshold of liability could be changed; perhaps actions could not be brought for anything less than gross negligence. Many patients today forgo promising lawsuits either out of loyalty to the provider or because of a distaste for litigation. Patients so disposed should not be denied the opportunity to receive an appropriate concession from the provider in the opening transaction.

D. No-Fault Insurance with Benefits Conditioned on Release of Tort Claims

Jeffrey O'Connell, University of Virginia School of Law
Insurance policies should permit health care providers to guarantee tender of a victim's net economic

loss within 90 days of injury. Net economic loss is any resulting medical expenses (for example, rehabilitation) and wage loss (perhaps with a maximum limit) beyond the victim's own resources (e.g., accident/health insurance or sick leave). Under this proposal, benefits would be paid as losses accrued.

The victim, and anyone else with a claim based on the same injury, will then have an additional 90 days to accept such tender *or* to claim in tort only for non-economic losses. Upon acceptance of the tender of net economic loss, the victim will be required to waive tort claims against the tendering party.

In addition, the victim can be required, at the provider's option, to waive tort claims against any designee of the tendering party. Thus, the provider would gain bargaining leverage against a third party who contributed to the injury too (e.g., another provider, or an instrument manufacturer) for either a pre-accident or post-accident contribution to the fund paying victims' net economic losses.

The contract can be structured to exclude smaller cases at the provider's option. Tender need not be made for cases concerning lesser amounts. Or, restrictions on the insured event could be devised, e.g., limiting tender to adverse results involving severe brain damage paralysis. (Catastrophically injured people are usually risk-averse. They likely will welcome an early, certain settlement, even if less money is given them than the tort system would provide.)

E. Designing a No-Fault Substitute for Tort Remedies

Laurence R. Tancredi, M.D., J.D., University of Texas Health Science Center at Houston

No-fault compensation for medical injuries is an effective replacement for the existing tort system. In addition to eliminating the haphazard initiation of tort claims and their uncertain outcome, a no-fault system improves the trust relationship between physicians and patients, and achieves legal and administrative savings. The stated objectives of the tort system itself can be better realized by a no-fault plan for medical malpractice.

No-fault compensation for medical injuries is an effective replacement for the existing tort system.

Designated Compensable Events (DCE's) do not try to include all adverse outcomes. The system retains some fault element to keep up incentives for quality. Cost can be factored in as well. DCE's are flexible; they can be periodically expanded as new diagnoses and treatments become available.

Outcomes under this system are predefined, cer-

tain, quick, and fair, unlike the fault system. The system is pro-plaintiff because hospitals are better able to discover injuries and discourage cover-ups. However, hospitals are concerned that using DCE's would raise their costs because they would automatically pay out. More data on the frequency, duration, and severity of DCE's is needed before this fear can be answered.

F. Consumer Acceptance and Consumer Education

Max Fine, Max Fine Associates, Washington, D.C.

The timing is right for consumers to accept changes in medical malpractice litigation. Changes rejected by pace-setting unions a few years ago are now embraced because costs have transcended their level of complacency. The expense of health insurance pre-

Without consumer education, widespread acceptance of even desirable changes will be difficult, though.

miums may be the margin between a company's losing or winning a contract, or the difference between a labor settlement and a strike. Without consumer education, widespread acceptance of even desirable changes will be difficult, though.

Conventional wisdom about the malpractice insurance problem consists of two theses: first, the problem is the rapidly rising amount spent on malpractice insurance—about \$2 billion in 1983. However, the cost of “defensive medicine” is more, at least \$15 billion and perhaps as much as \$40 billion. Defensive medicine is in the economic interest of the health professions. It is a mistake to expect it to diminish.

Only 1/3 to 1/5 of the premiums paid for malpractice insurance are paid to the injured. The balance goes to lawyers and administration. A several-year wait before case resolution is typical. The delay is fine for insurers, who have investment use of the money, but it is catastrophic for a poor, injured person.

The second thesis is that the solution for the medical malpractice problem is reform of the applicable tort law. The tort law bar is an extremely strong lobby, though; it is not sensible or productive to attempt such legal reform.

Alternative delivery systems like HMO's and Preferred Providers Organizations (PPO's) have several good ideas: they encourage providers to abandon defensive medicine with its large costs. They almost automatically reflect financial gains which result from removal of problem doctors. Third, they emphasize reviews, reducing deficient practices. Risk management systems deter communication problems responsible for malpractice. Many alternative health care delivery systems have patient advocates or ombudsmen.

As group purchasers of malpractice insurance for

their practitioners, the alternatives can drive a better bargain with conventional insurers, or they can self-insure. Finally, the initial recourse for malpractice claims against them is mediation or arbitration, although enrollees may go to court if an award is not acceptable.

SESSION VI: SMALLER GROUP DISCUSSIONS

[OMITTED]

SESSION VII: FINAL THOUGHTS ON THE REFORM AGENDA

A. Contract and Tort: A Scholar's View of the Boundary

Patrick Atiyah, Oxford University

It seems unlikely that a free market approach to the provision of health care will lead to optimal results. The selection of contract or tort as the appropriate channel for liability may be merely a matter of legal technique, but not one of substance.

If the real problem is that tort liability has expanded beyond the bounds of reason, then the remedy is to cut back on legal liability. The use of explicit contractual clauses may appear to facilitate and legitimize this process, but reformers should not delude themselves—or others—as to the purpose of their exercise. If their purpose is to reduce tort liabilities by the “back door,” judges and juries might not agree with this idea. Then this reform is bound to be troubled and perhaps will fail. Even with a private contract, there will always be societal input through the courts and juries who rule on its terms.

It is unlikely that contractual standards of care can ever supplant tort standards for the majority of cases (especially when they are framed in terms of “reasonableness”). It is difficult to believe, for example, that minors would ever be held to have contractually lost their right to a “reasonable” quality of medical care. An attempt to contractually regulate these matters also might spawn a new round of litigation involving the standard of care the plaintiff was entitled to receive.

B. A Consumer Perspective

Sylvia A. Law, New York University School of Law

Proposals to encourage contracting between doctors and patients misconceive the nature of medical malpractice. Most claims involve patients who have been seriously injured by actions that no reasonable practitioner would approve. Informed patients, with free choice, are unlikely to absolve doctors of responsibility for such conduct.

Malpractice standards are not monolithic or rigid, but are tailored to community resources. Informed consent law allows doctors and patients to shape treatment to meet patients' preferences. Both parties can avoid inefficient, costly treatment by allowing patient choice. Many doctors, however, find it difficult to share uncertainty with patients or to facilitate informed choice.

Proposals to encourage contracting also misconceive the market for medical services. Patients who have the power to choose avoid out-of-pocket costs when seriously ill. Fifteen percent of the population has no form of health insurance, however. Offering patients reduced cost in exchange for reduced care at the time of illness is not fair. Patients have little capacity to make informed judgments about cost/quality trade-offs prior to illness, nor can they "shop" when seriously ill.

Proposals to encourage contracting between doctors and patients misconceive the nature of medical malpractice.

Most malpractice occurs in hospitals. Their workers can best evaluate the competence of medical care. In some states, the law encourages hospital and nursing home workers to act to protect patients against incompetence, abuse, and neglect. On the other hand, aggressive enforcement of federal antitrust laws limits hospitals' ability to protect patients from unskilled physicians. Any nationwide solution should not be attempted until it has been tried in some states first.

C. Implications for the Quality of Care and Overview

Randall R. Bovbjerg, J.D., The Urban Institute

Maintaining quality is the best reason to maintain our current professional liability system. Malpractice processes fail as a way to compensate most injured patients, even if tort recoveries *are* needed for exceptional cases.

Do malpractice threats improve quality by deterring substandard care? The emotions aroused by this question are matched only by the lack of evidence on it. Surely, other factors have equal or greater influence on quality. Liability insurance, furthermore, blunts what influence tort recoveries do have.

It is undisputed that culpable bad results are the main cause of malpractice recoveries. Every estimate shows that litigated malpractice claims are only the tip of the low-quality iceberg. High though medical quality

Do malpractice threats improve quality by deterring substandard care? The emotions aroused by this question are matched only by the lack of evidence on it.

surely is, problems remain (and public expectations may be even higher).

Liability based on fault is theoretically sound and in accord with what society requires of other actors. Americans are simply not going to give up such recourse without other safeguards being substituted. Other legal and administrative means for promoting quality are rudimentary at best. Medical professionals have traditionally resisted any discipline or consumer information which is not under their tight control. Fortunately, medical ethics and the need to please customers (including fellow professionals) are powerful forces, although "risk management" is in its infancy. (As the name implies, this system works to limit damages once a risk has developed.)

Individual professionals or groups which do improve quality must be appropriately rewarded by, for example, "experience rating" insurance premiums. The trend toward self-insurance is also helpful. Nothing can promote conscientious peer review quite like having peers all in the same fiscal boat.

Problems exist with one national malpractice solution because a whole spectrum of severity and frequency of accidents occurs. The current law of malpractice works imperfectly, but it does work in the right direction. Quality concerns differ considerably

Liability based on fault is theoretically sound and in accord with what society requires of other actors.

from dealing with "bad apples" to an occasional sour bite. An important element of quality, patient satisfaction, is slighted under both systems. Professionals must make their practices more accountable to patients' desires.

It is hard to disentangle whether malpractice recoveries are *the* cause of defensive medicine, or *a* cause along with third-party payment systems, or the mentality of using every available technique regardless of costs.

Providers fear malpractice penalties if they have a bad result after omitting any element of professionally desirable care. Patients and other payers now are retreating from the ideal of maximum available quality at any price. For the law to recognize these new approaches to quality will require either broad acceptance of advance contracts, increased reliance on informed consent, or better explanations to juries about why alleged deficiencies were in fact economically and socially desirable. Professionals need to make their practices more directly accountable to patients' desires.

*A Conference Report***Extraterritoriality**

The problems associated with extraterritorial application of economic legislation and possible solutions to these problems were the subject of an April 18 and 19 symposium sponsored by the Law School, Duke University Center for International Studies, and the Josiah Charles Trent Memorial Foundation.

Extraterritorial application of a law occurs when a country seeks to regulate a business's conduct within a foreign country. Disputes are sparked when regulations of the two countries are in conflict. Frequently, the targeted business faces orders to comply with two mutually exclusive regulations. Lawyers in the securities, antitrust, taxation, and export control fields often find themselves embroiled in such extraterritorial disputes.

With its political and economic might, the United States is a frequent participant in these extraterritorial disputes. Other countries chafe at American efforts to regulate wherever its economic interests are affected. In addition, aggressive American enforcement, such as extensive pre-trial discovery and treble damages, creates further conflicts between the United States and the host country. As a result, countries have enacted "blocking legislation" prohibiting the disclosure, copying, inspection, or removal of documents within their jurisdiction if it is sought by a foreign authority. Other retaliatory measures include refusing to enforce U.S. judgments or allowing a losing company defendant to sue its American parent company to recover a portion of the damage award.

The recent pipeline controversy was a prime example of the complicated international problems that the extraterritorial application of economic legislation creates. The furor began when President Reagan banned the exportation of any pipeline equipment to the USSR. When the ban was extended to all European subsidiaries and licensees of U.S. companies, European countries quickly responded by ordering European businesses not to comply with the U.S.-instituted ban. The United States vehemently responded by revoking licenses and denying companies the right to participate in transactions involving U.S. commodities or technical data if they failed to comply with the ban. After numerous lawsuits involving billions of dollars, the deadlock was finally ended through diplomatic efforts.

Symposium organizer Law School Professor Pamela B. Gann, who teaches international business transactions and international taxation, said the two-day symposium served a particularly vital purpose. "A conference on this topic at this time was most ripe. U.S.



Pamela Gann

scholars and relevant U.S. agencies have spent little reflective time on the topic although American legal scholars write seemingly endless articles on conflicts of laws and their resolution among the states. Progress in this area will come most quickly by actions on the part of the U.S. government, but it needs to be prodded by thoughtful analysis and suggestions of scholars. It is important that U.S. scholars begin to construct useful resolutions of these problems before the problems become even larger and more complicated."

Participants and commentators in the symposium were drawn from the legal, political science, and economics fields in order to foster full discussion of all the ramifications of the extraterritorial application of laws.

The symposium was opened by Yale Law School Professor Lea Brilmayer who presented a paper entitled "The Extraterritorial Application of American Law: A Methodological Appraisal." Brilmayer discussed the possible methodological approaches that can be used to analyze the extraterritorial application of laws. One approach frequently used is a judicially-created discretionary doctrine which has proved to be quite controversial, she said. Courts have also invoked their dis-

cretion to determine the extent of legislative jurisdiction and whether the court will decline to adjudicate the case based on *forum non conveniens*, she said.

When congressional intent is impossible to discern and legislative history provides little guidance, courts have frequently created presumptions as to the territorial reach of legislation, according to Brilmayer. Courts have also approached the extraterritorial application of laws by presuming that the legislation is consistent with international law. Such presumptions create a high degree of inflexibility which forces the courts down a narrow path leaving little room for retreat, according to Brilmayer; as a result, courts are handicapped in their efforts to adapt to a changing environment. The inflexibility is created because the judiciary is charged with enforcing the wishes of the legislature, but it is not given sufficient guidance, she said. Brilmayer suggested that courts are not adequately equipped to determine foreign policy by weighing the interests of the foreign country with the United States in determining the proper reach of legislation and are therefore a particularly weak body to make such decisions.

Courts have been reluctant to consider the Constitution as providing a helpful approach to extraterritoriality, Brilmayer said. While some problems exist with applying the Constitution in this area, Brilmayer advocated examining the Constitution and particularly the fifth amendment to aid in determining the limits of extraterritorial application of American laws. She argued that due process and its requirement of minimum contacts does provide some useful constraints to the extension of jurisdiction.

James Atwood, a partner at Covington & Burling, in Washington, D.C., presented a paper entitled "Conflicts of Jurisdiction: Antitrust and Export Cartels." An export cartel is a group of producers who collaborate on pricing and volume decisions for a certain good which is shipped to foreign countries. The legal environment surrounding such cartels is in a flux, according to Atwood, because of the United States. The United States' retreat from its previous hard-line stance of aggressive prosecution and its reliance on the case-by-case ad hoc approach are some causes of the unsettled legal doctrine in this area.

Atwood advocated that the United States adopt a rule of restraint in challenging foreign countries' export cartels. Antitrust prosecutions should not be initiated if the cartel is registered and operating only within its home country and includes only producers from that same country, he said. Any concerns about the operation of such a cartel should instead be directed towards diplomatic or legal channels created especially for international trade disputes, he suggested. By doing so, solutions would be hammered out on a government-to-government basis. Such a system for handling export cartels would constitute a substantial step towards acknowledging that countries have a substantial and valid interest in controlling the export of goods produced within their borders,

according to Atwood.

Antitrust was also the topic of New York University's Economics Professor Janusz Ordovery's paper and discussion. Ordovery acknowledged that economists have hesitated to tackle the issue of extraterritorial application of economic laws. The problem of analyzing the interaction of countries on a world-wide level when vastly different market forms exist, such as communism, socialism, and capitalism, creates many obstacles, Ordovery said. In addition, tolerance of anti-trust violations on an international level is greatly affected by the political environment of each country, he said. As a result, many economists have left international trade issues to the political scientists.

Ordovery was also critical of the application of American antitrust legislation to businesses of other countries. However, his criticism was based on the economic principle that any cartelization or undue concentration is injurious to economic welfare. This argument supported the view that the enforcement of antitrust laws should be quite extensive in order to succeed in eliminating price fixing. Since such an extension of American jurisdiction is implausible, Ordovery suggested a coordinated uniform international antitrust policy directed at cartel behavior and any world-wide anticompetitive mergers to help correct the inefficiency of current extraterritorial application of existing U.S. antitrust laws.

The symposium's next speaker, Professor Kenneth Abbott of Northwestern University's Law School, discussed his paper on conflicts of jurisdiction. Abbott highlighted two major difficulties associated with the extraterritorial application of economic legislation. One problem is created by the inability of individual countries to cooperate in an area which demands just such coordination, he said. When one country institutes a policy which has external benefits for other countries, there is a tendency for the other countries to free-ride without actively participating. In addition, countries have different preferences concerning economic sanction of legislation which makes cooperation quite difficult, he added.

The second difficulty in applying laws extraterritorially, according to Abbott, is the difference between the fixed definition of a country and the highly mobile nature of a country's resources. For example, during the pipeline controversy, the United States argued it was simply trying to control resources functionally associated with it regardless of the resources' location within another country's territory, Abbott said. European countries criticized such an amorphous view of extraterritorial reach and instead focused on the static notion of "territory" in determining how far a country should be able to assert its jurisdiction, he said.

A Canadian perspective on multinational security offerings was presented by Mark Q. Connelly, of Davies, Ward & Beck, in Toronto. Connelly discussed the growth of international security offerings and its effect in Canada. In Canada, the province system

remains quite strong as compared to the state system in the United States. Each province maintains its own security regulations and there are some substantial differences in regulations. However, the provincial system is not unduly cumbersome to firms desiring to offer securities in Canada because the provinces cooperate and most follow the lead of Ontario, which helps to standardize regulations, Connelly said. In addition, the provinces have provided generous prospectus exemptions to foreign countries offering securities, he said, and this exemption system is used to increase Canadian participation in multinational offering.

Canadian firms are more likely to make offerings in the United States than U.S. firms in Canada, according to Connelly. Canadian firms face some difficulties when making offers in the United States. The size requirement foreign firms must meet in order to use the short-form prospectus are too large for most Canadian firms, and the U.S. requirement of continuous disclosure is far more stringent than Canadian standards, Connelly said. However, the largest obstacle for Canadian firms is the increased exposure to civil liability that firms offering securities encounter in the United States, he said.

The expansion in the number of securities offered multinationally was the subject of a paper and presentation by Law Professor Robert P. Austin, of the University of Sydney. Austin questioned the current U.S. treatment of foreign firms seeking investors. Security regulators should focus on fostering the efficiency of markets and protecting investors—not suppressing innovations, he said. Austin said that multinational securities benefit American investors because they offer an opportunity for diversification. Therefore, Austin argued, foreign issuers should be allowed to meet looser disclosure requirements than domestic

issuers. As a result, U.S. markets would be better able to compete with European markets and regulations might move towards a uniform standard, he said. The greater exposure of firms in the United States to civil liability for material misstatements in a prospectus is another impediment to foreign firms, according to Austin. He supported narrowing the areas under which foreign firms can be exposed to such liability.

Another symposium speaker was Dr. Kurt Hoechner, of the Swiss Embassy in Washington, D.C. Hoechner discussed the differences between Swiss and American legal systems. The restriction of the availability of certain information often requested as evidence and the control it exercises over evidentiary procedures have a long history in Switzerland. The differences between the United States and Swiss legal procedure are excellent reasons for each country to respect the others' sovereignty, Hoechner said. Because of the desirability to plaintiffs of getting into American courts with their large punitive damage awards and treble damages, Hoechner stressed the importance of the rule outlined in the *S.S. Lotus* case. The *Lotus* rule stated that unless there is a permissive rule allowing jurisdiction, a country should not exercise its power in any form in the territory of another country.

Other speakers at the symposium included Dr. Karl Meessen of the University of Augsburg, Federal Republic of Germany, who has been a special consultant on international economic law to the American Law Institute's revisions of the Restatement of the Foreign Relations Law of the United States, and David Small, Assistant Legal Adviser, Economic, Business and Communication Affairs, U.S. State Department, whose office coordinates U.S. government efforts to limit problems of extraterritoriality.

ABOUT THE SCHOOL

Joint Professional Degree Programs

The majority of Duke Law students are pursuing a traditional course of study leading to the J.D. degree; however, a number of students are attempting to broaden their horizons by seeking a second advanced degree in conjunction with their law school studies. There are two "tracks" leading to joint degrees at Duke: Students may either enroll in one of the older joint degree programs, such as those leading to the J.D.-M.B.A. and J.D.-M.D. degrees, or in one of the recently established programs in which the students get a "head start" on work toward J.D., M.A., or LL.M.

degrees by starting law school in the summer.

In addition to those students seeking joint degrees, foreign students who come to Duke either for the J.D. or for advanced degrees add to the diversity of the Law School and its curriculum. The international students were featured in the previous issue of the Magazine. In the following sections, Duke Law Magazine's student reporters explain some of these programs, along with presenting a more detailed look at past and present participants in Duke's special programs.

Joint Degree Programs

Duke University has four older joint degree programs which enable law students to combine their interest in law with their interest in another discipline and to get both a law degree and another graduate degree in less time than it would take to get both degrees consecutively. Receiving either of the two degrees is contingent upon getting the degree from the other school. While there are still only a handful of students enrolled in these programs, joint degrees are becoming increasingly popular and are likely to remain an alternative for incoming law students.

Until quite recently, the J.D.-M.B.A. program had more students than any other joint program. In 1984, five students graduated from this program, which involves the Law School and the neighboring Fuqua School of Business Administration. The program is the only joint degree program that appears, however, to be shrinking in terms of enrollment. There are no 1986 students in the program, and there was only one student in the 1985 graduating class.

The J.D.-M.B.A. program lasts four years. During the first year the student goes through either the first year of business school or the first year of law school. (Most students go through the first year of law school first.) The following year the student goes through the first year of the other school. The student then spends the next two years taking courses in both schools simultaneously, though most of these courses will be in

the Law School. The student will therefore spend approximately two and a half years in law school and one and a half years in business school. Two other joint programs, the law-health administration program and the law-public policy program, are similarly designed.

The law-business program accommodates the students in the program by reducing their credit requirements in each school. This arrangement is understandable since several courses (e.g., federal income taxation, business planning, and business law) are available in both schools and hence receive joint credit status. Moreover, during the last two years of the program, joint students take more credits per semester than does the average student in either separate school (generally fifteen or more hours as opposed to the usual thirteen or so).

Jeff London was interviewed in 1984, his final year of the J.D.-M.B.A. program. His college (Haverford) did not offer business courses. Since Jeff wanted to go into corporate law, he thought it advisable to study business administration, and thus he applied to the business school at Duke at the same time that he applied to the Law School. He is typical insofar as he had no specific goal in entering the business part of the joint program aside from acquiring general knowledge about finance and other aspects of the commercial world. Indeed, when asked whether he thought he would use his M.B.A. skills, he replied that while they should be directly applicable to some of his legal work, it was



Jeff London



Matthew Friedman



Jerry Namba

"unlikely" that he "would use the degree itself in the foreseeable future."

Matthew Friedman, a classmate of Jeff, shared Jeff's sentiment. Even though he planned to get a C.P.A. and to start his professional career in a corporate legal department, he agreed that it was "undetermined" whether he would ever use his business degree. He noted, however, that "[l]ateral movement to management is facilitated by having the two degrees" in case someone with his credentials would like to leave the legal department for another part of the corporation.

Jerry Namba, another 1984 graduate, speculated that he will use only his knowledge of accounting, which he described as "the language of business."

Law-business students disagree as to whether the joint degree affected their placement opportunities with law firms. "Interviewers [at the law school] told me it did not help me," noted Friedman. "But I can't say that I'm completely convinced because, as a practical matter, business is so related to law that interviewers probably look for a business background whether they admit it or not." Friedman pointed out, however, that people should not "enter the program with the expectation that it will increase their learning potential. A lot of people are under the illusion that [if] you double your degrees, you double your salary. Nothing could be further from the truth."

One of the few common complaints about the joint program concerned coordination between the Law School and the business school. There is no advisor for the joint program as such, which leaves joint degree students on their own in terms of finding out about and meeting the necessary academic requirements. There are other difficulties, too. The fall breaks for the two schools occur at different times. Also the classes are of different lengths (law school classes are fifty minutes long, business school classes are seventy-five minutes

long), which causes classes to be on different time schedules. As a result, it is often extremely difficult to integrate law school and business school classes during the same semester. Several joint degree students have had to sign up for business school courses in which they were not interested because these courses were the only ones that fit into their law school schedule.

David Lips, '84, found that he could avoid the "hassle of piecing together a workable schedule combining courses from both schools" by taking five of the six business courses required after first year in one semester.

The difficulty in scheduling business and law classes together reflects a clear undertone that the joint program serves more as an accommodation to students wishing to pursue both degrees than as a commitment by the university or by the two schools to make the joint program a coherent package with a separate identity. David Miller, an administrator at the Fuqua School of Business, admitted that the business school had little incentive to be in the program since joint students generally thought of themselves as law students and tended not to become contributing alumni to the business school.

Many of the comments made by the law-business students are echoed by other joint degree students. Lynn Stansel, '84, the sole law-health administration student, thought that while most law firms tended to be "pretty receptive" to the J.D.-M.H.A. degree, others were skeptical. Lynn observed that during interview season she had "to overcome" the presumption of many law firms that she was exclusively interested in health law. She worked one summer for a New York law firm that did not practice health law at present but which encouraged Lynn to establish herself in that field if she so desired.

Lynn came to Duke because it was one of the few



David Lips



Lynn Stansel



Richard Rosenberg

schools that has the J.D.-M.H.A. program. She majored in biology in college, but did not want merely to be a laboratory technician. Her interests in medical biology and in political science led her to consider the law-health administration program as a way to combine the two fields.

Lynn's principal criticism of the program was that "there are a lot of coordination problems." Since no one in the Law School was familiar enough with the M.H.A. program to counsel her on her course requirements and to make suggestions on scheduling, she was frequently left with too much uncertainty and too little guidance, exacerbated by the M.H.A. program's having changed its requirements after Lynn arrived in 1980.

Richard Rosenberg, an '85 law-public policy student, was equally candid. "My major complaint," he stated, "is that for two small schools, they ought to cooperate more. They ought to encourage, not discourage, the joint degree—which they do [not] do now." The academic requirements "were never made clear," and there is "no liaison between the two schools who knows" the schools' policies.

Nevertheless Richard was "on balance" satisfied with the law-public policy degree program. "The overlap [between law and public policy] is a natural for me," he remarked. He sees his joint degree as a tool for understanding the political system and for changing public policy. One summer Richard worked for the Community Development Corporation; the next summer he worked for two law firms, one of which he eventually joined.

Chris Christie, also in the class of '85 in law and public policy, chose Duke over the University of Virginia so that he could enter the joint program. He stated that he was "definitely" pleased with the program, even though he considered the public policy side of his degree as "more general education" than as

something he expected to use in legal practice. He found law firms to be "generally indifferent" to the joint degree. "A couple of [Washington] D.C. firms were interested in it; a couple thought it meant I wasn't interested in practicing law. For the majority of firms it made no difference."

Paul Greene, also a law-public policy student, thought the program beneficial in sensitizing the student to nonlegal approaches to issues. Paul originally entered the program expecting to work for the government on graduation.

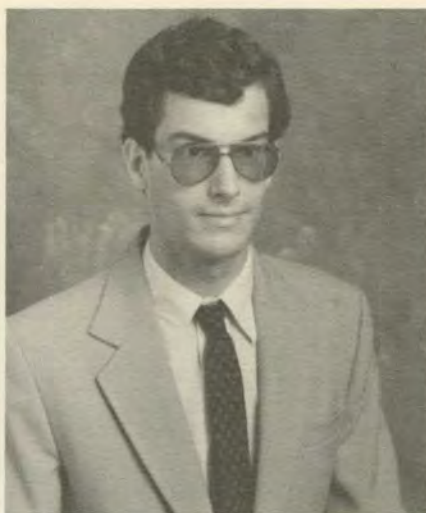
The most exotic joint program is the J.D.-M.D., which takes six years to complete. The law-medical student spends her or his first two years in medical school, the next two and a half years in law school, and the last year and a half in medical school. By taking medical science courses during the summer, however, the students can considerably reduce the time spent in the program. David Kiernan graduated from the program in 1985.

Although the program has existed since 1966, there have been only four graduates. Dr. Arthur Christakos, Dean of the Medical School, estimates, however, that as many as fifteen students entered the program but dropped out to return to medical school full-time before completing the joint requirements. The expense and the time commitment required explain this attrition. Even after completing the program, the graduate must do a three-year medical residency.

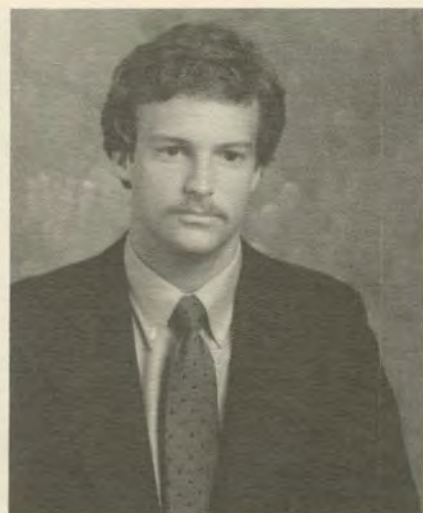
In contrast to the students in other joint degree programs associated with the Law School, J.D.-M.D. students generally do not end up as attorneys. Dr. William Bunn, for example, graduated from the law-medical program in 1980 and now practices occupational medicine at Duke Hospital. Although he functions primarily as a physician, he affirmed that he spends a "surprising" amount of time studying and researching legal



Chris Christie



Paul Greene



David Kiernan

issues, particularly in torts and workers' compensation. He may advise patients who have contracted a disease from their place of employment to go to a government agency or he may help businesses interpret regulations on their work environment so that they may comply with them or he may advise a workers' compensation board. Dr. Bunn mentioned that the nonlegal people he works with "commonly come to me for advice" regarding statutory interpretation of laws in their area. He assessed the program as being "quite beneficial and practical for what I'm doing now."

David Kiernan, on the other hand, had "a hard time thinking of how to use my law degree with my medical career." Kiernan was alone in the J.D.-M.D. program. Having held a long-time interest in law, he applied to the Law School during his second year of medical school. One summer he worked in a Texas law firm that has a large health law department. He admitted that many law firms had reservations about his joint degree, questioning whether he would become a doctor instead of a lawyer. Kiernan also

worked with Professor Clark Havighurst on medical-legal issues.

Dr. John Bell, an early graduate from Duke's program, has been able to use both degrees in virtually an ideal way. He helped draft legislation on medical issues with a congressional health affairs committee.

In summary, joint degrees provide a versatility that many students find lacking in a pure J.D. The students who plan to work in law tend to view the other graduate degree as informative rather than commercial, as more likely to expand their minds than their bank accounts, although dual degrees do add flexibility to career choices. Most students also see the Law School as more academically rigorous than the other school; yet the sentiment was also expressed that students from other schools were more enthusiastic about their work.

The joint degree will remain an option for the curious and ambitious student. The law student who wishes to follow a less traveled path finds several available at Duke.

Joint Study Program for J.D./Master's Candidates

A program of joint study, combining the concurrent pursuit of the professional degree in law with graduate work in economics or philosophy, was initiated by the School of Law in the summer of 1983. A history M.A. was added in 1984; and master's degrees in political science and humanities, as well as an LL.M. in international studies were added in 1985. The program allows the requirements for both the J.D. and M.A. degrees to be met after participation in a specially designed summer term and six additional semesters of residency at the University.

According to Jean Adams, Assistant Dean for Student Affairs at the Law School during the start-up of the masters' program, the purpose of the joint study program is to encourage a broader academic perspective among law students and to foster dialogue between law and related disciplines. The program, by combining the study of law with related disciplines, is intended to help alleviate the sometimes narrowing careerism of professional education.

The admissions procedures and requirements for the program are identical to those for the regular professional law program. The Law School selects the students, subject to approval by the graduate school. Students with no prior background in the second discipline are also considered, though some experience in quantitative reasoning is recommended for the economics program. Twenty-one students, comprising one of the Law School's traditional first-year small sections, were selected for the first joint study program. That number had grown to more than thirty entering students in 1985.¹

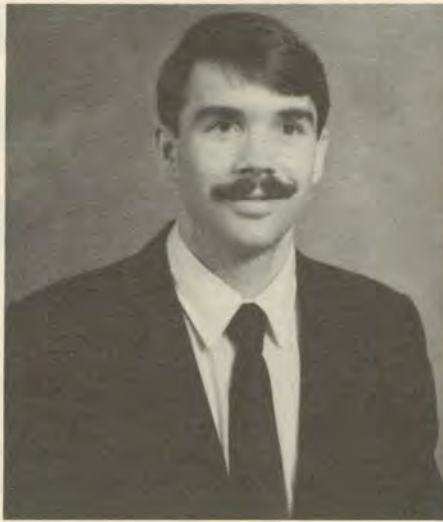
The 1983 summer curriculum consisted of twelve semester hours of course work evenly divided between law and the second discipline of economics or philosophy. The students, taught by Professor David Lange, completed the course in Torts and began the tutorial in legal writing and advocacy which continued into the fall semester. The same curricular division occurred in the summer of 1984, when the students finished the regular course in Civil Procedure, taught by Professor Christopher Schroeder. The remainder of the summer curriculum consisted of two graduate school courses taken in sequence. For those students in the economics program, there was a two-part course in Microeconomic Analysis taught by Professor Daniel A. Graham of the Economics Department. Professor of

Law and Philosophy Martin P. Golding taught two courses in Philosophy of Law for those students pursuing philosophy as a second discipline. In 1984 both the history and the philosophy students studied the evolution of the secular state, taught by Professor Ronald G. Witt of the History Department, and an introduction to the philosophy of law, taught by Professor Golding.

During the regular academic year, the students continue to take one course each semester in the graduate school. Upon completing six semesters of combined study the students are eligible to receive their J.D. and M.A. degrees concurrently. Students in the more traditional subjects can still be exposed to many international topics, such as Soviet economics, international economics, African history, and the history of Europe, Britain and the Commonwealth, Soviet Russia, Latin America, South Asia, modern China, and modern Japan.

While the joint study program is "sort of an experiment that still needs to be evaluated," Dean Adams believes the new program has been "pretty successful." There continues to be some tinkering with the summer offerings. In 1985, for instance, all new students completed both the Torts course, taught by Professor Horace Robertson, and the Contracts course, taught by Professor Herbert Bernstein. This deferred course work in the second discipline to the regular semesters of the first year.

The program is considered a success from the perspective of the first group of joint study students. Caren Senter's reasons for choosing in 1983 to combine the study of law and philosophy are representative of many in her small section class. Caren, an English major from Amherst College, spent two years after graduation working first at Time-Life Books and later as a paralegal at the law firm of Arnold & Porter. Concerning her decision to come to law school, she notes that "while a law degree creates a number of options, I was not one hundred percent sure about law school. This program was appealing to me because I had heard legal education could be a narrowing experience." She adds, "It was reassuring to come to a school where the administration believes other disciplines are also important. The fact that the Law School recognizes that, as a thinking person, you might have questions concerning traditional legal education is a positive factor."

*Caren Senter**Fred Kennedy**Gary Myers*

Caren, whose first spring semester graduate school course was Recent and Contemporary Philosophy, finds it rewarding to be with students "actively interested in non-legal ideas. For her, "having an outlet, being asked to sit down and read something other than case law helps you keep your sanity."

Fred Kennedy, a joint study student in economics, also stresses the advantages of the program in terms of "the new outlook it gives you on the law. Studying economics causes you to change gears, it forces you to be interested in something else."

For Fred, a West Point graduate who spent five years as an active duty military officer, the program "represented a good opportunity to get a master's degree. It is a relatively painless process where you sacrifice some law and economics electives but where you eventually gain in that both disciplines complement each other."

While at West Point, Fred concentrated in national security and public affairs and came to the joint study program with a limited background in economics. He admits, as did many of the joint law and economics students, to feeling initially overwhelmed by the demands of the graduate level economic courses. "It's a very quantitative department," he observed, "but you can find enough courses where basic analytical skills will carry you through."

The summer entering component of the 1983 joint study program was, for Fred, a particularly valuable introduction to the study of law. He remarks, "The total concentration in torts was a good learning experience. It was better than right away having to start budgeting your time and energy among several law courses."

Gary Myers, another joint law and economics

student, came to law school directly upon graduating from New York University. While, unlike Fred Kennedy, he was an undergraduate economics major, he also admitted that law students face a certain disadvantage in the graduate level economics program with its emphasis on "intense mathematical preparation." As law students can take only a limited number of credit hours in the economics department, he explained, "we have to be cautious about selecting courses. Many economic courses have implicit, in addition to explicit, prerequisites with each course building upon previous courses." He believes it is easier for regular economics graduate students in the sense that they have the opportunity to take more courses and, therefore, can build a better background in the field.

Gary is enthusiastic about the joint study program, though from his perspective legal education, by itself, is not necessarily a "narrowing experience." He observes, "To the extent law is specialized, this is true of every area of graduate study; there is a natural tendency to specialize." The advantage of the joint study of law and economics is that it offers "two related areas of specialization, two ways of analyzing problems." He expects concurrent study of law and economics to be especially useful in his chosen areas of interest — antitrust and general business law.

For Gary, the joint study experience has meant that, "As someone who came in not sure I wanted to be lawyer, not sure I would like the study of law, I have been pleasantly surprised."

1. Among the thirty-one American students entering in June 1985, thirteen enrolled in the J.D.-LL.M., six in the J.D.-Philosophy, four in the J.D.-History, four in the J.D.-Economics, three in the J.D.-Political Science, and one in the J.D.-Humanities parts of the joint degree program.

Private Adjudication Center: Toyota Arbitration

When the Private Adjudication Center (an affiliate of the Duke Law School) was incorporated in late 1983, under the direction of Benjamin R. Foster, it had as one of its goals the provision of a procedure for arbitration of private disputes. Since May 1985, the Center, in administering arbitration proceedings for Toyota Motor Sales, U.S.A., Inc., has had the opportunity to provide such a service and gauge its success. The disputes arbitrated are exclusively between Toyota dealers, and concern Toyota's allocation policy. Because Toyota has only a limited number of vehicles available to United States dealers, the corporation allocates them among dealers in accordance with the dealer's reported retail sales. Toyota's formal policy, which is a virtually binding rule of law for dealers, is to give retail sales credit to the dealer who sells a vehicle to the *ultimate retail customer* (the ultimate customer is the one who purchases for use only and not for resale).

The following kind of situation has led to disputes among Toyota dealers: A North Carolina dealer sells a vehicle to an individual believed to be the ultimate consumer purchaser. The purchaser, actually acting as a middle-man, sells the car to a Toyota dealer in New York. The New York dealer then sells the car to an ultimate retail customer and requests the retail sales credit. Toyota, burdened with several lawsuits brought by original dealers protesting the requests for reversal of sales credit, developed an arbitration procedure for its dealers. The company established the Reversal Arbitration Board ("RAB"), so named because it adjudicates dealer protests of proposed sales credit reversals, in an attempt to discourage litigation and provide a fair and independent determination of a dealer's disputed claim that he is entitled to the sales credit.

The co-architect of the plan was William A. Plourde, Jr., Associate General Counsel for Toyota. The Toyota program received national exposure, in a recent (December 1985) issue of *Alternatives to the High Cost of Litigation* devoted to Corporate Alternative Dispute Resolution. In this article, Mr. Plourde was quoted as follows: "I'm convinced that had we not gone forward with [the RAB], we'd be up to our necks in these suits." David D. Laufer, Managing Counsel for Toyota and a Duke alumnus, approached the Center for assistance in developing a private arbitration panel to resolve these common, frequent, and relatively simple disputes.

Toyota then retained the Private Adjudication Center to administer the program. The Center's responsibilities include monitoring the program and providing

administrative services such as setting of hearing schedules, notifying dealers, forwarding written documents to the arbitrators and participating dealers, and acting as an intermediary between the parties and arbitrators. Since the program's inception in May 1985 through the end of April 1986, there were 154 hearings in nineteen cities and fifteen states.

The panel of judges is comprised of former judges and law professors from across the country. They include Bruce R. Fawell, former Chief Judge, Dupage County Circuit Court, Illinois (Wheaton, Illinois); Paul G. Garrity, former judge, Massachusetts Superior Court (Boston, Massachusetts); Professor Richard C. Maxwell, Chadwick Professor of Law, Duke Law School (Durham, North Carolina); Professor James C. Oldham, Georgetown University Law Center (Washington, D.C.); L. Richardson Preyer, President of the Private Adjudication Center, former Adjunct Professor of Law, Duke University, former judge, U.S. District Court for the Middle District of North Carolina (Greensboro, North Carolina); Jacob B. Tanzer, former Justice, Oregon Supreme Court (Portland, Oregon); Julius M. Title, Adjunct Professor of Law, Whittier College School of Law, former judge, Los Angeles County Superior Court (Los Angeles, California).

The judges have attended training classes concerning Toyota policy. As the dealer disputes only involve Toyota policy concerning allocation, the judges are well-acquainted with the law and the factual situations from which the disputes arise.

The non-mandatory arbitration procedure has been very successful in clearly defining Toyota policy regarding these disputes, especially for the dealers. The consistency of the opinions by members of the panel has clarified that a heavy burden is placed on the dealer protesting a reversal of sales credit. In order to prevent a reversal, Toyota requires that the protesting dealer meet a burden of proof of "very strong and convincing evidence." The initial presumption is that the protesting dealer has not met the policy requirement. If a middle-man uses deceptive practices to obtain a vehicle from the protesting dealer, that deception will not be attributed to the requesting dealer, provided that he did not ask the middle-man to obtain the car and was not related to the middle-man. When arbitration administered by the Center commenced, more than fifty protests of reversal requests were expected each month. Now, about five protests are filed each month.

The availability of the records of hearings held and the dealers involved, as well as the consistency of the

panel's opinions, has led to the reduction in protests filed by dealers. Regional distributors now maintain files of the dealers involved in hearings. If a dealer suspects that a potential ultimate retail customer is in fact a middle-man, he has access, as a form of self-protection, to the file to determine if the buyer has been involved in prior PAC adjudications.

Disputes referred to the Center by Toyota have a similar history. Ordinarily, a dealer has initiated a reversal request, sending to Toyota all supporting written documents and a written summary of the requesting dealer's position. If Toyota finds the request proper, Toyota so advises the original dealer. If that dealer does not object within fourteen days, the reversal will occur automatically. If he desires to protest the reversal request, he provides supporting documentation to the Toyota Reversal Board. The protest, if it cannot be resolved with the assistance of regional distributors, is assigned by Toyota to the Private Adjudication Center. The Center advises the protesting dealer of the hearing through a form letter that informs the dealer of the time and place of the hearing.

Usually, the hearing is held in the distributor area where the protesting dealer is located. A single arbitrator presides over the hearing. Copies of documentation supplied by both the protesting and requesting dealer are included. The letter requests that, no later than seven days before the hearing, the dealer advise the Center as to whether he or she wishes to appear in person or through a permanent employee, by a conference call, or intends to rely solely on document submissions. During the hearing, each dealer may have about one-half hour to present its case; the arbitrator and parties may ask questions. Witnesses may be used. At the end of the hearing, the arbitrator issues a written opinion which is not appealable within Toyota (except for when the arbitrator chooses to revise or amend his opinion). A copy of the opinion is mailed to each party, each distributor, and Toyota.

The arbitration, because it may be conducted by phone and involves short hearings, saves both the dealers and Toyota expenses. The savings are not only in court costs. No attorneys are allowed to participate in the proceedings, unless the owner/manager happens to be an attorney. Information regarding practices involved in a case is obtained through the contesting parties, rather than from dealer consultants. Additional information, if necessary, may be obtained by the panel members from the Toyota Distribution Department or Legal Department.

Although dealers will always submit a number of protests of the reversal requests, Toyota retains its "ultimate consumer policy" in the belief that the primary function of the dealers is to meet the needs of the consumers. Toyota relies heavily upon the integrity of the dealers. Only three exceptions to the ultimate consumer policy are adjudicated in the Center's hearings:

(1) a protesting dealer will receive sales credit if he did all that he could reasonably be expected to do under the circumstances to establish that the purchaser was the ultimate retail customer and the requesting dealer did not act in good faith in obtaining the vehicle;

(2) a dealer requesting reversal will not receive credit if he did not act in good faith;

(3) protesting and requesting dealers will each receive one-half sales credit if it is proved that the protesting dealer did all he could reasonably be expected to do to establish that the purchaser was the ultimate retail customer and the requesting dealer acted in good faith.

The arbitration proceedings are funded both by Toyota, which pays the panel members for their services, and the parties to the disputes, who pay their own travel and communication expenses incurred in the proceedings. Additionally, the Center is compensated for its provision of administrative services. Thus the Toyota arbitration is instrumental in helping the Center achieve another of its goals: to be self-sustaining from service fees and training fees income.

The dealers appear satisfied with the dispute resolution system. They have been impressed with the caliber of the members of the arbitration panel. Because the arbitration has clarified the policy for the dealers, they are able to take more self-protective measures and are less apt to file protests that are of little merit.

The savings generated by RAB have been the outstanding feature of the program. The flexibility and informality of the system allowed the dealers to resolve their disputes in a less costly manner than does litigation. Since Toyota pays the fees and expenses of the arbitrators and the Center and dealers need not appear and cannot be represented by legal counsel, dealer costs associated with the program are low.

Toyota also has experienced positive results from the program. On the cost side, the RAB system cost \$25,000 to \$35,000 to set up and in the range of \$50,000 to \$75,000 per year to hold the hearings. This compares with several hundred thousand dollars in legal fees and related expense in discovery of just the allegation challenging the rules credit policy in the prior lawsuits. Since RAB's formation in May 1985, no lawsuits contesting the legality of Toyota's sales credit policy have been filed. Therefore, Toyota's Legal Department has not expended human and financial resources defending lawsuits concerning its allocation policy. The company's Distribution Department which enforces the allocation policy has spent progressively less time on disputed credits. Finally, Toyota's management has been confronted by less hostility from its dealers regarding this policy.

Toyota has been so pleased with the dispute resolution procedure that the company is exploring the possibility of using the RAB for other dealer-related disputes. In addition, most dealers have been satisfied with the program. A survey, conducted by Cynthia Milstead, Duke Law School class of 1987, of 62 partici-

pating dealers shortly after the institution of the program disclosed overall satisfaction with the procedure. For example, 80% of responding dealers believed the procedure was fair; 92% felt the instructions were clear; and 98% felt the arbitrator fair and impartial. Future surveys of dealers regarding the program are planned.

The excellence of the RAB program was recognized at the 1985 CPR Legal Program Awards ceremony on February 27, 1986, when Toyota Motor Sales, U.S.A., Inc., was awarded a prize for "Significant Practical Achievement for Excellence and Innovation in Alternate Dispute Resolution." It was the only corporation

(other winners were a government agency and a federal judge) to win a prize for practical achievement.

While the Toyota dispute arbitration concerns a dispute unique among dealers in the auto industry, the dispute is representative of a problem that is not unique in private businesses: costly litigation of matters which are likely to be frequently disputed. The Toyota hearings, given the relatively simple legal and factual context in which they arise, lend themselves well to informal and speedy adjudication. The Center hopes, based on its success with Toyota dealers, to further build its reputation and expertise in providing efficient private adjudication.

Duke International Law Society

This year, under the leadership of first-year law student Michael Scharf, and of Professor Horace Robertson, faculty advisor, the Duke International Law Society was resurrected from relative obscurity to a thriving organization of over fifty active dues-paying members. The society is an organization of law students, faculty, and alumni who share an interest in international law and international relations. Among its primary activities are (1) publication of the *Duke International Law Annual*, (2) sponsorship of a series of lectures and lunch-hour discussions of international issues featuring distinguished speakers from the Law School, undergraduate faculty, the U.S. Department of State, the United Nations, and various other government and academic institutions, and (3) selection and sponsorship of a team of students representing the Law School at the Regional and National Jessup International Law Moot Court competitions.

Prior to this year, there existed no forum for Duke Law students interested in reading or writing about international issues. Acting under the auspices of the International Law Society, Scharf and Editor Phil Nichols successfully petitioned Dean Carrington and the International Committee for funding and permission to launch the *International Law Annual*. The *Annual* is distinctly different from an international law review or journal. It is published and distributed only to Duke Law students and faculty and alumni members of the International Law Society once yearly in April. It is the hope of the Society that students who are not normally



Horace Robertson

exposed to international law will find something to pique their interest in an annual, while students who are interested will have access to the research and ideas of their peers. In particular, the society recognizes the unique value of the many foreign students at the Law School, and hopes through the *Annual* to make this resource available to a greater number of students.

The International Law Society's lecture series coordinator, Lisa Grogan, has throughout the year arranged for lunch-hour discussions with such experts in international law as James David Barber, Chairman of Amnesty International; George Taft, State Department Legal Advisor; and

Robert Friedlander, Counsel on the U.S. Senate Subcommittee on Terrorism. Attendance at these discussions has averaged forty students, with over sixty attending the Society's International Law Jobs Fair on February 21.

For the first time in several years, the Law School sponsored a Jessup International Law Moot Court team. The Jessup Competition involves a hypothetical case argued before a mock International Court of Justice. Participating students prepare lengthy written memorials and present extensive oral arguments on both sides of the dispute before a panel of judges. At the Regional competition in Knoxville, Tennessee, this year's team of Susan Donovan and Dale Sonnenberg and coordinator Michael Scharf defeated the teams from the University of Virginia Law School, Memphis State Law School, and Georgia State Law School, losing only to Vanderbilt on a split decision. Donovan was recognized as seventh best speaker out of forty-two participants. Next year, the International Law Society plans to sponsor an intramural Jessup competition, with the winners representing Duke at the regional tournament.

Finally, the International Law Society sponsors frequent social activities which serve as an informal forum for discussion on topics of international law and help integrate the many foreign students into the intellectual and social life of the Law School community. Most successful of the social events coordinated by the Society's social chairman, Randy James, have been the monthly pizza and beer socials at a local restaurant.

THE DOCKET

Dean Carrington Appointed as Reporter for Advisory Committee on Civil Rules

Dean Paul Carrington has been appointed by the Chief Justice of the United States Supreme Court to serve as the Reporter for the Advisory Committee on Civil Rules. This Committee is one of five committees, created by the Rules Enabling Act, which report to the Standing Committee on Federal Rules. The other committees suggest revisions in the federal rules on appellate procedure, criminal procedure, evidence, and bankruptcy. The Advisory Committee is composed of 12 persons, including several federal judges, a state judge, attorneys, and two professors of law. The Chairman is Frank Johnson, an Eleventh Circuit Judge.

Revisions in the Civil Rules begin in the Advisory Committee and are then approved by the Standing Committee. Dean Carrington will be responsible for reporting and defending these revisions before the Standing Committee. Revisions suggested by the Advisory Committee are generally approved. The Standing Committee then passes these revisions to the U.S. Supreme Court for approval. The Court always approves the revisions and does not play an



Paul Carrington

active role in the process. The revisions are then passed from the Court to Congress. If Congress does not take positive action, then these revisions become law. On occasion Congress intervenes, as in the case of the Federal Rules of Evidence. Congress has only intervened once in the Civil Rules.

In addition to reporting rule revisions to the Standing Committee, the Dean serves as a draftsman of the rules and does research. One of his responsibilities is to review the correspondence regarding the civil rules, which is forwarded from the Administrative Office of the U.S. Courts. Dean Carrington says that the correspondence ranges from carefully considered recommendations by bar associations, to letters from practitioners stating simply "Rule 56 doesn't work."

Dean Carrington looks forward to his new role and has enjoyed it so far. The terms of the appointment describe his duties as requiring two months a year, but the Dean says that two months is an understatement of the amount of time required. Since much of his time will be devoted to this new position, he will be relying more on others at the Law School to handle duties which he has traditionally performed. For example, he usually teaches the first year course on Civil Procedure, but he will not be teaching it this coming year. He may, however, offer an advanced course in Civil Procedure.

The Expanding Alumni Office

The Alumni/Development Office has undergone a number of changes in the past year. This article is intended to give an overview of these changes and to acquaint readers with the staff and activities of the office.

The Alumni/Development Office is now housed outside the Law School in a building on Pickett Road, approximately three miles from the Law School. The office was moved to help alleviate space problems in the Law School. The office was the first moved because it deals less often with current students than some other offices. The space in the new office is much appreciated for the expanded staff and equipment.

In mid-August, Evelyn Pursley arrived to take the position of Assistant Dean for Alumni and Development. She graduated from Duke Law School in 1984, having gone to law school after a brief career as a librarian and teacher. She spent the 1984-85 year clerking on the Fifth Circuit for Judge Will Garwood.



Evelyn Pursley

Ms. Pursley explains that it is traditional to have an alumnus or alumna in this position so that the person will be familiar with the school and know a number of alumni when he or she begins the job. Prior to Ms. Pursley, the position was held by Tom Croft, class of 1979, for several years. He is now practicing with the firm of Porter (Bill Porter, '66) and Clements in Houston.

The staff and office have been expanded because Duke now has a larger alumni base—almost 4,500 alumni. Since Duke is a national law school—graduates go as far away as Seattle and stay as close as Durham—it can be difficult to maintain ties with alumni. One of the goals of the alumni affairs component of the office is to strengthen the relationship between the Law School and its widely dispersed alumni. The office also helps alumni keep in touch with each other. The development or fund raising component of the office works mainly with the same constituency—the alumni, although support for the Law School also comes from faculty, parents of students, and other “friends of the law school.”

There are currently three members of the Alumni/Development staff: Margaret Cates, Linda Harris, and Lyn Horton. Margaret Cates joined the Law School staff in July 1985 to fill a new position, Coordinator for Development. Although new to the Law School, she had been with Duke University for twenty-five years, and her experience with the personnel and procedures of the University is a great asset.

Ms. Cates also had wide experience in computer programming and data management. She set up the program and system for putting alumni names, addresses, gift records, etc. on the new computer equipment. There are currently over 4,300 names on file. She has organized the data files to allow many

types of cross-referencing and is now working to include practice specialties in the listing of alumni. It is hoped that these alumni lists will prove helpful to both alumni and current students.



Margaret Cates

In addition to supervising many of the annual fund activities, she helps keep track of alumni, manages the data base, and works with Dean Pursley on editing the annual report, since her data files contain a great deal of the information provided in the report.

Linda Harris concentrates on the alumni affairs component of the office. She has been in alumni and development at Duke for fifteen years and with the Law School office for eight. She handles the social events of the office, including Law Alumni Weekend and Barristers' Weekend. For Law Alumni Weekend, she starts sending mailings in late spring to generate interest, prepares class booklets, and is responsible for arranging all meetings and social events. For Barristers' Weekend, she arranges the social events such as cocktail parties, dinners, and breakfasts. For both weekends she arranges accommodations.

Ms. Harris also handles graduation, including coordinating the third year picnic with the Duke Bar Association, arranging the reception for parents and faculty on the Saturday before graduation, and setting up the class picture. In addition she coordinates social events for alumni in other cities when Dean Carrington, Ms. Pursley, and other faculty are visiting.



Linda Harris

Lyn Horton joined the office last spring as Administrative Secretary. She handles word processing and correspondence for the office. She also serves as personal secretary to the Assistant Dean.

In addition to new staff members, the Alumni/Development Office also has added new computer equipment. This new equipment was necessary because the office is now physically separate from the Law School and because the office needed greater data management capacity than was available on the unit at the Law School. The office has one unit which is used primarily for data base management. Information regarding the law degree, employment, and addresses (home and business) of the alumni has been entered into this unit. The

office also plans to enter information regarding the undergraduate school, giving record, practice specialty, and Law School activities (as students and as alumni). The other unit is used as a word processor to generate the heavy volume of mailings which originate in the office.

LAW ALUMNI ASSOCIATION

The Alumni Affairs component of the office serves a social and liaison function among the alumni and between the alumni and the Law School. The office is aided in these functions by the Law Alumni Association. All law alumni are members of the Law Alumni Association. The Law Alumni Council, its governing body, consists of sixteen members who serve three year terms. The Council is served by a president, vice president and secretary/treasurer. Present officers are Charles (Chuck) Petty, '63, of Hamel & Park in Washington, D.C., president; John Q. Beard, '60, of Sanford, Adams, McCullough & Beard in Raleigh, vice-president; and Anton (Nick) Gaede, '64, of Bradley, Arant, Rose & White in Birmingham, Alabama, secretary/treasurer. The current officers and other members of the Council are enthusiastically expanding the role of the Law Alumni Association.

The Association is not a fund-raising organization, but the Council solicits dues from the alumni. This dues solicitation should not be con-



Lynn Horton

fused with the Law School Annual Fund Campaign. Donations to the Annual Fund become part of the operating budget of the Law School. Dues paid to the Law Alumni Association are deposited to its treasury and the Law Alumni Council oversees the expenditure of these funds for special projects. The Council most recently met in April and agreed that the Law Alumni Association treasury will pay for a general directory of Law School alumni for anyone who either pays dues to the Alumni Association and/or donates to the Annual Fund for 1986-87. The directory will be supplemented annually with local directories produced from the office's data base for those areas of the country which have local alumni associations. The Council also approved funding for a brochure to accompany the dues solicitation mailing. This brochure will describe the programs of the Alumni Office and the Law Alumni Association.

CONFERENCE ON CAREER CHOICES

During its April meeting, the Council made plans for a Conference on Career Choices to be held next spring and organized together with the Duke Bar Association. The conference will be a series of seminars on various legal careers, addressing questions such as what daily activities are involved in specific careers and what type of lifestyles are compatible with specific legal careers. The Council also plans to host a third year cocktail party to give the Law Alumni Association an opportunity to welcome graduating students into the alumni body.

LOCAL ASSOCIATIONS

The Alumni Office serves as liaison for the establishment of local alumni associations which are now being formed throughout the country. The purpose of these associations is to establish and maintain a sense of community and identity with the Law School among the alumni who are dispersed throughout the country. One responsibility of the Alumni Office to these local associations is to provide an annual

local directory. This spring, the office provided the first such directories to eleven local associations. The office will also provide a representative from the Law School for one annual social event to bring the group up to date on happenings at the Law School and answer questions. The office will help organize the event and will provide travel packs for the faculty representatives to take with them to use in answering specific factual questions. These travel packs will contain statistical information about the entering class and placement figures, as well as the annual report, a Law School bulletin, and brochures from the Admissions and Alumni Offices spotlighting new programs. The Law Alumni Council is considering ways to involve officers and other representatives from the local associations more fully in its meetings and programs.

Local associations now exist in Atlanta, Baltimore, Boston, Charlotte, Chicago, Cleveland (the Northeastern Ohio Association), Dallas, Hartford, Kansas City, Los Angeles, Orange County, CA, Orlando, Philadelphia (Delaware Valley Association), Phoenix, St. Louis, San Francisco, Seattle, and Washington, D.C. Associations are now forming in Ft. Lauderdale, Houston, Miami, New York, Palm Beach, FL, San Diego, and the Triad (Winston-Salem, Greensboro, and High Point, N.C.).

ALUMNI WEEKEND

The office organizes social events both on and off campus. The major on-campus social event organized by the Alumni Office is Alumni Weekend. Alumni Weekend is organized around class reunions in increments of five years. The weekend typically includes a welcoming cocktail party on Friday, a professional program followed by lunch and a football game on Saturday, and formal reunion class dinners on Saturday night. The Weekend is also an appropriate time for meetings of the Council of the Law Alumni Association. A special event is planned for Barristers attending the Weekend. This year, Alumni Weekend included

the first annual presentation of the Charles S. Murphy Award (see the accompanying article on the Charles S. Murphy Award). Next year, Alumni Weekend will include a joint fifty-year reunion for the classes of 1936-37.

BARRISTERS' WEEKEND

Barristers' Weekend involves both the alumni affairs and development components of the office. Barristers are those people who donate \$1,000 to the Annual Fund Campaign. A \$500 donation qualifies the donor as a Barrister if he or she is a graduate of less than seven years, seventy years of age or older, government official, or professor, or a judge. Beginning with the 1986-87 Annual Fund Campaign, Barristers who regularly donate at the \$2,500 level will be specially recognized as Sustaining Barristers.

Donations at the Barrister level are particularly important in maintaining a healthy infusion of funds into the Law School operating budget from the Annual Fund Campaign. For this reason, and because the Barristers thus make a particularly strong and exemplary commitment to the support of the Law School, the School specially recognizes members of the Barristers Club and honors them with this Weekend. The office tries to have the Weekend coincide with a special event at the Law School. The 1984-85 Weekend was in the fall and tied in with placement interviewing. In 1985-86, the Weekend was held in the early spring and coincided with a forum by the Duke Urban Property Development Council. Barristers were invited to participate in the conference free of charge. Barristers also receive an annual gift as a token of our appreciation, a complimentary subscription to *Duke Law Journal* and *Law and Contemporary Problems*, complimentary copies of books published by members of the Law School faculty, and discounts on special programs sponsored by the School, such as the Duke in Denmark program.

Membership in the Barristers Club is increasing. For 1985-86, we

will have over 200 members. This increase is in large part attributable to the efforts of members of the National Council for the Law School Fund. This group of active and concerned alumni has served as an advisory body to the Law School development effort. Recently, its members have served the effort by undertaking to publicize the Annual Fund Campaign generally and the Barristers Club specifically among Law School alumni.

ANNUAL FUND

The Annual Fund is administered by the Alumni/Development Office. Funds donated to the Annual Fund Campaign go directly into the operating budget of the Law School. They may be used to increase financial aid to students, library resources, and faculty salaries. Donations to the Law School, therefore, directly and significantly affect the Law School's ability to provide the best possible legal education to the best qualified students.

The Annual Fund Campaign runs on a fiscal year basis. It begins each year on July 1. Pledges and donations for that year are received through June 30th. The Law School Annual Fund is growing consistently healthier. During the 1984-85 Annual Fund Campaign, 1,762 donors pledged a total of \$333,582. Forty-four percent of the Law School alumni participated in the campaign. The 1985-86 Annual Fund Campaign started with an early fall telethon which was very successful. Over four nights of calling, \$120,000 was pledged. By February, the year's goal of \$350,000 had been reached.

FUTURE PLANS

Development

The Annual Fund Campaign will be highly publicized among our alumni and current students. Emphasis will be placed upon specially recognizing members of all the giving clubs as all donations to the Law School Annual Fund are greatly appreciated. Emphasis will also be placed upon increasing matching gifts. Some of our alumni and friends may not be aware that many

companies and law firms match the donations of their attorneys. A gift can, therefore, be doubled or, in some cases, tripled if it is matched. Some companies also match the gifts of their non-employee board members and/or the gifts of employees' spouses. These matching contributions are counted towards the individual's gift to the Law School. During 1984-85, matching gifts to the Law School totaled over \$30,000.

Alumni Affairs

The office will work to expand existing programs which serve to strengthen alumni ties with the Law School and with each other, such as the local associations.

The *Duke Law Magazine* will

also be used as a vehicle to strengthen alumni ties. As Assistant Dean for Alumni and Development, Ms. Pursley will become editor of the *Magazine* in 1986-87. The *Magazine* will feature an expanded alumni section. This section will include articles on alumni practicing in different legal specialties and in various geographic areas. Individual profiles will also be featured. An Alumni Activities section will give alumni an opportunity to share information regarding milestones in their professional and personal lives.

The office will also work more closely with students of the Law School. Students have expressed an interest in becoming more actively involved with alumni programs. The office has already helped several

student organizations contact alumni to participate in special programs, and students are being invited to participate in alumni events held at the Law School. The Conference on Career Choices, jointly sponsored by the Law Alumni Association and the Duke Bar Association, will give current students and alumni a chance to work together to produce a program of benefit to both groups.

Our alumni body is now growing at its fastest pace ever. This fact presents both a challenge and an opportunity for the Law School and for Law School alumni. As an alumnus or alumna of the Law School, you are encouraged to become involved in alumni activities at the School and/or in your local area.

Duke Law Alumni Local Associations

Duke Law Alumni are forming associations across the country. Current associations and their presidents are listed below. Local association leaders welcome your participation and ideas. If your address is kept current with the Law School Alumni/Development Office, you will be informed of events and activities. If there is no local association in your area and you are interested in forming one, please contact Evelyn Pursley in the Law Alumni/Development Office.

Atlanta Duke Bar Association—
Russ Hardin
Baltimore Duke Bar Association—
Robert E. Young
Boston Duke Bar Association—
Peter R. Pendergast
Charlotte Area Duke Bar Association—
Alton G. Murchison

Chicago Area Duke Bar Association—
Robert A. Schuckman
Northeastern Ohio (Cleveland)
Duke Bar Association—
Ronald R. Janke
Dallas Duke Bar Association—
Fred W. Fulton
Delaware Valley (Philadelphia) Duke
Bar Association—
TBA
Greater Hartford Duke Law Alumni
Association—
Francis M. Morrison
Houston Duke Bar Association—
TBA
Jacksonville Duke Bar Association—
John G. Grimsley
Kansas City Duke Bar Association—
John S. Black
Los Angeles Duke Bar Association—
Karla Simon
Orange County Duke Bar

Association—
Thomas D. Magill
Duke Law Alumni Association—
Orlando Area—
John F. Lowndes
Phoenix Duke Bar Association—
Robert J. Hackett
Salt Lake City Duke Bar Association—
TBA
San Francisco Duke Law Alumni
Association—
Janet F. Bentley
Duke University School of Law
Alumni Association of St. Louis—
Thomas J. Blackwell
Washington (D.C.) Duke Law Club—
J. Thomas Rouland
Washington State Duke Bar
Association—
Dale B. Ramerman

Alumna Profile

Brenda Kinney

Brenda Carlson Kinney, '70, is a partner in the Philadelphia firm of Schnader, Harrison, Segal & Lewis. Her husband, Thomas Kinney, is a Pediatric Hematologist-Oncologist at Duke University Hospital. They live in Durham. What started out eight years ago as an experiment—working in Philadelphia and living in Durham—has since become the routine for Kinney. She now maintains a successful law practice in Philadelphia while commuting from Durham.

Kinney and her physician husband met while they were both in professional school at Duke. After graduation they moved to Philadelphia, where Kinney began working for Schnader, Harrison, and her husband started a residency at The Children's Hospital in Philadelphia, Pennsylvania. Eight years later Kinney became the first woman partner in her firm and her husband received an offer from Duke Medical School to join the faculty. Both Kinney and her husband were undergraduates at Duke and they had strong ties to the area. They looked at Dr. Kinney's offer to come to Duke as a special opportunity which they did not want to pass up. However, as a partner, it was difficult for Kinney to simply pick up and leave her firm. Not only would she forego economic opportunities, but she also would have to give up the client relationships she had established. She discussed her situation with her partners and they agreed to try out commuting for six months or so and see how it worked out. That was eight years ago.

Kinney now usually works three days a week in Philadelphia and two days a week in her office at home. The particular days she is in Philadelphia vary according to such things as her meetings with other lawyers and clients, trial schedule and commitments at home. While in her office at home, Kinney keeps in close contact with the Philadelphia office. For her clients, she tries

always to be available by phone sooner than if she were in the office and returns phone calls quickly. Her secretary of fifteen years takes dictation over the phone and she uses overnight delivery service extensively.

When she needs to do research in Durham, she uses the Duke Law School Library or Lexis or delegates research assignments to associates in any of her firm's three offices—Philadelphia, New York, or Washington, D.C. She keeps abreast of what is happening in her field by reading cases and advance sheets on airplanes.

Kinney is a labor specialist, representing management. She also does nonlabor work for hospitals which became clients through the labor department. When asked about her clients' reaction to her maintaining two offices, Kinney replied that it has not been a problem. She explained that because most of her clients are large corporations, they are accustomed to transacting business on the phone, and flying to meetings is more routine than unusual. Also, Kinney's work involves a great deal of advice and counseling, which lends itself easily to the phone. She remarked that she is in the office more than some of the other firm attorneys who, because of their work, have to travel a great deal. The majority of her trial work is in the Eastern District of Pennsylvania and the Third Circuit, which sits in Philadelphia, although she occasionally tries cases in other parts of the country.

Kinney has two children, Thomas, age 11, and Heather, age 8. When Kinney and her husband moved from Philadelphia, the children were three and a half, and four months old. They have grown up with their mother working in another city and have adjusted to the situation very well. Kinney manages with a very helpful husband, and a housekeeper. Her housekeeper has been with her for eight years and lives in when Kinney is in Phila-

delphia. Her schedule is flexible enough to give her more time with her children than she probably would have had if she were restricted by a 8 to 6 schedule every day. She makes special efforts to attend events at her children's school, such as class plays or parties, even if it means making several round trips to Philadelphia in the same week.

Kinney said that she had always planned to go to law school. In college she saw a J.D. as a degree which would give a bright woman credibility—a verification that a woman was serious about her career. A law degree allowed a woman the opportunity to be professional. When Kinney was at the Law School, there were only four women in her class; a few years later, the number had risen to around 30%.

In addition to her personal and professional commitments, Ms. Kinney is an active alumna of the Law School. She has participated in the Commercial Practice Clinic as a senior partner, reviewing the work of students in the course and meeting with them twice during the year. She is also on the Executive Committee of the National Council for the Law School Fund and the Law School Board of Visitors.

Kinney's lifestyle means that she knows airline schedules by heart, is a familiar face to airline attendants, and has earned thousands of miles on frequent flier plans. It also requires a great deal of balancing and flexibility. The needs of her practice continue to change and so do the needs of her family. When asked if she will be doing this in ten years, Kinney replied that one must practice law as though one will always be doing it, while keeping all options open. More opportunities in her field may open up in the Triangle as the area grows, or she may find something else which she enjoys doing. But for now, she continues to commute to Philadelphia.

SPECIALLY NOTED

Charles S. Murphy Award

In November 1985 the Duke Law School Alumni Association presented the first Charles S. Murphy Award to *Carlyle C. Ring*. This award will be presented annually to honor an alumnus or alumna whose devotion to the common welfare is manifested in public or quasi-public service or in dedication to education, reflecting ideals exemplified in the life and career of Charles S. Murphy.

Charles Murphy was a North Carolina native who graduated from Duke University in 1931 and received an LL.B. at Duke Law School in 1934. He also received an honorary LL.D. in 1967. Mr. Murphy devoted himself to public service, holding several positions in the administrations of President Truman, Kennedy, and Johnson. He also served his alma mater by serving as a Duke trustee and by serving on the Board of Visitors of Duke Law School.

Attending the presentation ceremony were Murphy's children and grandchildren. Murphy's son, C.

Westbrook Murphy, addressed the Alumni Association and told the group about his father's background and the work which he did to serve his country. He explained that his father had appreciated the opportunities which Duke had given him to pursue a public service career. "And most importantly, his education here prepared him to take full advantage of his opportunity to serve, to use the processes of government to make the United States of America a better place for all of us." Westbrook Murphy also described how his father felt about public service. "For Charles S. Murphy the chance to serve was its own reward. Using one's public office for personal financial gain, or even to further personal ambition, was almost beyond his comprehension. The satisfaction was derived instead from helping others."

This year's recipient of the Murphy Award was Carlyle C. Ring, Class of 1956. Mr. Ring was chosen

for his record of public service as a city council member in Alexandria, Virginia, and as a past member and chairman of the school board of Alexandria, Virginia. He was also chosen for his work in the area of legal reform. This year he is completing service as President of the National Conference of Commissioners on Uniform State Laws. The Conference has contributed a great deal to legal reform, and under Mr. Ring the Conference has been especially active.

The prize awarded this year to Mr. Ring was an original watercolor of a tobacco barn in the North Carolina woods. It was painted by Robert Blake, a North Carolina artist. The award committee felt that such a prize would be more meaningful than the normal bronze plaque.

Next year's Charles S. Murphy Award will be presented at the Alumni Weekend in September.

Alumni Activities

CLASS OF 1942

C.H. Richardson was selected as the 1986 recipient of the Citation of Achievement of the American Protestant Health Association. He was recognized on March 3, during the sixty-sixth annual convention of the American Protestant Health Association held in Denver, Colorado. The Citation of Achievement is presented to individuals such as hospital trustees and other volunteers who have achieved outstanding accomplishments in church-related health activities, primarily on a local level. Richardson was cited for his contributions to Baptist Hospitals, Inc., in Louisville, as a member of the Board from 1963-82, and as chairman of the Administrative Board for a term. The award also recognizes Richardson's contribution to health care through his long years of service on various other local and statewide boards. The citation further notes his remarkable community and religious contributions.

CLASS OF 1956

Carlyle C. Ring was named Vice President and General Counsel for Atlantic Research Corporation in April 1986. He will continue to serve in his previous role as Director of Contracts for the Corporation.

Prior to joining Atlantic Research in 1985, Ring was a partner in the Washington, D.C., firm, Ober, Kaler, Grimes and Shriver. Mr. Ring was also the first recipient of the Charles S. Murphy Award of the Law Alumni Association. (See article on Charles S. Murphy Award in this issue.)

CLASS OF 1960

Stanley E. Faye was appointed Vice President/General Counsel and Assistant Secretary for Church's Fried Chicken, Inc. in February of 1986.

After graduating from Duke, Faye practiced law in New York and Dallas. In 1973, he moved to San Antonio as Vice President/Secretary and General Counsel for Datapoint.

In 1978, Faye joined La Quinta Motor Inns of San Antonio as Vice President and General Counsel.

In his position as general counsel, Faye will be responsible for all corporate legal matters. These include compliance with franchising and other trade regulation laws, labor laws, real estate, and acquisition and divestiture activities of Church's.

CLASS OF 1963

Michael R. Walsh was selected as one of the ninety best "family and marital lawyers" in the United States by *Town and Country Magazine*. The selection was the result of a nationwide poll. Walsh is a solo practitioner in Orlando, Florida.

CLASS OF 1964

Girard E. Boudreau, Jr., joined the law firm of Jones, Day, Reavis & Pogue in June 1985 as Regional Managing Partner for the California Region. Boudreau and his wife Barbara live in La Canada, California, with their five children.

Richard H. Rogers of Price Brothers Company has been elected Vice President, International. Gayle B. Price, Jr., Chairman and CEO, made the announcement following the Company Board Meeting held March 5, 1986. Mr. Rogers formerly held the position of Vice President of the Water Systems Technology Division and was responsible for the operation of the division in the international market. In his capacity, Mr. Rogers will, in addition to WST, be responsible for the Government Services Division and the United Kingdom Subsidiary, Price Brothers (UK), in addition to being Secretary and General Counsel. The consolidation of these functions will bring all international operations under one officer in a coordinated effort.

CLASS OF 1967

James B. Craven III was ordained deacon in the Episcopal Church by

the Bishop of North Carolina in Duke Chapel on December 14, 1985. Craven received an M.Div. from Duke in 1981.

Craven is a member of the American Law Institute, Judicial Conference of the 4th Circuit, and has lectured and written on federal issues, especially in the area of bankruptcy. After graduating from law school, Craven clerked in the U.S. District Court in Alexandria, Virginia, and then joined the Civil Rights Division of the U.S. Department of Justice. In 1970 he was a visiting professor of law at the University of North Carolina in Chapel Hill. From 1969 until setting up solo practice in 1980, Craven was with the Durham law firm of Everett, Everett, Creech & Craven.

As a clergyman, Craven will be assigned to the Federal Correctional Institution at Butner and as an assistant at St. Joseph's Episcopal Church in Durham. He will continue to practice law in Durham as a solo practitioner.

Dennis D. Yule was appointed to the Superior Court of the State of Washington for Benton and Franklin Counties by Governor Booth Gardner. His appointment became effective March 17, 1986. Yule was formerly Chief Deputy Prosecuting Attorney for Benton County, Washington.

CLASS OF 1968

Henry L. Ferguson III was elected Assistant Vice President and Counsel at State Mutual Life Assurance Company of America in December 1985. Ferguson joined State Mutual as associate counsel in 1975 and was promoted to assistant general counsel, real estate law in 1980. The following year, he was named counsel. Ferguson resides in New Braintree, Massachusetts.

Stephen W. Leermakers was named senior litigation attorney at Ashland Chemical Company in Jan-

uary 1986. In his new position, Leermakers is responsible for directing Ashland Chemical's litigation activities and reports to the administrative vice president and general counsel.

Leermakers joined Ashland Oil in 1979 as an attorney in the risk and insurance group. He subsequently held several positions in the insurance law and litigation areas, most recently serving as associate counsel for Ashland Services Company.

Leermakers will relocate from Lexington, Kentucky, to the Columbus, Ohio, area to assume his new position.

CLASS OF 1970

Joseph E. Olson, a professor at Hamline University School of Law, recently had his treatise on *Federal Taxation of Intellectual Property Transfers* published. Olson will spend next year as a visiting professor at the St. Louis University School of Law. He specializes in corporate and tax law.

William Haffke was recently promoted to the position of executive vice president of corporate development for AmeriTrust Corporation. He will be responsible for developing corporate acquisition strategies.

Haffke moved from Jones, Day, Reavis & Pogue to AmeriTrust in 1976. After being promoted to associate counsel in 1979, Haffke was named senior vice president of the asset support and corporate development division in 1984.

John J. Pomeroy has been named Vice President-Assistant General Counsel and Assistant Secretary of Allendale Mutual Insurance Company. Pomeroy joined Allendale Insurance in 1975. He currently resides with his family in Narragansett, Rhode Island.

CLASS OF 1972

Wendell L. Schollander was named General Counsel for the Specialty Tobacco Council in June 1985. This trade association, formed in May, is based in Winston-Salem, North Carolina, and represents major manufacturers and importers of specialty tobacco products, such

as clove cigarettes. Schollander will provide legal counsel for public affairs and public relations activities for the Council.

Schollander is a partner with the law firm of Finger, Parker & Avram in Winston-Salem and practices in the areas of corporate pension and financial planning. Prior to joining this firm, Schollander was general counsel for RJR Archer, Inc., in Winston-Salem.

Tom Triplett, senior aide to Minnesota Governor Rudy Perpich, was named in September 1985 to head the Minnesota Department of Revenue. In making the announcement, Governor Perpich called the Department of Revenue "the most critical agency in the State in our effort to make Minnesota competitive." Prior to this appointment, Triplett was director of the State Planning Agency.

CLASS OF 1974

Peter D. Webster was sworn in as a judge of the Fourth Judicial Circuit of Florida in January 1986. After graduation from law school, Webster clerked for Judge Gerald Bard Tjoflat (Class of 1957) of the Eleventh Circuit. He then went to practice with the Jacksonville firm, now Bedell, Dittmar, DeVault, Pillans and Gentry, and subsequently became a partner in that firm.

CLASS OF 1976

Robert J. Kasper, Jr., formed a partnership, Kasper & Rogers, with Robert K. Rogers, Jr., the City Attorney for South San Francisco. The practice will emphasize land use and development, corporation and partnership law, and municipal law. The partnership's main office will be in South San Francisco, with a Silicon Valley office in Sunnyvale. Kasper resides in Redwood City.

CLASS OF 1977

Mark Bookman was elected an active partner of the Pittsburgh firm of Reed, Smith, Shaw & McClay in January. Bookman resides in Pittsburgh.

Kathleen Pontone was admitted as partner to the Baltimore firm of Semmes, Bowen & Semmes.

Pontone joined the firm in 1981. Before joining the firm, she was labor counsel at Kaiser Aluminum and Chemical Corporation in Oakland, California. She specializes in labor and employment law.

Geoffrey H. Simmons was elected in January by the North Carolina Bar Association to the Board of Directors of Legal Services of North Carolina. He was also recently appointed to the Board of Directors of Family Services of Wake County. In February Simmons received an award from the Wake County Bar Association for his work as chairman of the Wake County Volunteer Lawyer's Program and for being one of eight attorneys in the county who donated more than 30 hours of free legal services to the poor in 1985. Simmons also hosts a biweekly radio show, "Lawyers' Forum," on Raleigh station WLE.

Simmons is a founding member of the Business Building Society of Wake County and serves as legal counsel to the Raleigh-Wake Citizens Association, Method Civic League, Inc., and the Combined Truckers Contract Hauling and Grading, Inc.

CLASS OF 1980

John (Jack) H. Hickey was elected last year to the Board of Directors of the Young Lawyers' Section of the Dade County Bar Association and is a member of the Judicial Evaluation Committee of the Florida Bar. Hickey is a trial lawyer and practices law with the Miami firm of Hornsby & Wisenand.

Karl W. Kindig became a partner in the Indianapolis firm of Henderson, Daily, Withrow & DeVoe in January 1986.

Happy R. Perkins has become a partner in the Louisville, Kentucky, firm of Brown, Todd & Heyburn.

John W. Titus became a partner in the Nashville firm of Boulton, Cummings, Connors & Berry in January 1986.

CLASS OF 1981

David H. Potel is Special Counsel with the U.S. Securities and Exchange Commission. He recently received the Manual F. Cohen

Younger Lawyer Award. The award recognizes younger lawyers who have displayed, within the first four years of employment by the Commission, "outstanding legal ability, creativity, high personal integrity and critical judgment and who have brought significant benefit to the Commission by their performance."

CLASS OF 1982

Terry Collingsworth accepted a position with Loyola Law School in Los Angeles in February. Collingsworth had been an assistant professor of law at Cleveland State University's Cleveland-Marshall College

of Law. Prior to that, he was an associate at the Seattle firm of Perkins Coie.

Michael J. Schwartz was appointed president and chief executive officer of Alexian Brothers Hospital in Elizabeth, New Jersey, in February. He had been chief executive officer of Rome City Hospital in New York since 1983. Schwartz also has a Master's in Health Administration from Duke and worked as an administrator at Duke University Hospital while enrolled in law school. He has served on a legislative committee of Central New York Hospitals, lobbying for changes in

the state's reimbursement system and malpractice laws.

CLASS OF 1984

Michael Bartok became an associate at the New York office of Dorsey & Whitney in April 1986.

Mark Mirkin is now an associate at Edwards & Angell in Palm Beach, Florida.

Matthew L. Friedman was appointed assistant counsel in the legal department at the Travelers Companies in Hartford, Connecticut, in February. Friedman, who also received a M.B.A. from Duke in 1984, joined Travelers in 1984 as a staff attorney.

Alumni News

THE DELAWARE VALLEY (PHILADELPHIA) DUKE BAR ASSOCIATION

The Law School softball experience of Duke Law alumni from several classes paid dividends on Saturday, May 10, 1986, when a stalwart crew of Duke Law alumni banded together to capture the championship of the first annual Philadelphia Bar Association Young Lawyers Section Charity Softball Tournament.

Sixteen teams of attorneys entered the competition, but Duke's intrepid alumni captured the title which had eluded the Blue Devil basketball team. Led by the outstanding play of Tucker Boynton, '79, and Steve Scolari, '84, of Stradley, Ronan, Stevens & Young, the Duke alumni attorneys crushed Wapner, Newman & Associates 21-3; edged out Daniels, Saltz & Associates, Ltd.

Heckscher 7-3, to emerge the tournament champion.

Gary Biehn, '84, and Brent Gorey, '77, of White and Williams, and Dave Lockwood, '84, of Rawle & Henderson staunchly defended the Duke name notwithstanding the presence in the tournament of teams from their firms. Brian Cary, '85, hopped back and forth between the Duane, Morris & Heckscher and Duke teams. In the championship game between those teams, Brian proved his Duke loyalty and wisdom when he elected to play for the championship team.

Bill Richter, '81, of Reed, Smith, Shaw & McClay, George McFarland, '84, of Saul, Ewing, Remick & Saul, 10-3; dominated Montgomery, McCracken, Walker & Rhoads 10-2; and mastered Duane, Morris & Jerry Novick, '84, of Wolf,

Block, Schorr & Solis-Cohen contributed their pounding bats, vacuum gloves, and rifle arms to the Duke juggernaut.

In the few days before the tournament, injuries and emergency commitments depleted the Duke squad of Jon Drake, '84, and Kevin Gilboy, '79, of Dechert, Price & Rhoads, and of Bill Widing, '79, and Jim Willhite, '78, of Montgomery, McCracken, Walker & Rhoads. Villanova law students Fred Levin, '86, and George Brunner, '87, donned Duke blue to replace the wounded and missing Blue Devil alumni. Their capable softball talents earned them honorary Duke alumni status.

As the Carolina blue sky began to fade on May 10, the champion Duke blue bore their trophy off the field of battle already looking toward next year.

Personal Notes

John (Jack) H. Hickey, '80, married Helen Hardie on September 15, 1985. Hickey practices with the Miami law firm of Hornsby & Wisenand.

James R. Peacock III, '82, and his wife announced the birth of their son, James Russell Peacock IV, born September 15, 1985.

Jeffrey E. Tabak, '82, and his wife Marilyn proudly announce the arrival of their second child, Brad Michael, on November 12, 1985. Tabak is an associate of Weil, Gotshal & Manges in New York City.

Patty Travers Billings, '83, and her husband Brad have a daughter named Katherine Michelle, born March 16, 1986. Billings is with the Minneapolis firm of Robins, Zelle, Larson & Kaplan.

Charles E. Henshall IV, '83, wed

Susan Geoghegan on February 15, 1986, in Wilmington, Delaware. Henshall is an associate in the Seattle law firm of Witherspoon, Kelley, Davenport & Toole.

Susan Westeen, '83, married Jeff Novalt on March 29, 1986, in Los Angeles, California. Westeen received an LL.M. in taxation from New York University in 1984 and practices law in Los Angeles.

Rebecca Strawn Wilson, '83, married Fred Kopatich on March 29, 1986. Wilson is an associate at the law firm of Miller, Nash, Wiener, Hager & Carlsen in Portland, Oregon.

Valerie Ann Schwarz, '83, was married to Steven J. George in May, 1986. Schwarz is an associate in the New York firm of Otterbourg, Steindler, Houston & Rosen.

Mike Mozenter, '84, married

Karen Brumbaugh, '84, in the fall of 1985. Mike is an associate at Vorys, Sater, Seymour & Pease in Columbus. Karen will begin working with Jones, Day, Reavis & Pogue in Columbus this fall.

Charles Robert Simpson, '84, and his wife Jan, announced the birth of their daughter, Elizabeth Anne, born December 4, 1985.

Ken Sibley, '85, and his wife had a daughter, Anna Elizabeth, on March 8, 1986. Sibley is an associate at the law firm of Bell, Seltzer, Park & Gibson in Charlotte, North Carolina.

Daniel F. Danello, '85, and Elizabeth Warren Harper were married in May, 1986. Danello is an associate at Dow, Lohnes & Albertson in Washington, D.C.

Obituaries

CLASS OF 1971

JACK M. KNIGHT died April 1, 1986, at his home in Charlotte, North Carolina. He was 47.

Knigh was born in Greenville, South Carolina. He graduated from Georgia Institute of Technology in 1961 with a degree in Industrial Engineering. He then received a Master's in Business Administration, with highest honors, from Emory University in 1962. Knight served as an officer in the Air Force from 1962 to 1965 and worked for Arthur Andersen & Company in Charlotte from 1965 to 1968. He left Arthur Andersen as a senior systems analyst to attend Duke Law School.

Knigh graduated from Duke Law School in 1972 as a member of the Order of the Coif. He was Editor-in-Chief of the *Duke Law Journal*.

Knigh then joined the Charlotte firm of Robinson, Bradshaw & Hinson. He concentrated on corporate acquisitions, securities, and international transactions. He became a partner in the firm only one year after joining. Bob Bradshaw, a senior partner in the firm, described him as "a superstar

among his generation of lawyers in Charlotte and the entire state."

A memorial fund has been established for Knigh at the Law School. Classmates and friends who wish to contribute to the fund may send checks made out to Duke Law School with a specific designation "Jack M. Knigh Memorial" to Evelyn Pursley, Assistant Dean for Alumni and Development, Duke Law School, Durham, North Carolina 27706. The class of '71 will have a 15 year class reunion in September, and memorial proposals will be discussed then.

CLASS OF 1945

CHARLES H. FISCHER, JR., died August 4, 1985, in West Haven, Connecticut. He was an active partner at the firm of Fischer & Fischer with his brother, Herbert D. Fisher, class of 1948. He was the father of five children, one of whom was also in the law firm. Mr. Fischer received his Duke A.B. degree at Trinity in 1938. While at Trinity, he was a member of the varsity football team and captain of the track team. He also

served as an Assistant End Coach under Coach Wallace Wade.

CLASS OF 1930

H. PAUL STRICKLAND died on April 29, 1986, after an illness. A native of Dunn, North Carolina, Strickland practiced there for over fifty years. He had also served as judge of the Dunn records court. Strickland was a member of the Harnett County Bar Association and the North Carolina Bar Association.

CLASS OF 1915

WILLIAM GRIMES MORDECAI died October 13, 1985, at the age of 96. He was the son of Bettie Grimes and Samuel Fox Mordecai, dean of Trinity College (now Duke University) Law School from 1901 to 1926.

Mordecai served in the Army as a 2nd lieutenant after studying law at Trinity College. Upon discharge, he returned to North Carolina and began to practice law in Raleigh. Mordecai continued to practice there for over sixty years, taking time to serve as Clerk of Superior Court from 1941 to 1943.

Agenda

Law Alumni Weekend, September 26–27, 1986

Friday, September 26, 1986

- 2:00 p.m. Registration Desk Opens—Lobby,
Law School
- 3:00 p.m. Law Alumni Council Meeting
- 6:00 p.m. Cocktails, Lobby, Paul M. Gross
Chemical Laboratory
- 7:30 p.m. Dinner on your own

Saturday, September 27, 1986

- 8:30 a.m. Coffee and Danish
 - 9:00 a.m. Professional Program—Moot Courtroom
 - 11:30 a.m. **REUNION CLASS PARTIES**
 - 5:00 p.m. Pig Pickin' catered by Bullock's Barbecue—
Law School Back Lawn
 - 7:00 p.m. Duke vs. Virginia Football Game
-

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ALUMNI NEWS

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