

# *Duke Law Magazine*

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SUMMER, 1987



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*Diversity*



# *Duke Law Magazine*

## **Contents**

*2 Editor's Column / About the Cover*

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### **3 Current Issues**

*4 Baby M: The Legal System Confronts Conflicting Human Values  
Katharine T. Bartlett*

*9 Apartheid and the South African Judiciary / Lawrence G. Baxter*

*16 Advertising and the Ethical Profession / Thomas B. Metzloff*

*22 The Tax Reform Act of 1986: The Impact on Support  
of Public Goods and Services / Richard Schmalbeck*

---

### **30 About the School**

*31 Duke Law School Conference on Career Choices*

*35 Duke Society of Medical-Legal Affairs:  
Bridging The Gap Between Law and Medicine*

*36 The Duke Bar Association*

*36 BALSAs and Duke Law School*

*37 Duke's Forum for Legal Alternatives:  
Activism, Education, and Mutual Support*

*39 The Student Funded Fellowships Program*

---

**DEAN**  
Paul D. Carrington

**EDITOR**  
Evelyn M. Pursley

**ASSOCIATE EDITOR**  
Maria Isikli





---

**41** *The Docket*

**42** *Fulbright Scholars at Duke*

**45** *Duke Law Alumni Pursue Diverse Second Careers*

**48** *Alumnus Profile: Gary Lynch*

**51** *Book Review: Justice et Argumentation*

**54** *Specially Noted*

**58** *Alumni News*

**67** *Upcoming Events*

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## Editor's Column

In this issue, the *Duke Law Magazine* celebrates the diversity of interests and expertise among Duke Law School alumni, faculty and students. Several faculty members share their views on matters of topical interest, including the Baby M case and the surrogate motherhood issue, attorney advertising, some effects of the new tax law and the role of the judiciary under South Africa's system of apartheid.

We continue the series of articles on student organizations currently operating at the Law School in the About the School section. This issue features some groups which show the diversity of interests of our student body. A significant addition to the Law School calendar, of importance to students and alumni interested in placing Duke Law students in compatible jobs, is reported in the article on the Conference on Career Choices.

In the Docket, we continue to highlight the personal and professional accomplishments of Duke Law School faculty and alumni. In this issue we report on the involvement of Duke Law School faculty

members in the Fulbright program, including several faculty members who recently received grants to teach and study abroad. Also featured are several alumni, including a novelist, an artist and an entrepreneur, who continue to practice law while claiming success at other endeavors. Our alumnus profile features Gary Lynch, who is currently serving as Director of Enforcement at the SEC, and our book review reports on a collection of essays on law and philosophy co-edited by Guy Haarscher, a visiting professor at the Law School. The remainder of that section focuses on the current activities and accomplishments of our alumni and events at the Law School.

The Alumni Activities feature (including Personal Notes and Obituaries) is now a regular part of the Docket. We have been pleased by the response to this feature and encourage you to continue to send us news of the milestones in your personal and professional careers so that we can share the news with the rest of the Duke Law Alumni family.

## About the Cover



The cover reproduces a painting, *Full Moon Behind Clouds*, 1987, by Rick Horton, '80. An article on Rick's success as an artist since graduating from Law School appears in the Docket.

The transparency for our use in reproducing the painting on the cover was kindly provided courtesy of Gimpel & Weitzenhoffer Gallery (New York and London) and the Jerald Melberg Gallery, Inc. (Charlotte, North Carolina).



# CURRENT ISSUES



# Baby M: The Legal System Confronts Conflicting Human Values

*Katharine T. Bartlett\**



*\*Professor of Law, Duke University School of Law. Professor Bartlett began teaching at Duke in 1979. Her special areas of interest include child advocacy, family law, and public school law.*

*This paper includes material from a presentation made by Professor Bartlett at a program on surrogate parent contracts sponsored by the Women's Law Society at Duke Law School on March 17, 1987 and sections from a piece by Professor Bartlett entitled Courts Not Bound by Parental Agreements, in a collection of opinions by law professors published in the New Jersey Law Journal on Feb. 26, 1987. It is part of a larger work-in-progress on claims by women for exclusive parenthood.*

**B**aby M.<sup>1</sup> focuses for us an irreconcilable conflict between some of our most basic values: the sanctity of motherhood on the one hand; the powerful human drive for genetic reproduction and the value of keeping one's word on the other. These values play a critical role in how we define ourselves and our purpose on this earth. Most of us have experienced some ambivalence in this area. How courts decide cases like *Baby M.* becomes part of the background against which we resolve this ambivalence. We want them to come out right.

Given these stakes, the trial court's decision in the *Baby M.* case is disappointing. The custodial award of Baby M. to her biological and by then psychological father, William Stern, is supportable taking as given the circumstances of March 31, 1987: Baby M. had, by that time, been in the custody of the Sterns for eight months (since she was four months old) and a change of custody at that point would have been cruel. The delays creating these circumstances, as well as the "temporary" placement of Baby M. with the Sterns, are more difficult to justify. What I will address here is not the outcome of the case, however, but the basis upon which the case was decided. The court's approach is troubling. Despite its child-focused rhetoric, the court centers on the rights of the respective parents rather than the child. It offers a blunt interpretation of those rights rather than a refined analysis of their meaning and application. It focuses on reciprocity of obligations and fairness rather than the promotion of parent-child relationships and on fixed, stereotypical notions of appropriate parental conduct rather than realistic understandings of the wide range of ways parents can demonstrate commitment to their children.

The heart of the court's opinion was its finding that the surrogate parenting contract is enforceable. Under this contract, Mary Beth Whitehead agreed, for the payment of \$10,000, to become inseminated with the sperm of William Stern; to carry the child to term after conception; to deliver the child to Mr. Stern; and to have her parental rights terminated. She agreed also not to form a parent-child relationship with the



child. When, after the birth, she changed her mind and wanted to keep the child, months of procedural wrangling and a six-month trial ensued. The trial court enforced the terms of the contract giving custody to Mr. Stern and terminating Mrs. Whitehead's parental rights. It also granted the adoption of the child by Mrs. Stern.

To hold the contract enforceable, the trial court had to bypass the available New Jersey law. New Jersey, like all other states, prohibits agreements involving consideration paid or promised in connection with a placement for adoption.<sup>2</sup> Courts are not bound by any agreements made by parents that relieve them of their parental obligations or that determine custody of their children.<sup>3</sup> New Jersey law also, again like other states, specifies procedures that must be followed and findings a court must make before a private adoption can be ordered.<sup>4</sup> Adoption requires that the rights of the child's parents be terminated, that the parents fail to object to the adoption, or that the parents have intentionally abandoned the child or substantially neglected their parental duties.<sup>5</sup>

The "surrogate parenting agreement" in this case was drafted in a deliberate attempt to circumvent the baby-selling prohibition by characterizing Mrs. Whitehead's commitment as the performance of services rather than the sale of a product, and by providing for delivery of the child only to Mr. Stern, the child's biological father, rather than to him and his wife. The court found this choice of terminology determinative, concluding that the contract described a transaction that the legislature did not intend to regulate through its adoption laws which, therefore, did not apply. As for its jurisdiction to terminate Mrs. Whitehead's parental rights on grounds other than those specified by statute, the court held that its general authority to act as *parens patriae* was sufficient to terminate Mrs. Whitehead's rights on a "best interests of the child" standard.

The court's treatment of adoption and termination laws is remarkable. Even if these statutes were not enacted to address the issue of surrogacy, this fact hardly constitutes a basis to disregard them. These statutes represent our best information on how the legislature regards the transfer and termination of parental rights and responsibilities. Absent an express signal from the legislature that it considers surrogacy a different matter (and the New Jersey legislature had considered and failed to enact legislation that would have treated surrogacy differently<sup>6</sup>), the court's decision to set them aside is inappropriate.

As to whether surrogacy *should* be treated like adoption, the policy considerations are more similar than the court acknowledges. State adoption laws are concerned that babies not become subjects of commerce. The distinction made by the court between selling a child and selling one's procreative services is virtually meaningless with respect to this danger. Endorsing the attachment of monetary value to the services necessary for a woman to nurture a fetus to a full-

*Despite its child-focused rhetoric, the court's approach centers on the rights of the respective parents rather than the child.*

term child, like the services of a farmer who grows corn, may change the terms of the exchange but it makes the child (like corn) no less an object of commercial value than if she were the explicit object of purchase. That Mr. Stern is the child's biological father reduces only slightly the indignity and risks of commodification, for it does not negate the fact that money is paid for the purpose of obtaining a child who would otherwise "belong" to another.

Adoption laws are also intended to prevent the exertion of pressure on and exploitation of women whose personal circumstances may make them vulnerable to arrangements under which they give up their babies for money. The trial court concluded that women considering surrogacy are not subject to the same kinds of pressures as already-pregnant women. This distinction is also problematic. A legislature that declines to authorize the enforcement of surrogacy contracts may have concluded quite sensibly that legal endorsement of surrogacy contracts will add to the perceived acceptability and thus frequency of surrogacy arrangements, making pregnancy and childbirth for pay an option to which women in severe economic straits may increasingly be vulnerable.

New Jersey, like other states, does not allow a parent to terminate her rights voluntarily until after the birth of the child. Appellate courts in the state have emphasized the state's interest in assuring that parents make careful, well-considered decisions to surrender their children for adoption.<sup>7</sup> There are good reasons for assuming that decisions cannot be well-considered in advance of the birth of the child. The law expects that parents will develop emotional feelings toward their children, will consider their welfare, and will attempt to act in their best interests; indeed, in automatically assigning responsibility for children to their parents, the law depends upon their doing so. That mothers will develop these feelings during the course of a pregnancy, notwithstanding agreements they may make to the contrary, demonstrates the strength of the connection between parent and child. It is in society's interest that these impulses be respected, and that the unwillingness of a parent to follow through on her intention to give up a child to another be viewed as understandable and defensible, not wrong or pathological. Enforcement of a surrogacy contract through specific performance against the surrogate mother would assume, and give legal encouragement to the view, that parents should be able to set aside their parental sentiments at will (if the price is right).



*A legislature that declines to authorize the enforcement of surrogacy contracts might well conclude that legal endorsement of surrogacy contracts will add to the perceived acceptability and thus frequency of surrogacy arrangements, making pregnancy and childbirth for pay an option to which women in severe economic straits may increasingly be vulnerable.*

The law assumes that, ordinarily, parents will *not* give up their children. Doing so is an extraordinary and solemn act requiring in New Jersey an investigation by an "approved agency" and approval of a court before an adoption can be ordered.<sup>8</sup> To allow parties to make the termination of parental rights a subject for private negotiation and exchange enforceable in a court of law gives new meaning to parenthood; it becomes a right—an alienable right—belonging to an individual, rather than a relationship that, once begun, we expect a parent to sustain and protect.

Having abandoned the available statutes, the court attempts to strengthen the basis for its conclusion that surrogacy contracts are enforceable by resort to the U.S. Constitution. The court identifies a constitutional right of non-coital reproduction: "if one has a right to procreate coitally, then one has the right to reproduce non-coitally." The court may be correct in identifying a right of non-coital reproduction. But it fails to justify its assumption that such a right *means* the right to specific performance of a contract under which private parties have sought to rearrange the terms of parenthood.

In fact, the cases relied upon by the court in defining a right to non-coital reproduction define a right to be free from certain kinds of state interference with activities that individuals engage in as sexual beings or as parents. They do not in any direct way address the right of private parties *against one another*. Thus, although these cases may well render unconstitutional a state prohibition of surrogacy arrangements by parties who remain willing to perform under them, they do not support the claim of a parent like Mr. Stern to state enforcement of a private contract against another parent. To the contrary, the privacy cases are protective of parents who have developed relationships with their children and would thus seem to weigh *against* the termination of Mrs. Whitehead's rights.

What ultimately drives the court's analysis in *Baby M.* is a concern for reciprocity, fairness, and equality

between the feuding adults. In its constitutional analysis, for example, the court reasons: "If a man may offer the means for procreation then a woman must equally be allowed to do so." The court's analysis as to these matters might be questioned on its own terms. One wonders, for example, whether even a man would, or should, be compelled to specifically perform under a contract to sell his sperm if he changes his mind after the agreement is made. One wonders also whether sperm donation is an activity comparable to pregnancy and childbirth for purposes of this constitutional analysis. But my objection here is an even more basic one—it is to the use of these concepts *in any form* in child custody disputes.

The court writes: "A person who has promised is entitled to rely on the concomitant promise of the other promisor." Setting aside the relevant doctrinal questions this statement raises with which the court fails to deal—did Mrs. Whitehead make the kind of promise upon which Stern was entitled to rely? And if she did, is the remedy of specific performance available?—a fundamental aspect of this reasoning is the underlying assumption that adults become entitled to children on the basis of such concepts as mutuality and reciprocity. According to the court, Mrs. Whitehead agreed to terminate her rights; the court should thus give effect to her agreement. Put another way, in terminating her rights, the court is simply giving to Mrs. Whitehead what she deserves.<sup>9</sup>

Legal doctrines built around notions of mutuality of contract, equal treatment, reciprocity, and deservedness build upon the model of freely operating, autonomous agents. These agents operate for their own benefit to maximize their own advantage and are entitled to whatever gain or pain they experience as a result. This model simply does not fit the context of child custody. With respect to disputes over children, what should be emphasized are the interests of the child; the rights of the parent are not legitimate ends in themselves but rather the vehicle through which it is assumed that children's interests are best served.

Children are best served when child custody doctrine reflects the importance of parental responsibility for children, not the individual rights of parents. Responsibility, in turn, is fostered when emphasis is placed on

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*Enforcement of a surrogacy contract through specific performance against the surrogate mother would assume, and give legal encouragement to the view, that parents should be able to set aside their parental sentiments at will (if the price is right).*

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the relationship between parent and child. Where relationships develop, the law should attach certain predictable consequences to them, reinforcing the critical (desirable) cultural assumptions that parents should, and will, assume responsibility for their children and, in so doing, put the interests of their children ahead of their own. A rule that enforces pre-conception agreements altering the assignment of parenthood makes parenthood a relationship about which bargains can be made for the parent's own advantage, and thereby redefines and degrades that relationship.

The natural father in a surrogacy arrangement also, of course, has a biological connection to the child, a connection that should be reinforced and respected. My point is not that this relationship should be ignored, but only that the maternal connection to the child should not be foreclosed *on the basis of contract*. Custody law, not contract law, should define the status of *both* parents with respect to the child.

Without an enforceable contract, a court in a custody dispute developing from a surrogacy arrangement would be left to follow the state law relating to the custodial rights of unwed parents. Under the relevant law in New Jersey, both parents are to be treated equally; a court determines the best interests of the child. By this standard, the trial court might have properly reached the custodial result in favor of Mr. Stern. It would not, however, have been able to terminate Mrs. Whitehead's parental rights because adoption over the objection of a natural parent cannot be accomplished under a best interests standard alone.<sup>10</sup>

Moreover, a best interests standard would not have justified some of the court's analysis of the comparative fitness of the respective parents. For example, the court made repeated note, sometimes with explicit disapproval, of the fact that Mrs. Whitehead dominated her husband in their marriage. Also considered relevant by the court was expert testimony that Mrs. Whitehead acted intuitively rather than rationally; that she was hard to influence once her mind was made up; that the reason she wanted to have another child was to fulfill herself as a woman; that she had no empathy for her husband's alcoholism; that she did not place as high a value on education as the Sterns did; that on at least one occasion she thought she knew her son and his educational needs better than her son's teacher; and that she and her husband were financially less secure than the Sterns and had once filed for bankruptcy. The court strongly condemned Mrs. Whitehead for the threats she made against the baby in her efforts to persuade Mr. Stern not to interfere with her custody, her "elopement" with the baby to another state in violation of a court order, and her apparently deliberate actions to gain publicity.

Several of these considerations reflect fixed and unrealistic notions of how parents, especially mothers, should act. Wives should not dominate their husbands;

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wives should be understanding of their husbands; mothers should assume their children will go to college and follow the recommendations of their children's teachers; and so on. While taking a child out of state in violation of a court order is irresponsible and may properly be taken into account in judging a parent's stability and ability to serve as a parent, one senses in reading the opinion that the court is unduly insensitive to the emotional reactions of a mother, post-partum, who finds herself at risk of losing her newborn child. This is seen perhaps most clearly in the court's condemnation of her for developing strong emotions toward her child, changing her mind, and wanting to keep her child. But what one might ask, could be more natural; indeed, how would we prefer mothers to react to the experience of pregnancy?

In some jurisdictions, the law in a custody dispute between unwed parents over a newborn will favor the mother over the father because of her prior connection to the child through pregnancy. Many would say that this preference is unfair to fathers, and perhaps it is. But I repeat: the object of the law here is not fairness to either parent, but to the child. And to the child, and to children generally, it is most important that the law affirms the instincts of parents to be parents and links responsibility for the child to existing relationships. When *both* parents feel strong instincts in favor of protecting and taking care of the child, it is unfortunate that a continuing, meaningful relationship with both parents is usually impractical. Then, a hard choice must be made. In some cases, the biological father may be required to accept the disappointment of his expectations of parenthood, in the face of an existence of a parent-child relationship that, through the vagaries of biology, will give an initial advantage to the mother. In the right case—and perhaps this is one of them—the father may be able to demonstrate a stronger commitment to the child and a greater ability to meet her needs than the mother. But in this demonstration, it is responsibility, commitment and relationship, not fairness and equality, that should make the difference.

Adults can be disappointed in many ways when they set out to have children, often for reasons totally beyond their control. We can grieve for these individuals. But their disappointment, their good works, their noble efforts to overcome the disadvantages they may



*. . . to hold a woman to her intention to bear a child without developing the instincts of motherhood—is to redefine motherhood in a way that will benefit neither children nor society as a whole.*

face in achieving parenthood, and even the agreements they may be able to make before the child's conception, are not themselves enough. These factors cannot support an entitlement to a child that automatically requires legal recognition in derogation of an actual relationship between mother and child established through the experience of pregnancy and child-birth. To hold otherwise—to hold a woman to her intention to bear a child without developing the instincts of motherhood—is to redefine motherhood in a way that will benefit neither children nor society as a whole.

1. *In re Baby M.*, 13 FAM. L. REP. (BNA) 2001 (N.J. Super. Ct. Ch. Div., Mar. 31, 1987).
2. See N.J. REV. STAT. § 9:3-54 (Cum. Supp. 1986).
3. See, e.g., *Bergen County Welfare Board v. Cueman*, 164 N.J. Super. 401, 396 A.2d 620 (Juv. & Dom. Ct. 1978); *Wist v. Wist*, 101 N.J. Super. 509, 503 A.2d 281 (1986); *S.M. v. S.J.*, 143 N.J. Super. 379 (Ch. Div. 1976). See also N.J. STAT. ANN. § 9:17-45(d) (Cum. Supp. 1986) (paternity action may be brought notwithstanding any contrary agreement between mother and alleged father).
4. N.J. STAT. ANN. § 9:3-48(c)(1) (Cum. Supp. 1986).
5. N.J. STAT. ANN. § 9:3-48 (c)(1) (Cum. Supp. 1986).
6. See 9 FAM. L. REP. (BNA) 2695 (describing SB 3608). The legislature has also considered, without adopting, a bill that would have made surrogate parent contracts illegal. See 9 FAM. L. REP. (BNA) 2356 (describing AB 3139).
7. See, e.g., *Sees v. Baber*, 74 N.J. 201, 377 A.2d 628 (1977).
8. N.J. STAT. ANN. § 9:3-48 (Cum. supp. 1986).
9. Another aspect of deservedness seems to enter into the court's analysis when it compares Mr. Stern's family situation—since 1983 and until the birth of Baby M., he was the only surviving member of all branches of his family—with that of Mrs. Whitehead—the Whiteheads already have two children, which they at one time had thought was "the perfect family."
10. See N.J. STAT. ANN. § 9:3-48(c)(1) (Cum. Supp. 1986). Dicta in a number of Supreme Court opinions suggest that it would be unconstitutional to terminate the rights of a natural parent who had developed a relationship to her child on a best interests standard. See *Santosky v. Kramer*, 455 U.S. 745, 760 n.10 (1982) (citing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978), quoting *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-63 (1977) (Stewart, J.)).



# Apartheid and the South African Judiciary

Lawrence G. Baxter\*



**R**ecently, while standing at the library check-out counter, a student noticed the journal in my hand. He pondered for a moment, then offered this reflection: "Hmmm—the *South African Law Journal*; isn't that an oxymoron?" I am not sure he quite appreciated how complex his rhetorical question really was.

South African lawyers have always been proud of the rich blend of Roman-Dutch and Anglo-American common law that constitutes their legal system. We like to believe our judges have taken the best from each to build a body of contractual, delict (tort), property, criminal and commercial law doctrine that is sophisticated, rich and flexible.

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\*Professor of Law, Duke University School of Law. A native of South Africa, Professor Baxter came to Duke in 1985 from the University of Natal. This article is an updated version of a talk given at Duke Law Alumni Weekend on September 27, 1986.

We also like to recall those grand moments in which judges upheld the principles of liberty and democracy in the face of authoritarian government. In 1879, when a part of the Cape Colony was in a state of rebellion, a Griqua chief and his son, suspected by the government of instigating rebellion, had been unlawfully detained. The chief justice, Sir John Henry de Villiers, granted their petition for habeas corpus. He strongly rejected the government's contention that this action would foment further disturbances:

It is said the country is in such an unsettled state, and the applicants are reputed to be of such a dangerous character, that the Court ought not to exercise a power which under ordinary circumstances might be usefully and properly exercised. The disturbed state of the country ought not in my opinion to influence the Court, for its first and most sacred duty is to administer justice to those who seek it, and not to preserve the peace of the country. If a different argument were to prevail, it might so happen that injustice towards individual natives has disturbed and unsettled a whole tribe, and the Court would be prevented from removing the very cause which produced the disturbance.<sup>1</sup>

Soon afterwards the chief justice issued another writ of habeas corpus, and he was then able to observe with satisfaction that "none of the disastrous consequences which were confidently predicted [by the Crown in the earlier case] ever ensued."<sup>2</sup>

Nearly two decades later the judiciary in the old South African Republic, now the Transvaal, clashed head-on with both President Kruger and the Trekker Parliament. The Court, quoting (in Dutch translation!) from Alexander Hamilton's *Federalist No. 78* and from John Marshall's opinion in *Marbury v. Madison*,<sup>3</sup> declared a resolution unconstitutional,<sup>4</sup> thereby precipitating a constitutional crisis which was resolved only by the eventual departure of the Chief Justice for another South African bench.

Much later, South Africa's highest court, the Appellate Division, took a heroic stand against parliament and the executive when the new Nationalist government attempted—successfully in the end—to disenfranchise non-white voters in the 1950's.<sup>5</sup> In the process the court attracted international admiration.

But the South African courts have more recently acquired a different reputation. To some South Africans and many foreign observers, the legal system now seems a grotesque parody of everything Western lawyers value.



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Critics have used various epithets: "quintessentially unjust," "wicked," "repressive."<sup>6</sup> Lon Fuller once used South African legislation to illustrate his thesis that legislation lacking certain moral characteristics could not be described as "law" at all.<sup>7</sup> A fact-finding team of the International Commission of Jurists recently announced that "the 'judges' presence on the bench lent 'undeserved credibility' to a legal system in which personal and political freedom was left unprotected;"<sup>8</sup> and some jurists have called upon the judges to resign from the bench.

There are a number of reasons. First, the South African government has used sweeping, often draconian, legislation as the primary means of articulating and implementing the policy of apartheid. The constitutional model that was adopted in South Africa is that of parliamentary government. The executive is theoretically accountable to parliament; in practice, however, it has been able, through the party system and a permanent parliamentary majority, to gain full control over the legislature. With one trivial exception (relating to the official languages), the Republic constitution contains no protection of human rights; these can be infringed by ordinary act of parliament. It therefore fails to operate as a significant restraint. Unlike their American counterparts, judges cannot strike down acts of the "sovereign" parliament. They are confined to interpreting and applying this legislation.

Second, the government has attempted to foreclose the remaining avenues of review insofar as administrative rules, orders, and actions are concerned. Although theoretically subject to judicial review (for want of compliance with the relevant act of parliament), the governing statutes have themselves frequently contained provisions purporting, in the clearest possible terms, to preclude any judicial review whatsoever. One of the most explicit examples is section 29 of the Internal Security Act,<sup>9</sup> which reads: "No court of law shall have jurisdiction to pronounce upon the validity of any action taken in terms of this section, or to order the release of any person detained in terms of the provisions of this section." Provisions

such as these led one jurist to liken the role of the South African judiciary to that of an umpire who has been stripped of the power to rule on all the essential aspects of the ball game.<sup>10</sup>

The executive also controls the appointment of judges, all of whom, with one recent exception,<sup>11</sup> are white. Unlike the lower magistracy, which is staffed entirely by employees of the Department of Justice, the judges of the Supreme Court do enjoy security of tenure until the mandatory retirement age of 70, but it is inevitable that the appointment power should influence the character of the judiciary to some degree. In 1955, after the government had suffered a series of adverse decisions in the Appellate Division, the size of the court was increased to enable the government to add six judges to the five then sitting. These factors, coupled with the fact that the government has remained in power for nearly forty years, led to the creation of a judiciary that displayed meek acquiescence in the face of an increasingly draconian body of apartheid and security legislation.

During the 1960's and 1970's the role of the courts as protectors of liberty and equality reached its nadir. In a manner reminiscent of some judges during the slavery era in the United States,<sup>12</sup> the South African judiciary protested their inability to ameliorate the harshness of the legislation they were called on to apply. The most notorious example was *Minister of the Interior v. Lockbat*,<sup>13</sup> where the court had been asked to rule that group areas legislation (which requires that land be demarcated for exclusive use by members of one race group) should be applied in a manner that did not have disparate impact as between races. Notwithstanding the existence of an important precedent to this effect,<sup>14</sup> Holmes JA, speaking for the unanimous court, concluded that

[t]he Group Areas Act represents a colossal social experiment and a long term policy. It necessarily involves the movement out of Group Areas of numbers of people throughout the country. Parliament must have envisaged that compulsory population shifts of persons occupying certain areas would inevitably cause disruption and, within the foreseeable future, substantial inequalities. Whether all this will ultimately prove to be for the common weal of all the inhabitants is not for the Court to decide.<sup>15</sup>

Even where statutes were vague, judges seemed to have little difficulty filling in the details, thereby intensifying the harshness of their application. An illustration is *Rossouw v. Sachs*,<sup>16</sup> where the Appellate Division ruled that a detainee was entitled to no more daily exercise or reading material than that officially permitted, even though the relevant act of parliament was silent on this point and despite the existence of precedent to the effect that a prisoner awaiting trial retains whatever rights the empowering legislation does not expressly take away.<sup>17</sup> By a spectacular piece of anti-libertarian reasoning, Ogilvie



Thompson JA took the view that since the statute already constituted a drastic inroad into traditional principles of South African criminal procedure, one had to assume that it also intended to eliminate all residual rights of detainees other than the right to basic "necessities"<sup>18</sup>

A leading South African jurist has concluded that "the Supreme Court, since 1950 when the total onslaught on freedom and legality began, has failed (with some exceptions) to protect individual liberty, to understand and apply the requirements of due process, to check or restrain arbitrary action and to speak resolutely against uncivilized and sometimes barbarous official behavior."<sup>19</sup>

Casual observers might be tempted to conclude that the South African legal system not only fails to protect the vast majority of South Africans but actively facilitates the imposition and maintenance of apartheid. Like the legal systems of Nazi Germany and various other totalitarian regimes of recent history, it must be a gigantic and tragic farce.<sup>20</sup> But such a conclusion would be too facile. Not only does it depend upon simplistic analogies and a narrowly segmented view of the legal system which overlooks large areas of the law that are almost untainted by apartheid legislation, but it also fails to take into account the fact that thousands of black South Africans, including most of those who are politically sophisticated and of radical persuasion, regularly resort to the courts in an attempt to challenge various facets of apartheid. It overlooks the fact that many (black and white) South African lawyers, possessing impeccable democratic and human rights credentials, regard the legal system as providing at least a partial protection against the onslaught of apartheid.

Most important of all, such a conclusion does not square with the dramatic judicial about-turn that has occurred during the past five years. This truly remarkable development merits some description since it has been little noticed or understood in the United States.<sup>21</sup> How, I am often asked, can judges do much in a system that has the features I have briefly described? Faced by a sovereign, executive-controlled parliament, no bill of rights, powers delegated to officials and the police in far-reaching terms and protected by a web of unreviewability clauses, what could the judges really do to protect individual rights and political expression, even if they wanted to? The answer is, quite a lot. But it requires a major shift in judicial attitude—a shift in which Duke Law School can claim a small part!

As the pro-apartheid attitude of the Appellate Division became clear during the 1960's, a few South African jurists began to level criticism at the judges for their failure to apply presumptions of interpretation that were more favorable to individuals than to the government. Among the most prominent of the critics was John Dugard, a former visiting professor at Duke Law School and presently professor of law at

*During the 1960's and 1970's the role of the courts as protectors of liberty and equality reached its nadir. In a manner reminiscent of some judges during the slavery era in the United States, the South African judiciary protested their inability to ameliorate the harshness of the legislation they were called on to apply.*

the University of the Witwatersrand and Director of its Center for Applied Legal Studies. During visits to the United States he had been impressed by the success of the civil rights movement in the courts. Of course, the United States Constitution was central to the movement's strategy, and South Africa lacks a counterpart. But Dugard was also influenced by the views of the American legal realists, from whom he learned that judges enjoy a much greater range of choice in the characterization of evidence and the construction of statutes than they are often prepared to admit. He began to advocate the persistent resort to the courts in South Africa as a means of resisting government action. In 1974, while visiting at Duke, he wrote the bulk of his most important work, *Human Rights and the South African Legal Order*,<sup>22</sup> a comprehensive study and critique of the role of the South African judiciary in the maintenance of human rights in South Africa.

Criticisms such as those leveled by Dugard and others at first enraged the judges. They were met with stern reproach from the Chief Justice.<sup>23</sup> One outspoken critic, the late Barend van Niekerk, was actually twice prosecuted for contempt of court.<sup>24</sup> But some judges gradually began to respond. Towards the end of the 1970's, and especially since about 1983, a few started handing down decisions in the field of race and security legislation that were surprisingly adverse to the government. A Natal judge, setting aside an influx control order that had been issued against an African who had been deemed "idle and undesirable," severely criticized the legislation concerned in terms that attracted considerable local publicity.<sup>25</sup> A judge in the Transkei granted habeas corpus to a detainee who had been held under broadly-couched security legislation. Echoing Sir Henry de Villiers, he declared that "the criteria [for] ascertaining the intention of a statute do not differ according to the relative tranquility or disruption of a community, but remain the same."<sup>26</sup>

This trickle of judicial resistance has since become a flow that even the two states of emergency, accompanied by regulations that are breathtaking in their sweep, have failed to stem. At all levels and in most provincial jurisdictions of the Supreme Court, judges



have declared executive action under widely-framed statutes governing forced removals,<sup>27</sup> pass law violations<sup>28</sup> and influx control<sup>29</sup> to be illegal. In 1982 they effectively paralyzed the South African government's attempt to denationalize almost a million blacks by transferring their residential areas to an independent country, Swaziland.<sup>30</sup> An order of the State President requiring removal of a black tribe from its ancestral home against its will was declared unlawful, notwithstanding the fact that in 1975 the South African Parliament had attempted by resolution to validate his action in advance.<sup>31</sup> The administration of influx control was severely hampered by a series of decisions that imposed liberal constructions upon the narrow statutory rights of residence enjoyed by Africans living in urban areas;<sup>32</sup> these decisions have affected the lives of thousands,

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and potentially hundreds of thousands, of African urban dwellers, and the government was eventually compelled to repeal the governing legislation.<sup>33</sup> A series of decisions of the Transvaal Provincial Division has also effectively brought to a halt prosecutions of blacks living in white areas in violation of group areas legislation.<sup>34</sup>

Most striking of all has been the judicial response in litigation involving the actions of the police and security forces, under both the permanent security legislation<sup>35</sup> and the states of emergency.<sup>36</sup> Even in strong democracies, such as Britain and the United States, the courts have a predictable tendency to defer to the executive at times of national crisis.<sup>37</sup> Nor should we assume that this occurs only at a time of war;<sup>38</sup> the contrary is amply illustrated by recent cases in both Britain<sup>39</sup> and the United States.<sup>40</sup>

Yet it is in the area of state security that the activism of the South African courts has been greatest. In Natal, the Eastern Cape, the Transvaal and Namibia, in the Appellate Division and in other provincial jurisdictions, judges have rendered ineffective the most broadly phrased unreviewability clauses in the South African statute book. Though expressly forbidden to review the lawfulness of police action in detaining individuals or to grant writs of habeas corpus and related remedies, they have done so repeatedly and have ordered the release of numerous detainees.<sup>41</sup> The courts have literally interpreted the preclusionary clauses, including the one quoted in this article, out of existence.<sup>42</sup>

Employing expansive canons of construction and drawing on common law presumptions of statutory

interpretation, the courts have rejected as inadequate the provision by the government of sham or "skeleton" reasons for detentions (in other words, mere regurgitations of the empowering statutory clauses),<sup>43</sup> and in some cases have imposed fair hearing requirements even where the legislation seemed not to contemplate that these should be observed.<sup>44</sup> They have ordered prison officials to allow detainees access to legal advisers in the face of regulations to the contrary.<sup>45</sup>

Using the technique of strict construction, judges in Natal and the Transvaal have rejected certificates presented by the Attorney-General purporting to prohibit the granting of bail to persons charged with security offenses.<sup>46</sup> In a particularly outrageous instance of police intimidation, the traditional protection of attorney-client privilege was reinforced when a court ruled illegal the police's seizure on warrant of a written statement taken from a witness by a firm of attorneys acting for the wife of a detainee who had died while under arrest. The court very strictly construed the ostensibly-broad wording of the warrant.<sup>47</sup>

Some judges have begun to subject official action to vigorous, "hard look" review. In Natal, the Western and Eastern Cape and the Transvaal they have set aside banning orders placed upon individuals,<sup>48</sup> meetings<sup>49</sup> and funerals<sup>50</sup> by officials acting under broadly-phrased security legislation. In Natal, especially, they have ameliorated the draconian scope of the statutory offenses against the state, which have been used to harass opponents of the government, by imposing tough procedural and evidential requirements,<sup>51</sup> by restricting the scope of the offenses<sup>52</sup> and by inserting a requirement of subjective, specific mens rea where the wording of the provisions has remotely permitted.<sup>53</sup>

They have also become more receptive to allegations of maltreatment. Courts around the country have upheld claims of torture by ex-detainees<sup>54</sup> and have issued interdicts<sup>55</sup> to the extent that the government has been driven, in many cases, to release detainees<sup>56</sup> and settle damages claims out of court for fear of permitting yet further adverse precedents to be created.<sup>57</sup> Some judges have adapted a remedy, derived from English commercial law, which authorizes the pre-emptive search, without notice, of a police station or prison for the purpose of obtaining evidence relating to allegations of torture or maltreatment.<sup>58</sup>

The government seems to have assumed that by imposing a state of emergency and suspending the operation of the meager safeguards of Parliamentary legisla-

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tion it would avoid embarrassment and obstruction in the courts. After all, a state of emergency, like martial law, is usually thought to suspend, in practice if not in theory, the jurisdiction of the courts. But here too judicial protection has not been entirely eliminated. Various courts have ruled sections of the emergency proclamations affecting detainees,<sup>59</sup> the press,<sup>60</sup> freedom of expression,<sup>61</sup> and public gatherings<sup>62</sup> invalid. Under the second state of emergency (imposed in June of 1986) there had already been 218 court applications against the validity of the declared state of emergency itself, or actions taken under it, by late September of 1986!<sup>63</sup>

These decisions have forced the government to amend and tighten the wording of the emergency proclamation and associated regulations under the glare of international publicity and without ever being sure that it has plugged all the gaps. And now, having created an unwieldy tricameral parliamentary system in which South Africans of Indian descent and of mixed race have a limited role, the government can no longer rely on the speedy assistance of a compliant "sovereign" legislature to validate its illegalities; instead it has been forced, after first having to wait until Parliament actually *is* in session, frustratedly to coax unwilling legislators, many of whom have resorted to dilatory tactics to stall legislative amendments.<sup>64</sup>

The full implications of the cases described here, as well as their overall impact, require much fuller examination and should not be exaggerated. There have also been a significant number of decisions in favor of the government, and judicial activism is probably still confined to a minority of judges. There are still a number of judges who appear to be adopting the views and attitudes of their counterparts of the 1960's and 1970's; some have meted out savage sentences to youthful protesters; the notorious Delmas treason trial proceeds in the Transvaal.

Even so, the mere existence of contrary decisions, let alone their actual number, is remarkable. This raises a wide range of questions concerning the constitutionalist and interpretive theories that might explain these decisions. It reminds us of the obvious but frequently forgotten fact that judges, having once acquired tenure, often surprise those who appointed them. More importantly, it demonstrates the complexity of the lengthy debate among liberal South African legal scholars over the appropriate role of judges in an unjust society and whether they should resign. The legal system and the judiciary cannot simply be dismissed as a reflection of the apartheid state, nor can the decisions surveyed here be fairly described as "occasional judicial expostulations in the name of justice" or "faint voices in the wilderness."<sup>65</sup> Large numbers of real people are enjoying the benefits of these "expostulations."

The impact of "liberal" decision-making in South Africa may still be dwarfed by the larger political events. It is unrealistic to assume that the judiciary can be an important agent for the abolition of apartheid itself.

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The most the judges can do is serve to reduce the oppression, help to protect the agents of political change, and display the virtue of an independent judiciary to South Africa's future rulers. Perhaps in the end, through a combination of increasingly vicious reactions on the part of the government, exhaustion on the part of some judges and recalcitrance on the part of others, every ember of judicial protection will be snuffed out.

Nevertheless, we should not underestimate the significance of judicial resistance. The judiciary enjoys immense prestige and credibility in the eyes of most whites, and the business community could not function without it. To this extent, therefore, it is a branch of government that is very difficult to subordinate, which, through its very actions and criticism, can help further to erode the monolithic power base upon which the government presently relies. Parliament could theoretically abolish the courts altogether, or render judges removable at the whim of the executive. Or the government could just ignore their decisions.<sup>66</sup> But until this has happened, what the South African judges have been doing to resist apartheid, what they can and should be doing, and whether they should collectively resign are issues that demand much more complex analysis than has hitherto been accorded them in the United States.

1. *In re* Willem Kok and Nathaniel Balie, (1879) 9 Buch. 45.
2. *Sigcau v. The Queen*, (1895) 12 S.C. 256 at 270-71, *aff'd*, [1897] A.C. 238 (Privy Council).
3. 1 Cranch 137 (1803).
4. *Brown v. Leyds*, N.O., 4 Off. Rep. 26 (1897).
5. *See* *Minister of the Interior v. Harris*, 1952 (4) S.A. 769 (A.D.); *Harris v. Minister of the Interior*, 1952 (2) S.A. 428 (A.D.).
6. Wacks, *Judges and Injustice*, 101 S. AFR. L.J. 266, 269, 277 (1984).
7. *See* L. FULLER, *THE MORALITY OF LAW* 160-161 (rev. ed. 1969).
8. *See* *The Financial Times* (London), Mar. 17, 1987, at 4.
9. Act 74 of 1982.
10. *See* Wacks, *supra* note 6, at 278.
11. An Indian senior counsel, Mr. Hassan Mall, was appointed as an acting judge in Natal in February 1987.
12. *See* R. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 27-28, 119-23 (1975).
13. 1961 (2) S.A. 587 (A.D.).
14. *Rex v. Abdurahman*, 1950 (3) S.A. 136 (A.D.) (espousing the "separate but equal" doctrine).



*The legal system and the judiciary cannot simply be dismissed as a reflection of the apartheid state, nor can the decisions surveyed here be fairly described as "occasional judicial expostulations in the name of justice" or "faint voices in the wilderness." Large numbers of real people are enjoying the benefits of these "expostulations."*

15. 1961 (2) S.A. at 602.
16. 1964 (2) S.A. 551 (A.D.).
17. Whittaker v. Roos & Bateman, 1912 App. Div. 92.
18. See *Rossouw* 1964 (2) S.A. at 558-61.
19. Mathews, *The South African Judiciary and the Security System*, 1 S. AFR. J. HUM. R. 199, 202 (1985).
20. Indeed, there are some painfully obvious parallels between the Nazi and the South African legal systems. See, e.g., Fernandez, *The Law, Lawyers and the Courts in Nazi Germany*, 1 S. AFR. J. HUM. R. 124 (1985).
21. For an exception, see Mufson, *South African Judges Flexing Their Muscles*, 9 (18) NAT'L L.J., Jan. 12, 1987, at 1, 30.
22. J. DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER (1978).
23. See Steyn, *Regsbank en Regsfakulteit*, 30 TYDSKRIF VIR HEEDENDAAGSE ROMEINS-HOLLANDSE REG. 101 (1967).
24. State v. Van Niekerk, 1970 (3) S.A. 655 (T.) (acquitted, but only because of absence of mens rea); State v. Van Niekerk, 1972 (3) S.A. 711 (A.D.) (conviction upheld).
25. See *In re Dube*, 1979 (3) S.A. 820 (N.).
26. Sigcaba v. Minister of Police, 1980 (3) S.A. 535, 542 (Transkei Sup. Ct.). See also *Honey v. Minister of Police*, 1980 (3) S.A. 800 (Transkei Sup. Ct.).
27. See e.g. *More v. Minister of Co-operation and Development*, 1986 (1) S.A. 102 (A.D.).
28. See *In re Duma*, 1983 (4) S.A. 469 (N.).
29. See *Black Affairs Administration Board, Western Cape v. Mthiya*, 1985 (4) S.A. 754 (A.D.); *Oos-Randse Administrasieraad v. Rikhoto*, 1983 (3) S.A. 595 (A.D.); *Komani N.O. v. Bantu Affairs Administration Board, Peninsula Area*, 1980 (4) S.A. 448 (A.D.). See also *Mahlaela v. De Beer N.O.*, 1986 (4) S.A. 782 (T.) (attempt by township superintendent to disestablish a black township by applying a policy of refusing site and residential permits ruled unlawful).
30. See *Government of the Republic of South Africa v. Government of KwaZulu*, 1983 (1) S.A. 164 (A.D.).
31. *More v. Minister of Co-operation and Development*, 1986 (1) S.A. 102 (A.D.).
32. See cases cited *supra* note 29.
33. Abolition of Influx Control Act 68 of 1986.
34. See *State v. Govender*, 1986 (3) S.A. 969 (T.).
35. Internal Security Act 74 of 1982.
36. Declared in terms of §3 of the Public Safety Act 3 of 1953.
37. As is illustrated by Lord Parker's speech in a case during World War I: "Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public." *The Zamora*, [1916] 2 A.C. 77, at 102 (H.L.).
38. Obviously relevant here are *Korematsu v. United States*, 323 U.S. 214 (1944), and *Liversidge v. Anderson*, [1942] A.C. 206 (H.L.).
39. See e.g. *Council for Civil Service Unions v. Minister for the Civil Service*, [1985] 1 A.C. 374 (H.L.); *R v. Secretary of State for Home Affairs, ex parte Hosenball*, [1977] 1 W.L.R. 766 (C.A.).
40. See *Haig v. Agee*, 453 U.S. 280 (1981). See also *Dennis v. United States*, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951). The observation concerning the *Korematsu* and *Dennis* cases is more fully developed by Dugard. See J. DUGARD, *supra* note 22, at 362-64.

41. See, e.g., *Radebe v. Minister of Law and Order*, 1987 (1) S.A. 587 (W.L.D.); *Jaffer v. Minister of Law and Order*, 1986 (4) S.A. 1027 (C.); *Dempsey v. Minister of Law and Order*, 1986 (4) S.A. 530 (C.); *Nkwinti v. Commissioner of Police*, 1986 (2) S.A. 421 (E.); *Katofa v. Administrator-General for South West Africa*, 1985 (4) S.A. 211 (S.W.A.), *confirmed* 1986 (1) S.A. 800 (S.W.A.); *Moodly v. Minister of Law and Order*, D.C.L.D. unreported (see *The Weekly Mail*, Feb. 13-19, 1987, p. 1); *Vale v. Minister of Law and Order*, E.P.D. Sept. 5, 1986, unreported; *Bishop of Roman Catholic Church of the Diocese of Port Elizabeth v. Minister of Law and Order*, E.C.D. Aug. 1, 1986, unreported (only one applicant released) (for the last two cases, see 2 S. AFR. J. HUM. RIGHTS 381-384 (1986)); *Thabata v. Minister of Law and Order*, E.C.D. Oct. 29, 1985 (unreported) (see 1 S. AFR. J. HUM. RIGHTS 300 (1985)).
42. See esp. *Minister of Law and Order v. Hurley*, 1986 (3) S.A. 568 (A.D.) (upholding *Hurley v. Minister of Law and Order*, 1985 (4) S.A. 709 (D.C.L.D.) (where the breakthrough was achieved)). See also *Akweenda v. Cabinet for the Transitional Government for South West Africa*, 1986 (2) S.A. 548 (S.W.A.); *Nkwinti v. Commissioner of Police*, 1986 (2) S.A. 421 (E.); *Steel v. Minister of Law and Order*, D.C.L.D. Sept. 20, 1985 unreported (see *The Weekly Mail*, Sept. 27-Oct. 3, 1985, at 1). For holdings to the same effect in the context of the emergency regulations, see *Radebe v. Minister of Law and Order*, 1987 (1) S.A. 586 (W.L.D.); *Nqumba v. State President*, 1987 (1) S.A. 456 (E.); *Jaffer v. Minister of Law and Order*, 1986 (4) S.A. 1027 (C.); *Dempsey v. Minister of Law and Order*, 1986 (4) S.A. 530, 534 (C.); *Metal and Allied Workers Union v. State President of the Republic of South Africa*, 1986 (4) S.A. 358 (D.C.L.D.).
43. See *Nkondo v. Minister of Law and Order*, 1986 (2) S.A. 756 (A.D.).
44. See *Nqumba v. State President*, 1987 (1) S.A. 456 (E.); *Bill v. State President*, 1987 (1) S.A. 265 (W.L.D.); *Mathale v. Secretary for Education, Gazankulu*, 1986 (4) S.A. 427 (T.); *Buthelezi v. Attorney-General, Natal*, 1986 (4) S.A. 377 (D.C.L.D.); *Nkwinti v. Commissioner of Police*, 1986 (2) S.A. 421 (E.); *Momoniati v. Minister of Law and Order*, 1986 (2) S.A. 264 (W.L.D.).
45. See, e.g., *Ebrahim v. Minister of Law and Order*, T.P.D. (unreported) (see *The Weekly Mail*, Mar. 20-26, 1987, at 3); *Bill v. State President*, 1987 (1) S.A. 265 (W.L.D.); *Metal and Allied Workers Union v. State President of the Republic of South Africa*, 1986 (4) S.A. 358 (D.C.L.D.); *Katofa v. Administrator-General for South West Africa*, 1985 (4) S.A. 211 (S.W.A.), *confirmed* 1986 (1) S.A. 80 (S.W.A.); *Nqulunga v. Minister of Law and Order*, 1983 (2) S.A. 696 (N.).
46. See *Buthelezi v. Attorney-General, Natal*, 1986 (4) S.A. 377 (D.C.L.D.); *State v. Baleka*, 1986 (1) S.A. 361 (T.); *State v. Ramgobin*, 1985 (3) S.A. 587 (N.).
47. See *Cheadle, Thompson & Haysom v. Minister of Law and Order*, 1986 (2) S.A. 279 (W.).
48. See 2 S. AFR. J. HUM. RIGHTS 259 (1986) (where it is reported that the banning orders imposed on five leading activists were set aside in the wake of the decision in *Nkondo v. Minister of Law and Order*, 1986 (2) S.A. 756 (A.D.)).
49. See e.g., *United Democratic Front v. Acting Chief Magistrate, Johannesburg*, 1987 (1) S.A. 413 (W.L.D.); *State v. Mahlangu*, 1986 (1) S.A. 135 (T.); *Metal and Allied Workers Union v. Castell N.O.*, 1985 (2) S.A. 286 (D.C.L.D.); *United Democratic Front (Western Cape Region) v. Theron N.O.*, 1984 (1) S.A. 315 (C.) (*rescinded* *Theron N.O. v. United Democratic Front (Western Cape Region)*, 1984 (2) S.A. 532 (C.)).
50. See *Mbeka v. Nell N.O.*, E.P.D. Nov. 14, 1985, unreported (see 2 S. AFR. J. HUM. RIGHTS 128 (1986)).
51. See *State v. Ramgobin*, 1986 (4) S.A. 117 (N.); *State v. Ramgobin*, 1986 (1) S.A. 68 (N.). See generally, 2 S. AFR. J. HUM. R. 120, 261 (1986). See also *State v. Leepile*, 1986 (4) S.A. 187 (W.L.D.) (court refusal to permit the state to withhold the identity of one of its witnesses from the defense); *but cf.* *State v. Harber, in re State v. Baleka*, 1986 (4) S.A. 214 (T.); *State v. Baleka* (2), 1986 (4) S.A. 200 (T.).
52. *Cf.*, e.g., *Mokoena v. Minister of Law and Order*, 1986 (4) S.A. 42 (W.L.D.); *State v. Ntshiwa*, 1985 (3) S.A. 495 (T.); *Ndabeni v. Minister of Law and Order*, 1984 (3) S.A. 500 (D.C.L.D.).
53. See e.g. *State v. Ratshitanga*, 1986 (4) S.A. 949 (Venda Sup. Ct.) (mere bearing of arms insufficient to constitute 'act of terrorism', unless accompanied by an intent to commit a specified offense); *State v. Ndlovu*, 1986 (1) S.A. 510 (N.) (knowledge of unlawfulness required).
54. See generally, 2 S. AFR. J. HUM. R. 384-85 (1986); 1 S. AFR. J. HUM. R. 304-07 (1985).
55. See *id.* See also *The Weekly Mail*, Sept. 27-Oct. 3, 1985, at 4 (report of the *Shirish Soni* case, in which the security police were ordered to cease their interrogation of the detainee). For subsequent developments, see *Morarjee v. Minister of Law and Order*, 1986 (3) S.A. 823 (D.C.L.D.) (court refused to impose a reasons requirement on the minister but stated that if the detainee was medically unfit to be interrogated his continued detention would be unlawful). See also *Mkhize v. Minister of Law and Order*,



1985 (4) S.A. 147 (N.) (order to district surgeon to examine detainee and report to court).

56. As in the *Billy Nair* case, N.P.D. (unreported). See *The Weekly Mail*, Oct. 11-17, 1985, at 3.

57. See 1 S. AFR. J. HUM. R. 307 (1985); cf. SOUTH AFRICAN INSTITUTE OF RACE RELATIONS, RACE RELATIONS SURVEY 1985, 495-496 (1986). Cf. also *Dlamini v. Minister of Law and Order*, 1986 (4) S.A. 342 (D.C.L.D.) (where the government tried to repudiate its settlement); *Mda v. Minister of Justice, Police and Prisons*, 1986 (3) S.A. 500 (Ciskei Sup. Ct.).

58. See *Ex parte Matshini*, 1986 (3) S.A. 591 (E.); see 2 S. AFR. J. HUM. R. 262 (1986).

59. See e.g. *Metal and Allied Workers Union v. State President of the Republic of South Africa*, 1986 (4) S.A. 358 (D.C.L.D.); *Nkwinti v. Commissioner of Police*, 1986 (2) S.A. 421 (E.); *Thabata v. Minister of Law and Order*, *supra* note 41; *Itsweng v. Minister of Law and Order*, T.P.D. Case No. 12714/86 (unreported) (see 1 Afr. L. Rev. 19 (1987); 2 S. AFR. J. HUM. R. 382-383 (1986)).

60. See *Natal Newspapers (Pty.) (Ltd.) v. State President of the Republic of South Africa*, 1986 (4) S.A. 1109 (N.); *Argus Printing and Publishing Co Ltd. v. Minister of Law and Order*, W.L.D., Jan. 29, 1987 (see 3 S. AFR. J. HUM. R. 131 (1987)). Most recently the more extensive restrictions imposed in response to the *Argus* decision were struck down by a judge in Natal. See *Washington Post*, Apr. 29, 1987, at A1, A24.

61. In April a full court of the Natal Provincial Division struck down emergency regulations purporting to prohibit expressions of support for, or calls for the release of, detainees. See *N.Y. Times*, Apr. 25, 1987, at 3.

62. See *United Democratic Front v. The State President*, E.C.D. July 30, 1986 (unreported); *United Democratic Front v. State President*, W.L.D. July 28, 1986 (unreported) (see 2 S. AFR. J. HUM. R. 379 (1986)).

*It is unrealistic to assume that the judiciary can be an important agent for the abolition of apartheid itself. The most the judges can do is serve to reduce the oppression, help to protect the agents of political change, and display the virtue of an independent judiciary to South Africa's future rulers.*

63. See 2 S. AFR. J. HUM. R. 377 (1986).

64. It has been speculated that the inability to obtain the cooperation of all three houses of parliament was the reason for the lifting of the first state of emergency on Mar. 7, 1986. See 2 S. AFR. J. HUM. R. 252 (1986).

65. Wacks, *supra* note 6, at 281.

66. It was reported on the CBS Morning News, May 5, 1987, that the police were ignoring, pending their appeals, the recent decisions of two Natal courts (*cited supra* notes 60, 61) that had lifted restrictions on public protest and press coverage thereof.



# Advertising and the Ethical Profession

Thomas B. Metzloff\*

In the past two years, I have been responsible for organizing the reading materials for Duke's legal ethics course. Unlike most schools which offer an upperlevel course on the subject, we teach professional responsibility during the first year in a one-week intensive course. Duke is fortunate that Judge Alvin Rubin from the Fifth Circuit Court of Appeals and Judge James Oakes from the Second Circuit serve as faculty members. Each year before the course begins, we review the materials, and they routinely suggest that the materials on legal advertising be reduced, if not eliminated.

Each year, I have agreed with the suggestion but complied only to an extent. On one level, they are undoubtedly correct. The basic question whether lawyers should be able to advertise is no longer particularly interesting. The constitutional issue has by now been almost fully explored. The ethical issue lacks depth. Compared to a host of other concerns—confidentiality, conflict of interest, or the essential appropriateness of the adversarial system—advertising is an also-ran. Why then my urge to continue to include a discussion about legal advertising?

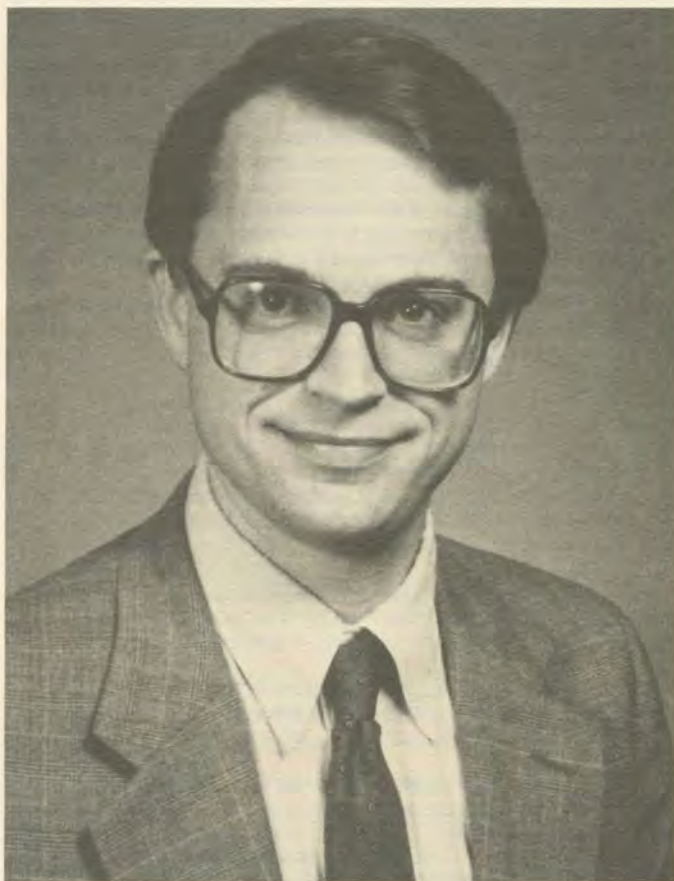
In part, I justify my position by noting the significance of the issue within the profession itself. The last fifteen year period has seen great activity in analyzing the ethical dimensions of the legal profession. During this time, professional ethics has been recognized as a legitimate academic discipline and practitioner concern. Throughout this exciting period of examination, the topic that has garnered the most attention by the legal community itself—whether it should have or not—has been the propriety of advertising by lawyers.

This attention results from the profession's perception of its own virtues. The amorphous conception of professionalism—so often raised and so little discussed—is, as always, a topic of current interest.

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Indeed, if anything, the legal profession is more concerned with its "professional" image today than at any time in the past decade. Recently, the ABA and any number of states have empowered special committees to opine on how to regain the professional edge. The emotional cachet is real. A large part of the profession believes, and is quite willing to profess its belief, that our tolerance of professional mercantilism has been a monumental mistake.

Behind much of this renewed concern with professionalism is a strong undercurrent that the quality of the legal profession has deteriorated largely as a result of the permissive attitude towards advertising fostered by the courts. Advertising has become the stalking horse of the professionalism debate. The recent report of the Georgia Committee on Professionalism is instructive. Critical of the new emphasis on business development, the report focuses on the



evils of advertising. "The committee shares the remorse, indeed the indignation, of much of the Bar over the shameless commercialism of some advertising by lawyers. It is artless, crude, and, in a word, unprofessional. It is also unsophisticated." To be sure, we have been bemoaning the decline of the attorney as professional for a seeming eternity. Yet, the recent wave of accusations and apologies are at least sincere.

If we are to believe the rhetoric, our chosen profession has evolved into little more than a cadre of money-grubbing entrepreneurs. In fact, the critics do not view the process as evolutionary in the least. Rather, its origins are directly traced to the Supreme Court's decision in *Bates v. State Bar of Arizona* (1977) "legalizing" attorney advertising. From that beginning, the powers that be—the local state disciplinary authorities—have been unable to stem the tide. Like Eve's first encounter with the apple, this small beginning has led to dire consequences. It is widely perceived that the Supreme Court's required promiscuity relating to advertising has resulted in the legal profession being cast out of its garden paradise of professionalism into the world of cheap marketing tricks, heightened governmental regulation, malpractice exposure, and other previously unthinkable potential worries. Many wish that we could somehow confess error and return to the halcyon days.

At this point, the debate over advertising has become rather staid. Those favoring it, or least willing to tolerate it, appeal to the inherent logic of the Supreme Court's decisions or the benefits of the competitive realities of a free market. Its opponents appeal to the subjective virtues of professionalism or the acknowledged tastelessness of particular advertisements. Little new has been added to the discussion in quite some time. In fact, however, if one goes just a little beneath the surface of the debate, one finds a rich deposit of important issues going to the essence of the profession.

We must first identify more specifically what the "right" is. The profession's strong anti-advertising philosophy dates from the early 20th Century, an era dubbed the Progressive period in no small part by those involved. Prior to the promulgation of the 1908 Canons of Professional Ethics, there was no strong history of opposition to advertising. Under the new "professional" regime, lawyers obtained business by doing a good job. Their successes combined to form a professional reputation ultimately resulting in demand for their services. As the Canons themselves

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confidently predicted, the "most worthy and effective advertisement possible . . . is the establishment of well-merited reputation for professional capacity and fidelity to trust." That is essentially where we stood until the Supreme Court's decision in *Bates v. State Bar of Arizona* (1977).

*Bates* is well-known, but its facts deserve brief mention. John Bates and Van O'Steen were attorneys in Arizona. After passing the state bar in 1972, they worked for a few years with a local legal aid group. They then decided to form their own firm, self-designated as a "legal clinic." Their approach, motivated in part by their own values and in part by a perceived opportunity, was to offer legal services at a modest fee. By focusing on routine matters such as uncontested divorces, adoptions, simple personal bankruptcies and the like, they hoped to achieve some measure of success. Much of the work would be performed by paralegals; secretaries would master the emerging technology of word processors.

Soon after opening shop, they sensed that the flow of business required an improved ability to communicate with potential clients. Limited by the State's disciplinary rules, they quickly concluded that something beyond what was allowed would be needed. In clear violation of the regulations, they placed an ad in the *Arizona Republic*, the daily newspaper in Phoenix. The copy was certainly tame by today's standards, noting that their firm offered "legal services at very reasonable fees," and then listed the applicable fee for each category of service. There was no misrepresentation; the fees listed were those being charged. Indeed, if a case proved to be more complicated than it appeared at first glance, the firm would not even take it.

The proper authorities filed disciplinary proceedings and the matter ultimately found its way to the Supreme Court, whose decision is a tour de force rejecting the classical arguments of professionalism. The essential concern of the majority in permitting advertising was the need to improve access by the public to the legal profession's services. As with many leading Supreme Court cases, *Bates* identified a shift in policy. The contours of the "right" were left to be described.

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Since *Bates*, the Supreme Court has issued a number of opinions embellishing and to an extent reinterpreting the limited constitutional right for attorneys to advertise. In 1981, the Court was called upon to issue a "We meant what we said" decision in *In re R.M.J.* (1981), involving a rather silly attempt by Missouri to define the precise words that could be used by an attorney to describe his or her areas of practice.

Many observers would proclaim that as a result of *Bates*, as reinforced by *R.M.J.*, there has been a revolution in attorneys' opportunities to market their services in the past decade. Focusing solely on the yellow pages and late night television programming, this assessment might have some validity. Certainly, the legal profession is increasingly aware of the potential use of advertising as a marketing tool. Yet, *Bates* and *R.M.J.* addressed only a limited range of marketing activities, namely objective statements by attorneys about their own qualifications and practices. In 1985, the Court was called upon to consider a different type of marketing effort.

In *Zauderer v. Office of Disciplinary Counsel* (1985), an attorney placed an advertisement in a number of Ohio newspapers offering his legal services to women who had suffered injuries possibly stemming from the use of a Dalkon Shield intra-uterine device. The ad noted that the Dalkon Shield had caused serious injuries in other women and that the attorney was representing plaintiffs in lawsuits against the manufacturer on a contingency fee basis. The ads also contained an illustration of a Dalkon Shield.

The disciplinary authorities filed a complaint charging that the ad violated Ohio regulations because it improperly used an illustration, was not "dignified," and contained information beyond that permitted under the rules. Following administrative and judicial proceedings in Ohio upholding the regulations, the case went to the Supreme Court. Writing for the Court in a sharply divided decision, Justice White held that the Dalkon Shield advertisement was constitutionally protected. The Court noted that the ad was entirely accurate and did not promise success, nor did it claim that the attorney had any special expertise in handling such matters. Therefore, the state's acknowledged power to restrict misleading advertising could not be applied just because the ad was "geared to persons with specific legal problems." Stated differently, the Court held that the First Amendment applied to protect creative advertising designed specifically to

reach interested potential clients with specific legal problems.

The central holding in *Zauderer* is an important addition to the constitutional protections afforded attorneys' marketing efforts; indeed, in terms of practical implications on the type of marketing it authorizes, *Zauderer* is arguably more important than *Bates*. Given the nature of marketing, this flexibility will be of critical importance. Rather than limiting *Bates* to information about an attorney's routine services or own personal qualifications, *Zauderer* broadens the constitutional protections to include information about whether the consumer has a legal problem in the first place, a far different informational focus. Without the ability to address specific legal problems of potential clients through creative marketing, the constitutional safeguards established in *Bates* and *R.M.J.* would have meant little, merely giving attorneys the right to conduct ineffective advertising.

After *Zauderer*, I think we are just about finished with the legal adjustments needed to implement *Bates*. This is not to say that a few other problems will not emerge. Indeed, continuing litigation seems inevitable given the recently enacted Model Rules of Professional Conduct's approach on legal advertising. Moreover, as will be argued below, I believe that the basic approach of the Model Rules is descriptive of the attitudinal development that has generally occurred within the profession in response to advertising.

State disciplinary authorities only begrudgingly accepted *Bates*' teachings; they were more interested in taking advantage of its potentially limiting language than in opening opportunities for attorneys to advertise. Canon 2 of the old Model Code of Professional Responsibility contained the advertising and solicitation restrictions under the general axiom that an attorney had a duty to "Assist the Legal Profession in Fulfilling its Duty to Make Legal Counsel Available." The fact that many of the advertising provisions limited attorney communication about services—and thereby restricted access—was an irony apparent to many. The ABA Model Rules, officially adopted in August 1983, were far more sympathetic to attorney advertising or at least to its inevitability. Conceptually, the Rules restructured the entire approach to regulating attorney marketing.

Marketing restrictions are now contained in Part 7 of the Model Rules which is entitled "Information About Legal Services." On the whole, the Model Rules embrace both the letter and spirit of *Bates* and *R.M.J.*,

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as opposed to the ABA's earlier, more restrictive efforts to modify its prior prohibitions to conform to *Bates*. As opposed to setting forth a laundry list of permitted information, Model Rule 7.1 establishes only a general standard that an attorney "shall not make a false or misleading communication about the lawyer or the lawyer's services." It defines three factors to be used to determine whether a communication is misleading. Specifically, the communication is misleading if it: (1) contains a material misrepresentation of law or fact or omits a fact needed to make the statement not misleading; (2) is likely to create an unjustified expectation about the results the attorney can obtain; or (3) compares one attorney's services with another absent factual substantiation.

The Model Rules accept that the inherent purpose of marketing is to make "self-laudatory statements," and that the question whether an advertisement is "dignified" is hopelessly subjective. Despite the Model Rules' sensible approach, the "dignity" issue continues to divide the profession and the courts. Like many legal concepts, "dignity" is hard to define on anything other than an "I know it when I see it" basis. Some courts have, nonetheless, attempted to articulate a "dignity" restriction. For example, the Iowa Supreme Court in *Committee on Professional Ethics & Conduct of the Iowa State Bar Ass'n v. Humphrey*, (Iowa 1984) recently upheld a state rule prohibiting the use of dramatic overvoices or music in lawyers' ads based upon a "dignity" concern. The United States Supreme Court vacated the decision and remanded it for further consideration in light of *Zauderer*, but, on remand, the Iowa Supreme Court affirmed its prior holding. The Supreme Court, in a divided decision, dismissed the subsequent appeal from the Iowa Supreme Court for want of a substantial federal question.

While the Model Rules as a whole greatly liberalize the previous regulatory regime, other portions include potentially significant restrictions. For example, Model Rule 7.3 substantially limits direct contact between attorneys and prospective clients. Specifically, it prohibits contact in person, by telephone, by letter, or by other forms of communication directed to specific recipients while allowing "letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful." Beyond the "general circular" exception, the area of prohibited contact is significant.

While the restriction against *personal* contact for pecuniary gain rests on firm footing, the Model Rules' limitation on direct mailing to targeted individuals raises serious constitutional questions and, indeed, has already been questioned in judicial decisions. For example, numerous state courts have held that direct mail campaigns to specific individuals known to need particular legal services are entitled to constitutional

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protection. It is likely that direct mail campaigns will continue to spur litigation, especially since these marketing efforts are among the most useful an attorney can conduct. The ABA itself has recognized the probable unconstitutionality of this provision and recently circulated a proposed amendment to Rule 7.3.

Rule 7.3 raises another issue relating to marketing efforts directed not to potential clients, but to those key third parties such as accountants, bankers, and real estate agents, who frequently are asked to recommend a lawyer to their own clients. The instincts of the "professional" school are deeply offended by such "back door" tactics. Some courts have restricted these efforts based upon a perceived conflict of interest being promoted between the third party and his or her client.

It is questionable whether the targeted broker, banker, or accountant will in fact attempt unfairly to solicit clients for the attorney or that the solicitation efforts that do occur on the attorney's behalf will result in a conflict of interest. While the concerns about overreaching and conflict of interest are of some significance, there are potential benefits to increasing the amount of information about attorney services available to those third parties who regularly recommend legal services to their own clients. Assuming that the third party cannot receive any compensation from the attorney, which is almost uniformly prohibited, it is doubtful whether the third-party will use high pressure tactics to obtain clients for someone else.

Indeed, third parties are likely to perform a useful and objective function in referring attorneys to their clients. Their relationship to their own clients, the crucial factor for denying direct marketing contact with third parties according to some courts, instead suggests that they would act in an informed manner to assure that their clients receive competent legal assistance. Often, these third parties are in a better



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position to be aware of the available choices and to know something about the competing attorneys' qualifications. Rather than seeking limitations on this type of communication, states should perhaps be seeking ways to capitalize on it.

In another important respect, the Model Rules also serve to restrict attorney marketing efforts. Model Rule 7.4 only permits attorneys to state either that they do or do not practice in particular fields of law. The rule further provides that attorneys may not state that they specialize except for attorneys practicing patent law, admiralty law, or other areas of designation or specialization established by the particular state. By limiting identification of specialization to state-created areas of designation, the Model Rules sanction a significant restriction if the state has not established a meaningful program of specialization.

The limitation on advertising specialties conflicts with a basic fact of modern legal practice. An increasing number of attorneys specialize to a significant degree. Whether this qualifies them as experts is, of course, open to question. To the extent that Model Rule 7.4 restricts the natural tendency of attorneys to address their qualifications within self-designated areas of specialization, it is likely to provide fertile ground for litigation. An attorney with relevant expertise has a natural, and arguably legitimate, interest in communicating that information to potential clients.

In sum, the Model Rules' approach is curiously schizophrenic. On the one hand, the Rules finally embrace the inevitability, if not the wisdom, of the Supreme Court's basic pronouncements on the subject. Yet, on those issues where the new advertising rules have not yet been fully played out, they take a stringent approach against attorney advertising. Moreover, as suggested above, the limited vision has occurred in contexts in which there would appear to be potentially major gains to be achieved at least from the public's perspective.

Given this brief overview of the historical background on the advertising issue, let me put the development into a ten-year focus from *Bates* through the present. *Bates* took a large part of the established profession by surprise. Its acceptance was never a matter of belief, rather one of necessity. Large portions of the profession did not see the need for advertising, nor do they have any use for it today. The tension between this widespread resistance and the inevitability of the constitutional arguments favoring advertising played out in a number of forums for most of the decade.

Courts decided numerous cases; bar associations debated the issue seemingly endlessly. As it became clearer and clearer that there was little power left to limit standard forms of advertising, the organized profession capitulated. The tension was resolved only in terms of what the legal community would allow—not in terms of what it would prefer or what it wanted.

With each new application—as advertising spread to radio, then television, or began to use direct mail techniques—the emotional opposition of many attorneys hardened. We have now reached a rather unpleasant equilibrium. The pro-advertising forces believe that they have captured most of the territory. Remaining issues—such as imposing disclaimers to accompany advertisements, limiting marketing efforts to third-parties, or restricting the claims of specialization—do not seem fundamental, and there is no great push favoring advertising rights on these issues except by those directly involved in a particular dispute that might emerge. The opponents of advertising, their resolve to limit the expansion stiffened, seek to accept the *Zauderer* status quo but are willing to go no further. My reading of the judicial temper is that *Zauderer* may be the last major decision favoring advertising. The existence of a sizeable dissenting minority on the Court suggests that there is a growing sense that we have already gone too far and that stopping now is a fair resolution of the debate.

I suppose stopping where we are and letting the profession adjust to the change has some merit; a judicial time-out once in a while would ordinarily be appropriate. Yet, in my view, this is not a particularly good place to stop analyzing the issues or discussing the points bubbling directly underneath the surface of the advertising issue. Returning to my original theme for a moment, advertising has never in and of itself been a major ethical issue. In many respects, the debate that has been occurring over the past decade has really been about issues that transcend advertising—issues such as the need to allocate legal services better, the need to move towards a system that recognizes the desirability of specialization, and the need to lower the overall costs of legal services. These ethical issues are fundamental, and we have been discussing them all too indirectly, but at least we have been considering them through the advertising context.

If we stop now and ethically codify *Bates*, *R.M.J.*, and *Zauderer* but nothing more and wash our hands of it all, we risk stifling development on the more fundamental issues. If the debate over advertising has shown us anything, it should be that something more is needed. For the traditional professional, it is clear that the changes in advertising rules have not done very much to improve the delivery of legal services, their cost, or the development of a good informational system relating to expertise. In this sense, the traditionalists are surely right; advertising is a blight whose virtues do not begin to outweigh its detriments.



For those who favor advertising, solidifying the status quo will ill serve the interests of the consumer who has a legitimate need for better information than is presently being presented, nor will it insure that competent attorneys will be able to market their services in a sensible way.

My point is simple enough—we are not presented with a choice between restoring professionalism by returning to the past, any more than we can improve the profession by permitting more advertising. The system is deficient in ways which advertising at best only tangentially addresses. The continued discussion about advertising using the same old arguments is now obscuring the more legitimate and important issues. Yet, these issues are readily accessible through the advertising issue; the debate can profitably begin there and hopefully develop.

Perhaps the point can best be explained by discussing briefly the specialization issue. To be sure, there is an advertising question here—should we continue to follow the Model Rule limitations? But certainly the more important approach is not to ask what marketing rule we should have, but instead to focus on what is the collective profession doing on the merits with respect to specialization. The enormity of the trend towards the specialization of legal services surely transcends the importance of the recognition of the constitutional right to advertise about it. Frequently in history, however, we deal first with the practical effect only then to revisit the cause.

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While some states have enacted specialization programs, many have not done so, thereby significantly restricting efforts by attorneys to advertise areas of specialization. In some states that have enacted a program, the areas of specialization are limited, and the administration of the programs has proven to be difficult. What is actually restricting attorneys is not the advertising rule per se, but the inability of the profession at large—from the law schools through the state bars—to lead the way on developing a sensible approach to specialization.

The point can be illustrated by a simple case. Minnesota had a typical rule prohibiting attorneys from holding themselves out to the public as specialists until such time as the Minnesota Supreme Court adopted a program of specialization. *In re Johnson* (1983) concerned an attorney who advertised that he was certified as a civil trial specialist by the National Board of Trial Advocacy (NBTA). The NBTA, a private organization, applied a rigorous set of standards before certifying an attorney as a trial specialist. As of 1983, the NBTA had certified only 541 lawyers.

The Minnesota Board of Professional Responsibility issued a charge of unprofessional conduct against Mr. Johnson. On appeal following an administrative proceeding upholding the provision, the Supreme Court of Minnesota held that the rule was unconstitutional as applied to the ad in question. The information seemed to be reliable, and Minnesota had, in a sense, defaulted by not creating a specialization program. The court acknowledged, however, that there would be significant problems with an attorney's self-designated claim of specialization or expertise if the state had created a specialization program.

*In re Johnson* raises more questions than it answers. Why is it assumed that the specialization function is one that in the first instance belongs to the State? Why should there be any question that a private organization could develop meaningful objective or subjective criteria for determining expertise? What is most surprising in the entire debate is that the obvious comparisons to the medical profession in the area of specialization are not drawn. Rather than tolerate the state by state development of fields of specialization, the medical profession has instead relied to a great extent upon private certification boards. While these boards have created their own forms of mischief, their basic functioning as developers of acknowledged and accepted definitions of relevant competence has proven beneficial. I cannot help but feel that the legal profession would be better served by some sort of analogous development. For present purposes, however, it is clear that the specialization issue should not be resolved as a compromise between the pro- and anti-advertising forces, both of whom are fighting different, as well as the wrong, battles.

Through the debate we have gotten some glimpses of the major currents of professional change, although these issues have been obscured at times in the advertising context. After ten years of arguing, we should take stock of where we have been. If we understand the advertising debate in its proper historical context, it is time to move beyond it. Instead of dealing at the fringes, we should address head-on the issues of specialization, competence, and access to legal services, leaving advertising alone. It is not so much that we have been wasting time—although there has certainly been some of that—but that instead we can now use the advertising debate as a springboard to address more important issues.



# The Tax Reform Act of 1986: The Impact on Support of Public Goods and Services

*Richard Schmalbeck\**

**T**here are a number of good things to be said about the Tax Reform Act of 1986 ("TRA '86" or the "Act"), though not many will be found here. To mention a few: the Act does accomplish important technical reforms in many areas; it will remove many of the so-called "working poor" from the income tax rolls; it will, overall, improve the efficiency of our tax system.<sup>1</sup>

So much for balance. In the present paper, I want to discuss something I regard as a negative aspect of the bill—one which I believe has gone largely unnoticed. That is, the Act will produce substantially less total revenue for public goods and services, and for what might be called quasi-public goods and services, than the pre-TRA '86 Code would have produced.

That may seem surprising since the Act is alleged to be revenue-neutral. One of my contentions is that, even if you look only at the federal budget, the Act is not likely to prove to be revenue neutral. But a second, more important contention is that it would be a mistake to look only at the federal budget in evaluating the revenue available for public and quasi-public purposes. The old Code provided a lot of indirect financing for a number of public or quasi-public activities that the new Code will simply not support at the same level. When these indirect effects are considered, it is clear that the funds in the public and quasi-public sectors in total will be significantly contracted, and presumably the scope of activities within those sectors will have to be contracted as well.

## **Revenue Neutrality: The Federal Budget**

Is the Act really revenue neutral even in the narrow sense of that concept, that is, will it produce the same tax revenues as the old Code would have? When it was enacted, Congress called the Act virtually revenue neutral. Congress' revenue estimates overall for the new act were that it would, over the five-year period from fiscal year 1987 to fiscal year 1991 inclusive, collect only \$286 million less than the old law.<sup>2</sup> This may sound like a significant sum, but it would be only a microscopic portion of the projected budget expenditures over that period of more than five trillion dollars.<sup>3</sup>

But Congress has not been very good at estimating revenue effects. The primary problem is that it has tended to underestimate the behavioral response of taxpayers and other rational actors to changes in the




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*This paper is based on remarks presented at a panel discussion entitled "Revolution in Our Tax Law," held at the University of Michigan Law School in November, 1986. Professor Douglas A. Kahn of the Michigan faculty and Dennis E. Ross, the Treasury Department's Tax Legislative Counsel, also participated in the panel discussion.*



tax laws. For example, suppose one wishes to estimate the revenue effect of repealing the deductibility of state and local sales taxes. One simple-minded way to do that would be to take Internal Revenue Service data on the dollars of such taxes that had been deducted in the most recent year for which that data would be available and multiply that times the weighted average of the marginal rates of the taxpayers who claim those deductions. That would yield the historical cost to the Treasury in that year of having that deduction in the Code. One would then adjust that cost upward for inflation over the intervening couple of years, and that would produce an estimate of what could be saved next year if that deduction were taken out of the Code. My understanding is that Congress, until fairly recently, developed revenue estimates in substantially that way; that is, it assumed *no* behavioral change would result from the change in the tax laws. The problem with that approach in this particular case, of course, is that repealing a sales tax deduction alone, without repealing deductions for state income and local property taxes, provides state legislatures with a fairly clear incentive to shift their revenue emphasis from sales taxes to income or property taxes.

Congress now claims to take these behavioral responses into account in developing a revenue estimate; however, Congress won't explain exactly how it goes about doing that, and it does not provide any backup detail on the precise calculations that have gone into the revenue estimates.<sup>4</sup> I have reason to think that Congress does not account very generously for these behavioral responses, but it is extremely difficult to verify that belief in view of the sparse published information regarding the method by which Congress develops revenue estimates. Occasionally, however, it is possible to find a revenue estimate in an area sufficiently simple that some inferences can be drawn about the degree to which Congress has incorporated a behavioral response. In fact, that can be done with respect to the repeal of the state sales tax deduction. Congress did, of course, repeal deductibility of state sales taxes in TRA '86, but left the property tax and the state income tax deductions in place. How much of a behavioral effect has Congress taken into account? To what degree has Congress anticipated that States may be inclined to change their revenue mix in the direction of greater reliance on income and property taxes? Surprisingly, Congress actually projects that revenue savings from repeal of sales tax deductibility will increase slightly over the five-year period to about \$4.91 billion by fiscal year 1991.<sup>5</sup>

This projection seems quite unlikely to me. There has been a significant move away from sales tax financing anyway in the last thirty years, from 58.3 percent of state revenue to 48.7 percent of state revenue between 1960 and 1984.<sup>6</sup> With the additional incentive given by the Tax Act, it would seem that that process would surely accelerate.<sup>7</sup>

*But Congress has not been very good at estimating revenue effects. The primary problem is that they have tended to underestimate the secondary effects of a change in tax law, by which I mean the behavioral response of taxpayers and other rational actors to changes in their economic situations.*

Of course, both of my degrees are from the University of Chicago, and Chicago School analysts are often faulted for assuming that people—even government officials—respond rationally, quickly, and thoroughly to changes in economic incentives. And it must be acknowledged that there are some institutional rigidities that will prevent wholesale abandonment of sales taxes. But it should be kept in mind that the Tax Reform Act of 1986 changes a great number of things affecting state revenues. Most state legislatures will be looking at their tax structures because they have to. They are going to find that changes in the federal definition of the taxable income base have implications for the state income tax. Some States will enjoy a substantial windfall; others will find that their revenues are actually contracted because of the overall lowering of the federal tax rates.<sup>8</sup> So States will be looking at their revenue needs and the current productivity of their major taxes. And I would think that in the process of that analysis, a major issue like federal tax deductibility will be on their minds. It won't be the only thing that determines the new structure of the state revenue-generating devices, but it will certainly be one factor that influences that structure. In concluding on this point, I would note that a shift from sales taxes to state income taxes seems politically salable: lower-income constituents will approve of the greater progressivity of income taxes, while higher-income groups will appreciate the deductibility of state income taxes.

What if I am wrong about this? To the extent that rigidities in state tax structures prevent legislatures from shifting revenue emphasis from sales to income or property taxes, then Congress' revenue estimates will be more accurate than I credit them with being. But Congress in that case faces another difficulty: it must then respond to a charge that it has treated the various States rather inequally. Why should, for example, the citizens of Washington (which has a substantial sales tax but no income tax) lose almost all of their state tax deductions, while the citizens of Oregon (which has no sales tax but a substantial income tax) lose none of their deductions?<sup>9</sup> Congress is thus in a dilemma to explain the impact of this change: either it has imposed a change which does not operate equitably with respect to citizens of all States or, to the



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extent that States are impelled to move away from reliance on sales taxes, the revenue gain Congress has projected from the repeal of state sales tax deductibility will be largely vitiated.

As I noted above, it is very difficult systematically to examine the revenue estimates that Congress publishes since it offers no explanation of how it comes up with the particular numbers. But there are some systematic biases in favor of over-estimation of revenues that seem worth noting. The first has to do with the basic nature of the tax-avoidance dynamic, which has become a familiar game in 1980's, largely because of the frequency and volume of tax legislation. The game can have any number of iterations, but the two basic moves are always the same: Congress enacts tax reform, plugging many loopholes; the tax-advice industry (which attracts a shamefully large number of the sort of minds that, in the Soviet Union, would belong to grandmasters of chess) pores over the legislation to find the leakiest plugs or other points in the revenue dike that are now ripe for the development of new loopholes. A legislative session or two later, the two steps are repeated. And so on. To the extent that Congress is able to anticipate the tax-advice industry's response to new legislation, it will try to skip the intermediate move; that is, it will try in the final version of the bill to plug any new loopholes opened by the early drafts of the bill. To the extent that Congress cannot anticipate the ingenuity of the tax-advice industry, it is presumably unable to reflect the effects of that ingenuity in its revenue estimates.<sup>10</sup> Those effects are not random, of course; they systematically favor taxpayers at the expense of the Treasury. Examples of this effect in the case of the TRA '86 abound. Did Congress anticipate how nimbly the banking industry would repackage the formerly cumbersome second mortgage into the new, no-closing-cost home equity line of credit, which for many taxpayers will permit them to continue to deduct personal interest payments?<sup>11</sup> Did Congress anticipate how quickly entrepreneurs would bring to market investment options designed to generate "passive activity" income to absorb taxpayers' existing passive activity losses, which the Act tried to make non-deductible?<sup>12</sup> I can't prove it, but I don't think Congress fully anticipated these responses; if it had, it probably would have written the Act differently in the first place.<sup>13</sup>

This taxpayer-response effect is likely to be worse under the TRA '86 than under most prior acts, it would seem, simply because this Act is so big, and affects so many different aspects of people's lives, that it will force nearly every taxpayer to evaluate his situation and to make changes accordingly. An act that made more modest changes might not occasion the kind of across-the-board review that this Act will produce.

Finally, the political atmosphere from which this bill emerged was one in which Congress went very quickly from a position of not really wanting a tax bill very much to wanting this particular tax bill a great deal, but only if it would be revenue neutral. Individual Congressmen frequently expressed mixed feelings about the bill, but it was quite clear politically that the Republicans wanted to enact tax legislation so that they could campaign in the 1986 election as having achieved fundamental tax reform during the Reagan administration, while the Democrats did not want to go into the election charged with having blocked tax reform. Once a bill emerged that was barely tolerable to a majority of Congressmen and that carried the label, "Tax Reform Act," it became nearly irresistible. The bill underwent a number of last-minute changes in an effort to make it revenue neutral, and the pressures on the people who are in charge of making the revenue estimates were substantial.<sup>14</sup> The staff of the Joint Committee on Taxation, which is charged with that function, is scrupulous and professional; even so, there is inevitably some tendency in the face of genuine uncertainty to prefer optimism to pessimism in the case of a bill that Congress clearly wants to enact, and whose enactment depends on a determination that it was revenue-neutral.

My conclusion is that the rate cuts really will cut revenue, but that the base-broadening measures may very well not produce as large an offsetting increment to revenue as Congress thinks they will.<sup>15</sup> This, of course, will worsen the deficit and make it even harder to maintain, much less augment, government programs.

### **Revenue Neutrality Beyond the Budget**

Important though all of that is, I think the indirect effects of the Tax Reform Act of 1986 will be even more significant. High rates combined with generous deduction rules have served over the past several years to channel funds privately in directions that Congress has wanted funds to flow. A number of tax commentators, dating back at least to the late Stanley Surrey, Harvard law professor and Assistant Secretary of the Treasury from 1961-69, have criticized this pattern, largely because of the lack of control and scrutiny of funds that are channeled to quasi-public purposes in that way.<sup>16</sup> I don't mean here to defend or condemn the use of the Internal Revenue Code to channel money for public purposes. I only note that it has



been a feature of our Code in recent years to have high marginal rates, but also to have a number of ways of avoiding the impact of those marginal rates for taxpayers who are willing and able to do particular things approved by Congress. But now the rules have been changed. We have much lower marginal tax rates and fewer ways of avoiding the impact of those rates. One effect of that change will surely be that substantially less money will be channeled toward ends that Congress has previously endorsed.

Let me illustrate this by an example: Under the pre-TRA '86 law, someone with a taxable income of \$150,000 with, say, \$100,000 of cash to invest, might well have invested that money in an apartment building that produced no net cash income, or even had a bit of a loss in cash terms. He might have found this action reasonable because the depreciation deductions and other tax benefits generated by his investment in that apartment building might have reduced his taxable income by, let us say, \$30,000. The individual would have saved about \$15,000 in tax. His situation would then have been as follows:<sup>13</sup>

Cash Income	\$150,000
Taxable Income	120,000 (cash income minus apartment deductions)
Tax	40,500 (1986 Joint Rates)
After Tax Income	109,500 (cash income minus taxes) <sup>18</sup>

Alternatively, this investor might have bought \$100,000 of corporate bonds paying, let us assume, \$12,000 of interest per year. This would have been less advantageous, however, since the adverse tax effect of foregoing his tax-sheltered apartment investment would have more than offset the additional income he would have gotten from the bonds:

Cash Income	\$162,000
Taxable Income	162,000
Tax	61,000 (1986 Joint Rates)
After Tax Income	101,000

So this taxpayer, being rational, would presumably have chosen the apartment investment instead of the bonds, and would have enjoyed a 109,500 after-tax income. Note however, that this total is \$52,500 less than the maximum pre-tax income that this taxpayer could have generated in 1986. This taxpayer can thus be said to have been burdened to that extent by the imposition of the 1986 tax structure as applied to one in his economic circumstances. This \$52,500 burden can be broken down into \$40,500 of explicit taxes and \$12,000 of implicit taxes—the bond income that he could have enjoyed, but elected not to because of his tax situation.

One of the TRA '86 reforms, however, is intended to preclude taxpayers such as this one from deducting losses on rental real estate investments against other types of income. When those provisions are fully effective, a hypothetical taxpayer such as the one de-

*Finally, the political atmosphere from which this bill emerged was one in which Congress went very quickly from a position of not really wanting a tax bill very much to wanting this particular tax bill a great deal.*

scribed will face a very different choice—a choice between a rental housing investment that generates neither cash returns nor tax deductions, and an investment in corporate bonds that generates substantial cash returns. If such an investor is rational, he would then choose the bonds. This will increase his taxable income, but the low post-TRA rates largely offset this. Thus, his 1988 tax situation will be as follows:

Cash Income	\$162,000
Taxable Income	162,000
Tax	45,000 (1988 Joint Rates)
After Tax Income	117,000

From one viewpoint this seems to be an attractive, almost magical, policy change—it looks as though both the government and the taxpayer are better off. The taxpayer has \$7,500 more after-tax income than he had in 1986, and the government has collected \$4,500 more tax than it collected in 1986. If you ask the Reagan Administration to explain this, its explanation might suggest that efficiency gains were responsible. That is, the administration might suggest that the tax-sheltering effect that I described was a drain on the economy, and that clearing out that underbrush from the Code really could make everybody, including the government, better off than they were before.

Unfortunately, that is an incomplete view because it has left out one of the major parties to this transaction. More specifically, under the 1986 system, this taxpayer paid an implicit tax of \$12,000, in the form of the interest income that he could have earned on his \$100,000 of investable capital but chose not to earn because he invested in the tax shelter instead. Some of that implicit tax was captured by landowners, construction workers, and other groups that Congress may or may not be particularly interested in subsidizing.<sup>19</sup> However, a substantial part of that implicit tax was, in fact, surely paid out as a rent subsidy to this hypothetical taxpayer's tenants. The taxpayer didn't set out to subsidize his tenants, but it was a natural effect of the market transaction in which he engaged. The tax benefits of investing in the apartment building were so generous that it enabled the taxpayer to make those apartments available at rents that did not cover the full economic costs of providing the apartments. In the case of rental housing, the rent subsidy was produced under the old system by the joint effects of high rates (about 50% for most



*My conclusion is that the rate cuts really will cut revenue, but that the base-broadening measures may very well not produce as much offsetting increments to revenue as Congress thinks they will. This of course, will worsen the deficit and make it even harder to maintain, much less augment, government programs.*

investors) and relatively generous deduction rules. Lowering the rates at the same time that the deduction rules are tightened obviously produces profound changes in the economics of the landlord-tenant relationship.

Even pure rate reductions without significant tightening of deduction rules can produce important changes in private incentives, however. For example, note the effect of the rate changes on the incentives to make charitable contributions. Suppose that in 1986 a wealthy individual made a \$10,000 cash contribution to his alma mater. Because he would have been in the fifty percent marginal rate bracket, the contribution actually would have cost him only \$5,000. The same contribution in 1988 will cost a wealthy taxpayer \$7,200, that is,  $\$10,000 \cdot (.28 \times 10,000)$ . The price of conferring a \$10,000 benefit on the school will have substantially increased. Economists generally believe that individuals respond to increased prices of conferring benefits on exempt organizations in the same way they respond to other price increases: they consume less of the good whose price has increased. One well-respected economist who has broken out estimates for particular types of charitable enterprises projects a 24-30 percent decline in individual contributions to colleges and universities.<sup>20</sup> Suppose that the result is in that range and that the hypothetical, \$10,000/year donor contributes 25 percent less in 1988 than he did in 1986, or \$7,500. He will still be able to deduct that contribution in full, and doing so will reduce the net cost of his gift by  $(.28 \times 7,500)$  or \$2,100. Thus, the net financial detriment to the alumnus of his 1988 gift would be \$7500-2100, or \$5400. The change from 1986 to 1988 is that the gift has cost the donor \$400 more, after accounting for his hypothetical response to the price effect of the tax rate change. On the other hand, the government is much better off: its charitable gift subsidy has declined from \$5,000 in 1986 to only \$2,100 in 1988—an apparent revenue gain of \$2,900. Again, however, there is a third party here: the university to which the contributions are made. In 1986, it received a \$10,000 contribution; in 1988, under these facts, it will receive only \$7,500. Of course, the tentative gains and losses

of the individual and the government are compensated for elsewhere in the bill. Revenue neutrality means that the government comes out even, and the modest overall individual rate cuts mean that this individual is likely to pay slightly less tax in 1988 than in 1986. The loss to the university, however, is a true loss—nothing elsewhere in the system compensates for it.

### Distributional Consequences

There are really two separate observations that follow from the foregoing examples. The first point is a distributional one. In 1986, the wealthy taxpayers in these examples not only paid substantial direct federal income taxes but some sizable implicit taxes (or, if one prefers, sizable tax-avoidance expenses) as well. The \$12,000 of interest foregone in the first example and the extra \$2,500 of charitable contributions in the second represent costs incurred in a high-tax system that would not be incurred in a low-tax or no-tax system. From the individual taxpayer's viewpoint, the substantial rate cuts reduce the effectiveness of, but also the need for, much of this tax-avoidance behavior. It can be predicted with confidence that taxpayers will engage in less of it. While this is in many respects laudable, it should be remembered that high-bracket taxpayers have always borne the bulk of these implicit taxes, since this phenomenon is driven by the high marginal rates to which only they were exposed. They will, therefore, receive the largest part of the benefit of the reduction in implicit taxes. This is precisely the case for the hypothetical investor in my earlier example. Under the 1986 Act, he will pay somewhat more direct tax, but the much larger reduction in implicit taxes leaves him considerably better off in after-tax terms. Because Congress ignored implicit taxes in the arithmetic of producing a modest tax cut that was allegedly equally proportioned by income group, my contention is that the tax cut is in fact by no means balanced, but rather is tilted in favor of the high-bracket taxpayer.

There is more than a little irony in this. Liberal congressmen and commentators could hardly argue very persuasively that the cut in implicit taxes should have been taken into account, since they have never really admitted that implicit taxes of the sort I've described exist. One of the liberal credos has been that our tax system was not significantly progressive. In fact, the pre-TRA income tax was significantly progressive, but it was so in large part because of the sizable implicit taxes paid by high bracket taxpayers.

There is, of course, one possible countervailing effect that should be mentioned, though it is unclear exactly how it should be incorporated into the distributional analysis: Congress anticipates that the Act will raise about \$120 billion more from corporations over the next five years than the old Code.<sup>21</sup> To the extent that these additional taxes are borne by holders of capital—presumably high-bracket taxpayers—it



could vitiate the effect of the cut in implicit taxes. That this is a distinct possibility cannot be convincingly denied. However, there are a number of reasons to be uneasy about whether the extra corporate taxes will entirely offset the reduced implicit taxes on individuals. Primary among these reasons, of course, is the general conceptual uncertainty regarding distribution of the burden of corporate income taxes. Significant parts of the incremental TRA '86 corporate tax burdens may be borne by the employees and customers of corporations and by foreign holders of capital rather than by purely domestic holders of capital. It should also be noted that some of the major revenue items constituting the increase in corporate tax collections are not permanent. An example is the recapture of the excess bad debt reserves held by banks over the three-year period from 1987 to 1989.<sup>22</sup> This may generate some one-time windfall losses for holders of equity interests in commercial banks, but it will not increase the tax burden on capital investment once economic equilibrium, post-TRA '86, is restored. And, of course, one important feature of that post-TRA equilibrium will be a corporate tax that has a maximum rate of only 34%, more than a quarter less than the pre-TRA rate of 46%.

Finally, it should be remembered that in assessing the impact of the \$120 billion corporate tax increase over the next five years, one is only looking at the *explicit* taxes paid by corporations. An implicit-explicit tax dynamic applies to corporate taxpayers as well as individuals. A hypothetical corporation may have bought, in 1985, a \$10,000 machine, and taken a \$1,000 investment tax credit. The credit reduced actual taxes by \$1,000, but if the net benefit of the machine to the corporation was only, say, \$9,200, then the company could be said to have paid \$800 in implicit taxes, or tax-avoidance expenses.<sup>23</sup> Conversely, TRA '86's repeal of the investment credit will surely increase tax collections from corporations, but the amount of the increase in tax may overstate substantially the net after-tax detriment to corporate taxpayers.

Putting all these things together is difficult; there are too many opposing vectors of uncertain magnitude to be confident about the net outcome. At this point, it seems to me that all that can be said about the distributional effects of TRA '86 is that the substantial cuts in implicit taxes will disproportionately benefit high-income taxpayers, and that this effect may be partly offset by increased burdens on income from capital.

#### **Social Effects of Reduced Implicit Taxes**

The second point worth noting about the substantial reduction in implicit taxes is that, whether or not the shadow revenues those taxes generated were used efficiently, they were buying billions of dollars of public and quasi-public goods and services that will not be bought under the post-TRA Code. Esti-

*But the ongoing debate over tax expenditures has been whether it is preferable to fund public and quasi-public activities directly, through appropriations, or indirectly, by failing to collect taxes otherwise payable. What the TRA '86 does is to cut substantially the indirect financing of public and quasi-public activities, without undertaking any analysis of whether and to what extent those activities are deserving of direct appropriations.*

mating how much these activities must contract is very difficult, but some indirect data on this question is provided by the Office of Management and Budget in the form of its analysis of tax expenditures.<sup>24</sup> The President's Budget for the government's 1988 fiscal year (October 1, 1987 through September 30, 1988) provides estimates for the "outlay equivalents" of the Code features that permit taxpayers to avoid taxes otherwise owed if they engage in particular activities, such as making charitable contributions, investing in solar energy devices, etc. An analysis of these so-called "tax expenditures" is prepared each year, showing estimates of the level of such expenditures, by category, in the recently completed fiscal year, and projections for those levels in the current and next succeeding fiscal years.

These estimates and projections do not perfectly illustrate the contentions in this paper, but they are of interest. One of the problems with the data is that there is no consensus on what constitutes a tax expenditure—each tax policy commentator would have his own list of appropriate items, based in large part on that commentator's view of what should be in the tax base in the first instance. Furthermore, the numbers may overstate the TRA '86 impact on funds available for public or quasi-public purposes since some of the tax expenditures represent items that nearly everyone would concede to be loopholes, which buy little if any such goods and services.<sup>25</sup> On the other hand, the numbers presently available understate the impact of the fully effective TRA '86 since they only extend through the 1988 fiscal year, during which many of the TRA '86 provisions will be only partly phased-in.

With these limitations in mind, consider the following reductions in tax expenditures:

—OMB predicts that the outlay equivalent cost of the charitable contribution deduction will decline from \$16.6 billion in fiscal year 1986 to only \$11.6



billion in fiscal year 1988.<sup>26</sup> Under the analysis described in detail in the "Distributional Consequences" section above, it seems likely that much of this reduction will be at the expense of charitable entities themselves, and not at the expense of contributors to those entities.

—OMB predicts that the outlay equivalent of allowing deduction of state and local taxes will decline from \$32.6 billion in fiscal year 1986 to about \$22.0 billion in fiscal year 1988.<sup>27</sup> (About half of this difference is attributable to the repeal of the state and local sales taxes, the effect of which may be overestimated.) The 28% maximum tax rate, and the reduction in the number of taxpayers who will find it advantageous to itemize under the new Code, will lessen the part of state and local tax burden that is shared by the Treasury. State and local taxes will be about ten billion dollars a year more painful than they were before; an indirect federal revenue-sharing device has been pruned dramatically.

—OMB predicts that the outlay equivalent of allowing deduction of mortgage interest payments on personal residences will decline from \$30.7 billion in fiscal year 1986 to \$19.9 billion in fiscal year 1988.<sup>28</sup> The Treasury's indirect contributions to Americans' mortgage payments will thus decline about eleven billion dollars per year.

The list goes on and on, running to more than one hundred separate items altogether. In total, OMB expects outlay equivalents of tax expenditure items to decline from \$473.5 billion in fiscal year 1986 to \$328.1 billion in fiscal year 1988, a decline of more than thirty percent, with more cuts to come as the Act's provisions become fully effective.

Recall that the point here is not that all of these tax expenditures should have been continued indefinitely at their 1986 levels. The reduction is in many respects praiseworthy. But the ongoing debate over tax expenditures has been whether it is preferable to fund public and quasi-public activities directly, through appropriations, or indirectly, by failing to collect taxes otherwise payable.<sup>29</sup> What the TRA '86 does is to cut substantially the indirect financing of public and quasi-public activities, without undertaking any analysis of whether and to what extent those activities are deserving of direct appropriations. Furthermore, because the Act, at best, does nothing to lessen the explicit budget deficit, and (if I am correct) is likely to make the deficit worse, there isn't room in the budget for any new direct expenditure programs to replace those for which Congress has reduced its indirect support.

### Conclusion

Where does all this leave us? I believe it leaves us with considerably shrunken federal support of public and quasi-public goods and services, a de-funding that has been accompanied by an equally sizable reduction in implicit taxes that is malapportioned by income group. While the high pre-TRA rates did not collect a great deal of tax, they did encourage upper-middle and upper-bracket taxpayers to behave in ways

that Congress thought healthy for the republic. TRA '86's message to those taxpayers is that such behavior is no longer required, that they can keep the bulk of their substantial incomes even if they spend them on yachts and BMWs rather than on rent subsidies and charitable contributions. This may be Ronald Reagan's vision of a better tomorrow, but is it truly a vision shared by the two-thirds of the House, and three-quarters of the Senate that voted for this Act?

1. On the other hand, it is likely to do little to achieve the other two goals of the President's 1985 tax reform initiative: promoting simplicity and fairness. One should not judge Congress too harshly for failing to do more, however, since efficiency, fairness, and simplicity are in some measure competing goals rather than complementary ones.

2. H.R. Rep. No. 841, 99th Cong., 2d Sess. II-884 (1986).

3. "Current services" outlay estimates (representing expenditure levels necessary to maintain current government programs without amendment) for fiscal years 1987-1991 (the same period for which the Act's revenue impact was estimated) were provided in the President's Fiscal Year 1988 budget. They totaled \$5.6 trillion for those years. Special Analyses, Budget of the United States Government, Fiscal Year 1988, at A-5.

4. An interesting description of the Congressional revenue-estimating process is provided in a two-part series in a recent volume of *Tax Notes*. See 33 TAX NOTES at 698 and 788, November 24, 1986 and December 1, 1986.

5. The revenue savings projections, by fiscal year, are as follows: FY 87: \$744 million; FY 88: \$4.876 billion; FY 89: \$4.442 billion; FY 90: \$4.557 billion; FY 91: \$4.908 billion. H.R. Rep. No. 841, 99th Cong., 2d Sess., II-866. The low FY 87 estimate reflects the fact that the provision will be effective only part of the year and will be reflected primarily in differentials in refund checks, which are paid out the year *after* the tax year in which a change in law becomes effective. The relatively high estimate for FY 88 presumably reflects the fact that the top 1987 marginal rate will be 38.5%, so that the revenue savings from not allowing a particular deduction in the Code will be higher than when the full TRA '86 rate cuts are effective. (And, again, the legal rate for 1987 primarily affects refunds paid in the spring of 1988). The steady increases of about five percent from FY 89 to FY 90, and from FY 90 to FY 91, presumably reflect an inflation assumption of about five percent per annum.

6. 1987 Statistical Abstract of the United States, Table 432.

7. I am fairly confident that States will collect a lower proportion of their total revenue from sales taxes in the future than they do today. This could take the form of lowering sales taxes while increasing income taxes (producing roughly constant revenue flows) or through leaving sales taxes at current levels, while income taxes are increased (producing increasing revenue flows). In the latter scenario, Congress' revenue gain estimates for repealing deductibility of sales taxes could be approximately correct. Congress will in that event, however, have lost revenue in the form of the additional deductions generated by increased income taxes, a revenue loss that does not appear to have been accounted for in its assessment of revenue gains and losses. In either case, revenues under the new tax law will have been overestimated.

8. For example, the Nebraska state individual income tax is simply 18% of federal tax liability. NEB. REV. STAT. § 77-2715. Since the TRA '86 embodies a modest reduction in individual tax collections, Nebraska's collections will, absent legislative change, similarly decline.

9. A cynic would quickly find an explanation of this phenomenon: Oregon's Senator Robert Packwood was chairman of the Senate Finance Committee; the Washington delegation in the 99th Congress had representatives on neither the Senate Finance Committee nor the House Ways and Means Committee (the tax-writing committees of the two houses of Congress.)

10. Congress does have one other tool, which it has used increasingly in recent tax legislation: it can empower the Treasury to close loopholes, through regulations. See footnote 12, *infra*, for an example.

11. Section 511 of the Act repeals deductibility for most non-business interest expenses. Subject to some conditions and limitations, however, interest on mortgage loans secured by a personal residence will continue to be deductible.

12. Section 501 of the Act limits deductibility of losses from so-called "passive activities." However, any such losses can be taken against income from passive activities in the same year. The trick, then, is for taxpayers to convert investment activity income (which may not be netted against



passive activity losses) into passive activity income. This is an area that Congress has specifically empowered the Treasury to deal with by regulations, suggesting in the conference report that: "this authority be exercised to protect the underlying purpose of the passive loss provision, i.e., preventing the sheltering of positive income sources through the use of tax losses derived from passive business activities." H.R. Rep. No. 841, 99th Cong., 2d Sess. II-147 (1986). It is my belief that the Treasury Department will enjoy, at most, only partial success in this area. See also the Lipton article cited at note 13, *infra*.

13. To be sure, Congress did anticipate many of the avoidance strategies that might occur to tax advisors and took steps in the Act itself to make those strategies ineffective or less attractive. There are several examples even in the two sections cited in the immediately preceding footnotes. However, one gets some sense of what Congress is up against from the titles of articles on the new Act in the December, 1986 *Taxes* magazine, which included an article by Richard M. Lipton entitled: "Fun and Games with Our New PALs," (noting that "many opportunities for creative tax planning" are provided by the new passive activity loss rules. 1986 *Taxes* at 801). The same issue contained a commentary on the corporate tax reforms, the centerpiece of which was the repeal of the pro-taxpayer *General Utilities* doctrine. This latter piece, by Louis S. Freeman, was entitled: "Some Early Strategies for the Methodical Disincorporation of America After the Tax Reform Act of 1986: Grafting Partnerships onto C Corporations, Running Amok with the Master Limited Partnership Concept, and Generally Endeavoring to Defeat the Intention of the Draftsmen of the Repeal of *General Utilities*." (1986 *TAXES* at 962.) These papers were presented at a tax conference held less than one month after the TRA '86 had been signed into law.

14. For example, when the revenue estimators at one point revised downward their overall revenue estimate, they were harshly and publicly criticized by Senator Packwood. For a brief description of this episode, see 33 *Tax Notes* at 698, November 24, 1986.

15. Some early confirmation about the overall revenue judgments expressed in this paper was provided by the Treasury Department in January, 1987 when it announced that it estimated that the new tax law would in fact lose \$15.7 billion in revenue, compared with the old law, over the FY 87-91 period. The Treasury attributed the difference between its estimate and the Joint Committee on Taxation estimates as stemming from, *inter alia*, "different responses in taxpayer behavior" from those assumed by the Joint Committee. (Letter from O. Donaldson Chapoton, Deputy Assistant Secretary of the Treasury, as quoted in 34 *TAX NOTES* 310, Jan. 26, 1987.) The Congressional Budget Office has also provided new estimates of the revenue effects of the Act; it predicts a \$9.1 billion revenue loss. *Id*

16. See Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 *HARV. L. REV.* 705 (1970); Surrey, *Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance*, 84 *HARV. L. REV.* 352 (1970).

17. For simplicity, I have assumed in this and the following examples

that taxable income equals cash income minus any deductions explicitly noted in the hypothetical. This obviously ignores exemptions and other deductions that this taxpayer would be able to take, but doing so does not impinge on the analysis in any significant way.

18. Note that the apartment deductions, being by assumption pure "paper losses," need not be subtracted to determine the true economic after-tax income for this taxpayer.

19. Subsidies of this sort in effect change the demand curve for all the factors of production of rental housing, permitting owners of appropriately zoned land, providers of labor, financiers, etc. to charge more for their goods and services than would be possible in a more neutral tax system. Reducing distortions such as these was a major goal of TRA '86.

20. See Clotfelter, *Life After Tax Reform for Higher Education* (January, 1987 Working Paper, at 7.)

21. H.R. Rep. No. 841, 99th Cong., 2d Sess. II-884 (1986).

22. Section 901 of the Act generally requires recapture of excess bad debt reserves of banks over a four-year period.

23. The \$10,000 payment to the supplier of the machine that was only worth \$9200 to the buyer could be viewed as a \$9200 payment for the machine, and an \$800 payment for the tax credit.

24. See *Special Analysis G*, in *SPECIAL ANALYSES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1988*, at G-1.

25. For example, the provisions of IRC § 585, which in past years have allowed commercial banks to deduct larger additions to bad debt reserves than were necessary properly to account for their loan losses, might be considered a pure loophole, rather than an indirect purchase of some quasi-public good or service. Even this relatively uncontroversial example, however, shows how treacherous it can be to divide tax expenditures into those that accomplish some Congressionally approved purpose and those that do not. It could be argued that a generous bad debt reserve provision was considered by some in Congress as a means of ensuring a greater degree of bank solvency and safety, or perhaps as a means of compensating banks indirectly for the opportunity costs of satisfying Federal Reserve Board reserve requirements. Presumably Congress had *some* reason for allowing banks to accumulate excessive bad debt reserves. In some sense, the only reason for continuing a tax expenditure that would not support my argument here regarding the indirect purchase of quasi-public goods and services would be if Congress' motive for the provision were simply to provide rate relief. That is, if some of pre-TRA provisions were intended primarily to relieve the burden of the 50 percent individual rate (or the 46 percent corporate rate), then repealing the favorable provision at the time that rates are cut creates no reduction in quasi-public goods and services financed.

26. *Special Analysis G*, *supra* note 18, at G-39 to G-40.

27. *Id.*, at G-38, G-41.

28. *Id.*, at G-38.

29. Note again the titles of the Surrey articles cited *supra* in note 12: they make it quite clear that Surrey himself, at least, did not intend that activities supported by tax expenditures be abandoned, but merely that they be supported at suitable levels by direct appropriations.



# ABOUT THE SCHOOL



# Duke Law School Conference on Career Choices

*"If I only knew then what I know now. . . ."*

How many times have you heard that phrase? If you are like most people, probably a hundred times. In fact, it is likely that you have used it more than a few times yourself. It is only natural to feel that the critical decisions you agonized over are easier when viewed with hindsight. After all, you are able to draw upon a wealth of personal experience. Your successes and failures provide guidelines for each future decision you make.

Unfortunately, however, few people benefit from the previous successes and failures of others. Rather, each of us is left to perpetuate the never-ending cycle of trial and error. A step was taken at Duke Law School this spring to combat this unfortunate cycle. Recognizing that career decisions are among the most critical faced by law students, the Duke Bar Association and the Law Alumni Association jointly sponsored a program designed to provide insight into this area and to help minimize the agonizing process of trial and error. The program was entitled the Conference on Career Choices and was modeled after a program of the same name for Duke undergraduates. The program consisted of a series of panel discussions featuring Duke Law alumni in various legal fields who could provide information regarding their different careers and how personal objectives may relate to career choices. The day ended with a reception for all students and conference participants held in honor of the graduating class.

The alumni response was overwhelming and truly heartening. Twenty-nine law alumni, from as

far away as California, Colorado and Wisconsin returned to the Law School to share their personal and professional experiences with current students. Many of them commented that they were delighted to participate in a program which they wish had been available to them as students.

The topics presented in the program were based on the results of a law student survey. Six panels were presented: "Off-Broadway" Practice; International Law Practice; In-house Corporate Counsel; Alternative Legal Careers; Firm Speciality Areas; and Balancing Career and Personal Decisions.

*Off-Broadway Practice.* This panel brought back alumni from five smaller cities across the country and one representative from a "boutique" firm. The panelists mainly addressed the concerns of students about legal opportunities in smaller cities. The discussion provided several important insights. First, the panel assured the audience that the size of the firms in their cities was as varied as that in larger cities. One could choose a small "boutique" firm, a monolithic general practice firm rivaling the Wall Street giants, or anything in between. Second, with regard to sophistication of practice, not one of the panelists felt that he or she had compromised the quality of legal practice in choosing to work in the respective locations. Rather, in addition to being challenged at work, the panelists felt they enjoyed a "higher quality of life". They based this opinion on the lower cost of living and more relaxed lifestyle present in most smaller cities. In short, the panel expressed the view that practicing in smaller cities was a viable alternative that should be explored by all students. Many stu-

dents were pleasantly surprised by the presentation. One remarked that he was "pleased to hear that there are rewarding careers outside large law firms in large cities."

*International Law Careers.* While practicing in a small city may be one option available after graduation, another appealing option might be practicing in one of many exotic places around the world. After all, there would be a certain charm and mystique in flying to Europe or the Orient to counsel a client. The International Law Careers panel, sponsored by the International Law Society, addressed an audience of interested students about pursuing careers in this field. The discussion was filled with reflections of the fascinating people and places encountered by each of the attorneys on the panel.

Perhaps the most encouraging portion of the discussion came when the panel members noted that the field of international law is quickly expanding. Many firms are opening offices in foreign countries to better serve their international clients. With this growth trend, the demand for attorneys now exceeds the supply. A great deal of travel is generally required to practice in this field, but the panel members agreed that international law can definitely provide a challenging and rewarding experience for the right person.

*In-House Corporate Counsel.* This panel consisted of four alumni from the legal departments of major multinational corporations. The panel discussion was structured to describe the opportunities available in each corporation's legal department and then compare those opportunities with those available in firm practice. The panelists generally agreed





*Chris Sawyer '78, and Jim Padilla '78 take time to answer students' questions following the Law Firm Specialties presentation.*

that the opportunities offered in corporate legal departments are as challenging as those found in firm practice. Being an attorney with a corporation also provides other benefits. The in-house attorney becomes involved with legal concerns as they arise. In this way, the attorney's efforts are geared more toward preventing problems than fixing them. Because their advice generally is forward-looking, the hours of in-house attorneys tend to be less extreme than those of their counterparts in private firms.

The benefits, however, are not without cost. The panel members did note that they may receive less compensation than attorneys with comparable experience in private firms. Also, an attorney with a corporate legal department is subject to being transferred. The panelists felt, however, that the benefits received from practicing with a corporate legal department are worth the compromises they had made. One of the panelists, Martin Avallone '86, suggested that the students at least look into corporate practice, perhaps through a

summer clerkship. In that way, the student would be utilizing a clerkship to broaden his experience and education, the true purpose of summer clerkship programs.

*Alternative Legal Careers.* This panel showed the breadth of applications of a legal degree. The panel was comprised of an investment banker, a corporate entrepreneur, a law school professor, a part-time law professor/part-time law school administrator, and a public interest lawyer. The varied backgrounds of the panelists, though not representative of all possible applications of a law degree, were intended to illustrate that a law degree can be the key to many opportunities. The panelists stressed that the basic skills learned in law school—effective communication, problem solving, and organization—are generally in great demand and that with a little desire and creativity, the holder of a law degree can go just about anywhere he or she desires.

They also noted the benefits of alternative careers. For some, an alternative career may be more satisfying. John Forlines, '82, indicated that,

while practicing law was attractive, investment banking was more in line with his career interests. Brian Stone, '63, found that providing legal services to the needy was more important to him than serving the stereotypical clients of a large firm. For others, the type of lifestyle allowed by another field may be the attractive feature. For Michael Richmond, '71, the relaxed work environment of teaching law, coupled with its job satisfaction, makes it one of the most rewarding careers around. "It allows me to deal with many issues on a highly intellectual level and permits me to pursue outside interests more than any other career." The pursuit of an alternative legal career did not necessarily entail taking a drastic cut in salary, as Mr. Forlines and Robert Mitchell, '61, President of Law & Technology, illustrate. Salary was simply another consideration in deciding which career path to take. In all, students attending the Alternative Careers Panel found that a world of opportunities lies open to them upon graduation. The only limiting factor is the imagination.

*Firm Speciality Areas.* This panel consisted of six attorneys representing some of the major practice areas of a large firm. The panelists described their areas of practice, then proceeded to explain both the benefits and drawbacks associated with them. Robert Montgomery, '64, a corporate attorney from Los Angeles, and Christopher Sawyer, '78, a real estate attorney from Atlanta, described their fields as forward-looking. Both noted that they were challenged working with top corporate management structuring deals which had far reaching effects. Julie Davis, '64, a tax attorney from Washington, D.C., described tax practice as "cerebral and intellectually draining." She described a precision-oriented field geared toward achieving the most correct answer for clients. While Ms. Davis noted that dealing with the IRS can be a frustrating experience, the monetary rewards of tax practice can make it bearable. James Padilla, '78, a commercial law attorney from Denver, described the inner-



workings of his practice. He said that he truly enjoys his current practice area, bankruptcy, where he aims to keep clients afloat. Steven Gilford, '78, of Chicago and Gusti Frankel, '84, of Winston-Salem presented contrasting views of litigation practice. Both described the field as backward-looking; they enjoyed piecing together the facts to create a case for their client. Ms. Frankel noted that life in the litigation field is "hassled," but that by carefully selecting your firm's size and location you can find the lifestyle most suited to your needs.

*Balancing Career Choices and Personal Decisions.* In the most well-attended panel of the day, a group of Duke Law alumnae, sponsored by the Women's Law Society, discussed a series of ever-increasing concerns faced by women professionals and two-career families. The panel took a unique chronological approach to the topic. Sandra Strebler, '62, and Elisabeth Petersen, '72, described the frustrations of entering a male-dominated legal profession before the women's movement of the 1970's. Many of the students in the audience were surprised by the difficulties faced by these women in seeking acceptance a relatively short time ago. Donna Gregg, '74, provided the viewpoint of a woman entering the legal field when women were first beginning to achieve more widespread acceptance in the profession. She related a feeling of accomplishment in making inroads toward establishing firm policies with respect to certain issues, such as pregnancy leave. Finally, Ann

Majestic, '82, and Elizabeth Roth, '82, provided a viewpoint of women entering the legal profession after the women's movement had supposedly attained equality.

Surprisingly, all of the women noted that many prevalent issues remain unresolved by firms, and the responses of firms which have taken action have been inconsistent. The uncertainty of response can make certain personal choices, such as having a child or requesting part-time employment, a risky undertaking. Donna Gregg also noted that these decisions are not solely "women's issues" but are issues which must be faced together by couples. She pointed out that her husband, Robert Gregg, '74, had also made many career choices based on the decisions they had made regarding their personal goals. As indicated by the large attendance, many law students were obviously interested in learning how panel members had handled these problems. One member of the audience noted that the panel was "a rare opportunity to get some useful and practical information on legal practice." Another found that the panel brought home the "importance of making decisions in light of your personal goals."

*Conclusion.* This last comment was typical of student response to the Conference in general. Most students found the Conference to be a great way to gain insight into various aspects of the legal profession. Many first-years used the Conference as an aid to finding a career path before beginning the recruit-

ment process. Upper-classmen found it a great way to reaffirm their career choices and/or to get more information about some aspect of their chosen legal career. One student noted that while the Conference did not result in any particular change in career plans, "it has given me a lot more to think about." The aspect of the Conference most appreciated by the students was the opportunity to hear the information from alumni first-hand. As one student put it, "Any information is helpful, but delivery via flesh and blood alumni was even more so." Other students found the discussions to be "candid," "helpful," and "insightful." A similar response was received from the alumni participants. They found the program to be a healthy exchange of information and would welcome the chance to participate again in the future.

Due to the positive response from students and alumni, the Conference will be an annual event at the Law School. Though an ambitious undertaking, the Conference will undoubtedly help many students make a more informed decision in selecting their career path.

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*The author, Robert Nagy, participated in the coordination of the Conference on Career Choices and would like to take this opportunity to thank the students, administrators and alumni who helped make the program such a success.*



## Participants in the First Annual Duke Law School Conference on Career Choices

### International Law Careers (sponsored by International Law Society)

- Patrick Fazzone, '81  
Collier, Shannon, Rill & Scott  
(Washington, D.C.)
- Paul B. Ford, '68  
Simpson, Thacher & Bartlett  
(New York, NY)
- Ron Katz  
Kadison, Pfaelzer, Woodard,  
Quinn & Rossi (Palo Alto, CA)
- Joseph Pike  
Graham and James (Raleigh, NC)
- Kimberly Till, '80  
Arnold & Porter  
(Washington, DC)

### Off-Broadway (Comparison of City and Firm Sizes)

- Harry Griffin, Jr., '63  
Griffin, Cochrane & Marshall, PC.  
(Atlanta, GA)
- Mark Koczela, '83  
Godfrey & Kahn  
(Milwaukee, WI)
- John Patterson, '72  
McGuire, Woods, Battle &  
Boothe (Richmond, VA)
- Steve Samaha, '84  
Annis, Mitchell (Tampa, FL)
- Mark Shepard, '82  
Buchanan Ingersoll  
(Pittsburgh, PA)
- Lori Terens, '80  
Ulmer, Murchison, Ashby,  
Taylor & Corrigan  
(Jacksonville, FL)

### Large Firm Specialty Areas

- Julie Davis, '64  
Tax—Caplin & Drysdale  
(Washington, DC)
- Gusti Frankel, '84  
Litigation—Womble, Carlyle,  
Sandridge & Rice  
(Winston-Salem, NC)

- Steven Gilford, '78  
Litigation—Isham, Lincoln &  
Beale (Chicago, IL)
- Robert Montgomery, '64  
Corporate Law—Gibson, Dunn  
& Crutcher (Los Angeles, CA)
- James Padilla, '78  
Commercial Law—Mayer,  
Brown & Platt (Denver, CO)
- Christopher Sawyer, '78  
Real Estate—Alston & Bird  
(Atlanta, GA)

### Balancing Career Choices and Personal Decisions (sponsored by Women's Law Society)

- Donna Gregg, '74  
Dow, Lohnes & Albertson  
(Washington, DC)
- Ann Majestic, '82  
Tharrington, Smith &  
Hargrove (Raleigh, NC)
- Elisabeth Petersen, '72  
Self-employed (Durham, NC)
- Elizabeth Roth, '82  
Ream, Train & Roskoph  
(Palo Alto, CA)
- Sandra Strebel, '62  
Spiegel & McDiarmid  
(Washington, DC)

### In-House Corporate Counsel

- Martin Avallone, '86  
IBM (Rye Brook, NY)
- Rondi R. Hewitt, '83  
Glaxo, Inc.  
(Research Triangle Park, NC)
- David Little, '79  
Exxon (Houston, TX)
- Vincent Sgrosso, '62  
BellSouth Corporation  
(Atlanta, GA)

### Alternative Careers for Lawyers

- John Forlines, '82  
Morgan Guaranty Trust Co.  
(New York, NY)
- Robert Mitchell, '61  
Law & Technology Associates,  
Inc. (New York, NY)
- Professors Gail Richmond, '71,  
and Michael Richmond, '71  
(Nova University Center  
for the Study of Law,  
Ft. Lauderdale, FL)
- Brian Stone, '63  
Volunteer Lawyers Foundation  
(Atlanta, GA)



*Brian Stone '63, Bob Mitchell '61, and Michael Richmond '71 listen to student reaction during the Alternative Careers for Lawyers panel.*



# Duke Society of Medical Legal Affairs: Bridging The Gap Between Law and Medicine

When law students and medical students at Duke University formed the Duke Society of Medical Legal Affairs (D.S.M.L.A.) in the fall of 1986, many people thought that the group's focus would be solely medical malpractice; they were wrong. "The purpose of D.S.M.L.A. is to foster understanding and discussion of the many areas where law and medicine interface," reports Andy Martin, who co-founded the organization along with Bob McDonough. According to Martin, "The proliferation of lawsuits has altered the pattern and practice of medicine. While we're interested in changes in the tort system, we're also focusing on medical corporate law, biomedical ethics, forensic psychiatry, and the use of medical experts in criminal and civil litigation." Partly as a result of such wide-ranging goals, D.S.M.L.A. includes members from the schools of law, medicine, health administration, divinity, public policy, and physical therapy. Topics for discussion range from "The Ethics and Law of Informed Consent," to "The Future of the Insanity Defense," and "Risk Management in Medical Malpractice."

One main focus of D.S.M.L.A. is medical corporate law. "Not many people realize that the health care industry makes up about 11% of the U.S. Gross National Product," says Brad Mindlin, Vice-President of D.S.M.L.A. "Medicine is a big business which is getting bigger, and it needs corporate lawyers who understand diagnostic-related groups (DRGs), preferred provider organizations (PPOs), and health maintenance organizations (HMOs)." In an effort to help meet that need, the D.S.M.L.A. sponsored a Health Law Job Fair this winter. Fourteen law firms, including several of the largest firms in North Carolina, sent representatives to the Job Fair,



*Officers of the D.S.M.L.A. represent a wide variety of disciplines. l. to r. Andy Martin, M.D. (law); Brad Mindlin (law/economics); Bob McDonough (medicine/law/public policy); Tom Iurlano (health administration).*

which was designed to help first year law students find summer jobs. Next year the group hopes to sponsor a panel discussion during the Conference on Career Choices.

While the emphasis on medical corporate law has drawn the attention of student members from the Law School and the School of Health Administration, the meetings on biomedical ethics have drawn upon a broader membership base. Undergraduates, divinity students, and medical students share an interest in topics such as the definition of death, euthanasia, the treatment of severely handicapped infants, and genetic engineering. For example, in the spring of 1987, D.S.M.L.A. co-sponsored a panel discussion on abortion with the Women's Law Society. The panel included Professor William Van Alstyne from the Law School; Takey Crist, M.D., a pro-choice advocate; Jewel Wheeler of the National Abortion Rights League; and Will Brooks, a right-to-life advocate. Panelists discussed the legal, medical and political aspects of abortion. The event, which also featured the North Carolina pre-

miere of the film "Eclipse of Reason" (the sequel to the graphic and controversial anti-abortion film, "Silent Scream"), was attended by over one hundred people and drew coverage from three local television stations.

The formula for D.S.M.L.A.'s success, however, depends on combining hard work with hard play. D.S.M.L.A. holds monthly meetings and social events. Last fall, for example, D.S.M.L.A. hosted a social for over 400 graduate students from the various schools. Members of D.S.M.L.A. also have the opportunity to attend conventions of the National Health Lawyers Association in cities such as Boston, Los Angeles, and Washington, D.C.

The group's leaders have plans for expansion on the Duke campus and beyond. "We're an organization with a broad interdisciplinary focus, and we intend to become leaders on the Duke Campus," says co-founder Bob McDonough. D.S.M.L.A. members took steps in that direction this year when they took on top leadership positions in the Duke University Graduate and Professional Student Council (G.P.S.C.). McDonough, who is working towards joint degrees in law, medicine, and public policy, was elected President; co-founder and D.S.M.L.A. President Andy Martin, a law student who already has his M.D. degree, was elected G.P.S.C. Treasurer; and D.S.M.L.A. Vice-President, Brad Mindlin, was elected Secretary.

Martin also has ambitious dreams of expanding D.S.M.L.A. to other schools. "We'd like to expand to other schools in the Southeast, Mid-Atlantic, and West Coast regions this summer. We'd like to be Duke's contribution to graduate schools nationwide. In this way, maybe we'll be able to promote harmony between the medical and legal professions."



# The Duke Bar Association

For years, the Duke Bar Association ("DBA") has served as the student government of Duke Law School. As such, it coordinates the professional, social, and other extra-curricular activities of the student body. It also serves as a mediator for students, faculty, and the administration. The DBA oversees all student organizations, publicizes Law School activities, sponsors athletic and social programs and dispenses its dues funds among the School's organizations.

In structure, the DBA is a representative organization comprised of an executive committee and three representatives from each class. Seven adjunct committees, comprised of both student and faculty members, work in conjunction with the DBA to bring student ideas and concerns to the attention of the Administration. The committees function in the areas of admissions; curriculum; placement; faculty appointments; the library; alumni and special events; and planning. The mission of the DBA is a simple one: to improve Law School life. The organization has been particularly active in recent years in striving to meet its goal.

Recognizing the need to reward outstanding professors, the DBA established the Distinguished Teaching Award in 1985. Each year the award goes to the professor whom stu-

dents believe has brought the most talent, attention, and concern to teaching. The decision is based upon nominations submitted by students. So far the award has gone to Thomas D. Rowe (1985); Richard C. Maxwell (1986); and James D. Cox (1987). The recipient of the award receives \$500 with which to purchase volumes for the library.

In an effort to increase student/faculty interaction, the DBA hosts a wine and cheese reception at the beginning of the school year so that students can meet faculty members in an informal, relaxed setting. In addition, the DBA has organized a student/faculty lunch program. Each week students now have the opportunity to have lunch with a selected professor. The DBA's efforts have thus enabled students and professors to get to know each other beyond the confines of the classroom.

The DBA, working through its Curriculum Committee, has helped bring student ideas regarding the curriculum to fruition. For example, the professional ethics course taught to first year students now receives more emphasis than in the past due to student concern. In addition, suggestions to enhance the first year writing program are currently before the faculty.

The student representatives to

the Alumni and Special Events Committee assisted the Law Alumni Office this year in coordinating the first Conference on Career Choices. Law alumni returned to Duke to speak to students on such topics as careers in specialized areas of the law, the practice of law in particular cities, and alternative legal careers. The Conference was an overwhelming success and will become an annual event.

Perhaps the most significant function traditionally performed by the DBA, however, is the coordination of various social events. Old traditions stand tall: The semi-formal Dean's Cocktail Party remains a gala event of the fall semester, and the infamous FLAW Day show spoofing the Law School experience remains a highlight of the spring semester. Yet, while old traditions remain, new traditions are beginning. Students also enjoy the fall picnic, softball season, midnight bowling, and a host of other social events to lighten up an otherwise rigorous law school schedule. In its quest to make law school life more enjoyable, the DBA seeks to bring students together on both an academic and social level. After all, the students themselves are what make the Duke experience so special.

## BALSA and Duke Law School

The Black American Law Students Association, Inc. (BALSA) was founded in 1967 at the New York University School of Law. BALSA's founders hoped that the fledgling organization would act as a catalyst for change in the legal system by addressing the impact of legal proceedings on the black community and by serving as a resource for black students pursuing a legal education. Today BALSA is a national organization with a membership of over 7,000 black law stu-

dents in chapters at 113 law schools. While remaining true to its original mission, BALSA has extended the scope of the organization's goals and activities.

BALSA goals now include: fostering professional competence among black attorneys and law students; examining the role of the black attorney in the American legal system; encouraging a greater sense of commitment among black attorneys and law students to the black com-

munity; and influencing law schools, legal fraternities, and associations to employ their expertise and prestige in the pursuit of justice and racial equality. Activities designed to implement these goals include: moot court competitions; pre-law education programs; community seminars; job placement conferences; grant programs; and legal aid programs. At an annual national convention, members review BALSA's progress and map future strategies.



The BLSA chapter at Duke University School of Law was established in 1976. In 1983, the Duke chapter name was changed to the Black Law Students Association (BLSA) to symbolize the inclusion of black students from other countries. In addition to participating in the national conventions, Duke's BLSA has been active in addressing a number of issues that impinge on the legal education of black students at Duke. One of its most important and ongoing activities is working in conjunction with the admissions office to encourage black students to enroll in Duke Law School. In this way, BLSA serves as Duke's ambassador to numerous black students who may be interested in a legal education. For the last two years, Duke's BLSA chapter has also sponsored a recruiting weekend for black seniors

who have applied for admission to the Law School. This year, twelve students from various universities, including Cornell, Yale, and the University of Virginia, attended the weekend's activities. Most recently, BLSA, in conjunction with the undergraduate Black Students Alliance at Duke, has implemented a program whereby members of BLSA "adopt" undergraduate students who have expressed an interest in pursuing a law degree. This year Duke's BLSA chapter established an Alumni Achievement Award. This award is presented to an alumnus/a who has made significant contributions to the legal community. The 1987 recipient of the award is Judge Charles Becton, '69, of the North Carolina Court of Appeals.

Duke's BLSA also lends the legal training of its members to improving

the quality of life for members of the Durham community. Members have volunteered their time and expertise in preparing briefs for suits where the potential ruling in the case concerns the civil rights of one or more of the litigants. In addition, BLSA works closely with other law student organizations and with the Duke Bar Association to address issues of interest to the Law School's student body. For example, BLSA has cosponsored events with the Forum for Legal Alternatives. Each year BLSA also sponsors Thanksgiving and Christmas fund raising drives to benefit needy Durham residents. In summary, Duke's BLSA serves as a conduit through which black law students at Duke can pursue their interests in serving the immediate Duke Law community as well as serving the black community.

## Duke's Forum for Legal Alternatives: Activism, Education, and Mutual Support

The Forum for Legal Alternatives (F.L.A.) is one of Duke Law School's most active and successful student organizations. Composed of students from all three classes who are interested in information about less traditional legal careers, F.L.A. is devoted to three central purposes. First, it is primarily an activist organization. It unites Duke law students to work for justice and human rights in current political, social, and legal issues. Second, F.L.A. seeks to fulfill an educational function. F.L.A. regularly brings in speakers on a wide variety of topics, ranging from legal representation of the impoverished to the legal and political implications of United States intervention in Central America. Finally, F.L.A. provides a network of mutual support, sponsoring social events and bringing together students who share similar hopes and career goals.

The Forum for Legal Alternatives was founded in the mid-1970's by a group of Duke law students who

felt the school needed an organization to initiate a dialogue on current political and social issues not adequately addressed by the school's curriculum. F.L.A. eventually expanded its scope to help publicize public interest job opportunities. In fact, Duke's Student Funded Fellowship (S.F.F.) started as a subcommittee of F.L.A., becoming an independent organization in the fall of 1978. Today, S.F.F. is also one of the law school's most dynamic groups, collecting over \$12,000 in pledges from students and faculty in 1986-87 to fund public interest jobs.

F.L.A. became dormant in the early 1980's until it was revived by David Birman, '87, who has devoted considerable energy and commitment to the organization. Since the fall of 1984, F.L.A. has consistently increased its membership and activities. Under Birman's chairmanship with a core membership of half a dozen first years and a budget of less than \$500, F.L.A. sponsored

events on the following topics during 1984-85: the Role of the Public Interest Lawyer; Capital Punishment in North Carolina; Gay Rights and the Crime Against Nature Statute; and Alternatives to Corporate Law Firm Employment.

The two highlights of that year occurred in the spring semester. The first was a presentation entitled "The Greensboro Massacre: Has Justice Been Done?" The keynote speaker was Lewis Pitts, lead attorney for the Greensboro Civil Rights Fund, the organization litigating on behalf of the widows and families of the individuals killed by the Ku Klux Klan in November, 1979. The second highlight was a panel discussion by members of the Sanctuary Movement, a predominantly church-based movement providing protection to illegal aliens certain to suffer persecution and even death if deported to their native countries. The panel included Sanctuary attorneys, religious leaders, activists,





## POVERTY LAW CONFERENCE

February 2-9  
1987

Duke Law School

and an illegal alien. Both the Greensboro and Sanctuary presentations were well-attended and received local news coverage, fostering dialogue in the community as well as in the law school.

In 1984-85 F.L.A. was also involved in the CROP walk for Hunger, the regional and national conferences of the National Lawyers Guild in Atlanta, and the sharing of public interest job information. F.L.A. also sponsored a Fall semester potluck dinner and a picnic lunch after Spring finals, allowing students to develop friendships in a more relaxed setting.

Reinvigorated by its 1984-85 successes, in 1985-86 F.L.A. was bolstered by increased membership and student interest, as well as a larger budget. The 1985-86 F.L.A. was led by co-chairpersons David Birman and Chris Petrini. The events sponsored by the 1985-86 group included a presentation by author and attorney Reed Brody, who utilized his legal skills to document human rights violations by the Contras. F.L.A. also sponsored speakers on the environment, racist violence in North Carolina, Indian rights, and apartheid. The organization co-sponsored a campus-wide conference entitled "Connections: Duke University Symposium on Apartheid."

Informative panel discussions provided F.L.A. with two of its biggest events of the year. The first was a panel discussion on the human rights violations suffered by Soviet

dissidents, co-sponsored with local chapters of Amnesty International. The keynote participant was Victor Davydov, a renowned Soviet dissident who defected to the West to tell his story. The second panel gathered lawyers and activists to discuss the legal implications of AIDS. The participants included two attorneys from New York gay rights advocacy groups, as well as a person suffering from AIDS-related complex. The discussion focused on discrimination suffered by AIDS victims in employment, housing, and insurance coverage, as well as what could be done to prevent such discrimination.

F.L.A.'s First Annual "Conference on Ethical Issues in Law School and Practice" was by far the highlight of the 1985-86 year. The purpose of the Conference was to assess the adequacy of legal ethics programs in teaching lawyers to fulfill their ethical and pro bono obligations. It also focused on ethical issues which face law students and practitioners who seek to advance the public interest. Held January 17-20, 1986 at the Law School, the Conference featured keynote addresses by Duncan Kennedy and Arthur Kinoy. Duncan Kennedy, founding member of the Conference on Critical Legal Studies, gave the opening keynote address on Friday, January 17. He spoke on "The Ethics of Professionalism in Law Teaching and Practice." Arthur Kinoy, civil rights lawyer and constitutional law professor at Rutgers University, gave the closing address

on January 20th entitled "Rights on Trial": The Lawyer's Duty to Promote the Public Interest."

The conference also featured panel discussions and audience questions on the following topics: The Critical Legal Studies Movement; The Ethical Responsibility of the Legal Profession in the Recruitment and Placement of Women and Minorities; Pro Bono and Public Interest Work Inside the Law Firm; Ethical Issues in Representing Civil Disobedience Groups; and The Good Moral Requirement for Attorneys. All of the conference events were well attended, especially the keynote addresses, which filled the largest rooms in the law school to capacity.

In addition, F.L.A. members attended the National Lawyers Guild Conference in Charlotte, which featured a workshop on recent developments in Section 1983 (42 U.S.C. 1983) law. F.L.A. also sponsored the collection drive for Oxfam's Day of Fasting, which netted several hundred dollars for famine relief, and the group held numerous social events open to the student body, including pizza meetings and dinner parties.

Guided by leadership of Co-Chairs Martha Hall and Brad Blower, the 1986-87 F.L.A. continued the pace of the preceding year, bringing numerous speakers to the law school on issues ranging from problems of the homeless to methods of constitutional interpretation. Some of its members decided to direct their interests to more practical matters and have helped local civil rights attorneys in voting rights and race discrimination cases. F.L.A. again sponsored the Oxfam famine collection, obtaining significant financial support from a previously untapped segment of the university population.

As in the previous year, the unquestionable highlight of 1986-87 was the F.L.A. conference. F.L.A.'s second annual symposium, entitled "Poverty Law Conference," also drew much support and initiated animated discussions at the Law School. The two major speakers for the conference were Robert



Hayes and Ralph Nader.

Robert Hayes is the Founder and Legal Counsel for the National Coalition for the Homeless in New York City. He spoke at the Law School on Monday, February 2 about the plight of the homeless and his efforts to combat it. Hayes spoke about his personal concern for the homeless and the ways in which he used his legal talents to translate that concern into action. In 1979, Hayes won a landmark decision in a New York City court, which found that the state constitution required the city government to provide shelter for all homeless men. The ruling was eventually extended to women and homeless families. According to Hayes, the solution to homelessness is affordable housing, but the supply is dropping due to cutbacks in federal public housing assistance and increased gentrification of urban areas.

The visit of consumer advocate Ralph Nader on February 5, 1987 was co-sponsored by the Duke Democrats, the North Carolina Public Interest Research Group, the Bassett Fund, Associated Students of Duke University (ASDU), and the Duke Public Policy and Political Science Departments. Over 400 students and faculty attended his speech at the Law School. Nader challenged the law students to pursue public interest and community-oriented careers. He pointed out that gains

for minorities and consumers were attained in the 1960's because the struggles were highly visible and the activists very creative. Today, the same struggles are less publicized but equally important. Nader challenged students to work full-time for their primary values.

On February 3, a panel discussion entitled "Solutions to the Problem" dealt with a range of issues raised in poverty law, including criminal and civil defense of indigents, and the rights of migrant workers, abused children, and victims of occupational hazards. Participants included Ann Loflin, a criminal defense attorney; Philip Lehman, past Executive Director and now senior staff attorney of North Central Legal Services; Billie Elerbee, senior staff attorney of the Farmers' Legal Services in Raleigh; Tobi Lipman, attorney for the North Carolina Occupational Safety and Health Project; and Maxine Alexander, a child advocate. The panelists discussed particular problems and characteristics of their work, and, in addition, offered some general observations on the nature and future of poverty law in this country.

Two other events focused more on the potential role of law schools in contributing to poverty law advocacy. A Wednesday, February 4 panel, entitled "How Law Schools Can Help," addressed how law school clinical programs can increase rep-

resentation for groups typically excluded from the legal system. Participants included the directors of the clinical programs at Duke, the University of North Carolina at Chapel Hill, and North Carolina Central University.

Finally, on Monday, February 9, Michael Caudell-Feagan, Executive Director of the National Association of Public Interest Law, spoke on the role of student funded fellowships and public interest law fellowships in providing representation to the impoverished. Mr. Caudell-Feagan lauded the development of these organizations, which have had a dramatic impact on the availability of legal services to the poor. These organizations are a concrete example of how law students themselves can use their creative energies to improve the balance of legal service in a tangible, palpable way.

As evidenced by these events, the Forum for Legal Alternatives has clearly had a stimulating, positive impact on the Duke Law School environment. By supplementing the law school curriculum with its activism, educational programs, and support network, FLA members and the student body as a whole go into the world more aware of their obligation and more confident of their ability to use their legal careers as a force for positive change.

## The Student Funded Fellowships Program

The Student Funded Fellowships Program (SFF) is a student run organization at Duke Law School which enables Duke law students to pursue alternative summer employment

with organizations whose salaries are insufficient for summer living expenses. "SFF seeks to correct the imbalance in summer job opportunities for Duke law students by funding jobs in non-traditional areas, such as civil rights, legal services, and environmental protection," noted David Birman '87, outgoing SFF Secretary. Funding is provided by current Duke law students, faculty,

the Law Alumni Association and, now, alumni. In order to maximize the contributors' control over the use of their donations, fellows are selected by surveying contributors. Each student seeking a fellowship submits a proposal, and contributors rate the proposals.

SFF has recently expanded in a spectacular fashion. In a fundraising drive this past February, SFF raised over \$12,000 in pledges from current students, faculty and the Law Alumni Association. This represented close to three times the amount raised in last year's drive. Using the slogan "Work a day in the public interest,"

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*Both SFF and PILF can be contacted through the Law School. The new President of SFF is Susan Maxson, '88.*



SFF encouraged students who had lined up much higher paying jobs with law firms to pledge one day's salary to the Fund. Thus, stipends could be provided for students who wished to take summer public interest jobs which often pay no or low salaries. The money will be available in the summer of 1988 to provide fellowships at a livable level for more students than SFF has ever funded before. "We're excited about the enhanced ability it gives us to support next year's candidates," said Peggy Force '88, outgoing SFF President.

This summer, SFF is helping Duke law students work in jobs as diverse as the Legal Aid Society of New York; the Prisoners' Rights Project at Duke Law School; and a special investigations project at the Department of Justice, which focuses on prosecuting Nazi war criminals. In past years, SFF fellows have worked as far afield as Alaska and Wisconsin on a wide range of legal issues with public interest organizations such as the American Civil Liberties Union, the Sierra Club Legal Defense Fund and legal services offices.

Graduates of the SFF program report that it has made a real difference in their legal education. "It was very helpful in building my sense of commitment to increasing access to justice," remembers Jan Volland, '83. Volland was an SFF recipient who worked for legal services. Following graduation, she was a sole practitioner for six months before deciding to join a public interest law firm in Durham. Volland still works with this firm, Gulley, Eakes & Volland, and she reports that work is going well. "The grant gave me the opportunity to start this kind of work. Also, I got the chance to work with individuals who were committed to the work."

Mark Goodman, '85, another SFF alumnus, reports that the grant made all the difference in his choice of career: "It's because of SFF that I'm in my present job." Goodman worked as an SFF fellow after his second year at Duke with the Stu-

dent Press Law Center, a public interest group in Washington, D.C. One year later, SPLC offered Goodman the job of Executive Director, and he accepted happily.

SPLC is the only organization in the country which counsels high school student newspapers about their rights and protections against censorship. "I love my job," Goodman continued. "I have a tremendous amount of responsibility. I'm the only attorney on staff, and I coordinate a pool of interns and law students. I wrote a Supreme Court amicus brief after three months on the job, and now I'm doing another one."

"It's sad that more law students don't have the opportunity to experience public interest jobs," Goodman reflected. "Many of them would love this kind of work. The pay is livable, and it's the kind of experience that they can never get in a law firm. SFF gave me that opportunity."

John Williams, '87, is a more recent SFF alumnus. Last summer Williams worked with the Sierra Club Legal Defense Fund in Juneau, Alaska. "I assisted one staff attorney on one case, opposing the Federal Bureau of Land Management's practices and policies in Alaska. I did research and writing and sections of briefs and motions on evidentiary issues," Williams recalled. "It was all federal court practice. I worked behind the lines; everything was filtered through a staff attorney."

Williams reported that the SFF experience shaped his career choice in a tangible way. He has accepted a job starting this fall with an environmental litigation law firm in New York City. "The fellowship confirmed my then shaky faith that it is feasible to create a socially responsible legal practice," Williams said.

SFF engaged in a range of other activities this year to enhance its principal fundraising work. Lisa Reed, '88, coordinated a t-shirt and sweatshirt sale which raised an estimated \$800 for SFF's administrative expenses. The shirts, featuring an original Duke Law design in bright,

eye-catching colors, were designed by Kevin Mulcahy, '88. SFF also co-sponsored a public interest jobs forum for first year students in the fall with the help of Cindy Peters in the Placement Office. "We wanted to dispel the myth that the only jobs available after the first year are in law firms," said Peggy Force, '88.

David Birman, '87, commented that SFF's vision is being extended to Law School alumni. "We've got a great pool of graduates who gave to SFF when they attended Duke, and we've never written them to ask for support. This year the SFF Board decided to take that step." Birman explained, however, that "the 1987 Pledge Drive was so successful that SFF decided to spin off a sister organization. I'm working now with John Keller, '87, and some recent alumni to create a new group—the Public Interest Law Foundation, which will fund year-long fellowships for Duke alumni." Birman said that the new group, known as PILF, will be sending out letters to SFF's list of prior contributors. However, it also will accept support from alumni who were unable to support SFF while they attended Duke.

Another key development for both SFF and PILF this past year was the emergence of a Washington, D.C.-based, national association of law school based fundraising organizations, known as the National Association for Public Interest Law (NAPIL). This group offers technical assistance to groups like Duke's SFF and PILF and has put Duke's fundraisers in contact with students at other schools doing similar work. NAPIL's Executive Director, Michael Caudell-Feagan, explained that the success of Duke's SFF this year is a small part of a national trend towards increased fundraising in law schools for public interest law projects. "We're working with law students and law alumni around the country," said Caudell-Feagan. "Last year, student fundraisers raised about half a million dollars for public interest jobs. And we think the total can go much higher, with the high energy that students like Duke's demonstrate."



# THE DOCKET



# Fulbright Scholars at Duke

Since its creation in 1947, the Fulbright Scholar Program (named for Arkansas Senator J. William Fulbright, the architect of the legislation which created the scholarship fund) has provided grants which have allowed more than 21,000 American scholars to conduct research or lecture in countries around the world. In its forty-year history, the program has done more than encourage an intellectual "cross-fertilization" between scholars and universities in countries as diverse as Togo, Papua New Guinea, Chile, and Great Britain. According to A. Kenneth Pye, Samuel Fox Mordecai Professor of Law and Chairman of the Council for International Exchange of Scholars (CIES) (the chief organization responsible for screening and nominating Fulbright Scholars), its most important achievement, "has been its contribution to public diplomacy. American Fulbrighters have demonstrated the best traditions of American scholarship and the genius of the American system of democracy. . . . Their greatest contribution to foreign understanding may well be in their example of the combination of excellence and diversity that has been a characteristic of American society and American education."

Professor Pye has served as Chairman of the Council for International Exchange of Scholars (CIES or Council) for the past two years. The Council, a private organization, is mainly responsible for the administration of the Fulbright Scholar Program. Its thirteen members are nominated by four sponsoring agencies—the American Council of Education, the American Council of Learned Societies, the Social Sciences Research Council and the National Academy of Science. The Council develops policy, responds to problems, and establishes procedures. It evaluates the effectiveness of various aspects of the program, such as procedures for ranking applicants, or the extent of feed-back received by scholars,



*Professor A. Kenneth Pye serves as Chairman of the Council for International Exchange of Scholars.*

and answers legal questions such as whether questions asked of applicants are appropriate. The Council makes its recommendations on policy matters to the Board of Foreign Scholarships (Board). The Council is also charged with screening and nominating promising young scholars and academics already well established in their fields for other prestigious grants for review by the Board. The Board, composed of twelve distinguished educational leaders, makes final decisions regarding determination of policy, establishment of criteria for selection of candidates and selection of candidates for awards. John Hope Franklin, James B. Duke Professor of History Emeritus and professor of legal history at the Law School, who has served as Chairman of the Board, was recently honored as the recipient of a Distinguished Fulbright Scholar Award on the fortieth anniversary of the program.

The Council is aided in this endeavor by its own permanent staff of seventy in Washington, D.C. and by advisory committees of scholars. Fifty Discipline Committees, comprised of leading scholars in a

variety of fields, review, evaluate and rank the applications of scholars applying to the program. The Seventeen Area Committees review the appropriateness of scholars for the annual country programs proposed by forty-three binational commissions and foundations and by U.S. embassies.

Richard C. Maxwell, Harry R. Chadwick Professor of Law at Duke, became quite familiar with the workings of these committees as he served stints on both varieties. Professor Maxwell served as Chairman of the Advisory Committee on Law from 1971 to 1974 and as Chairman of the Advisory Committee for the United Kingdom from 1974 to 1977. Before taking on these duties, Maxwell had served as a Fulbright Lecturer himself. In 1970, he was Fulbright lecturer at Queen's University in Northern Ireland, where he did some teaching of property law. He also enjoyed the opportunity to share ideas with scholars in that country. Some of his proposals were adopted by a parliamentary commission to revise the property laws of Northern Ireland.

Over the past two years, four Duke Law School faculty members have been awarded the prestigious grant. Percy R. Luney, Jr., Martha Price Research Fellow and Senior Lecturer in Law, was a Fulbright Research Scholar at the University of Tokyo during the summer of 1986. Professor Deborah A. DeMott, who teaches contracts, business associations, and corporate finance, spent four months in 1986 at Sydney and Monash Universities in Australia under the sponsorship of the Fulbright Fund. George C. Christie, James B. Duke Professor of Law, was a travelling Fulbright Scholar in New Zealand during the summer of 1985. Also during that summer, Martin P. Golding, Professor of Philosophy and Law, was a Senior Visiting Fulbright Lecturer in Australia, where he lectured on the philosophy of law at a number of universities.



For Professor Percy R. Luney, the Fulbright Research grant offered an opportunity to return to Japan (He previously spent six months as a visiting scholar at the University of Tokyo in 1983.) to continue his research on administrative decision-making in the Japanese civil bureaucracy. It is a subject closely related to the courses he teaches at Duke—Administrative Law in Japan, International Transactions with Japanese Businesses and Negotiations with Japanese Businesses.

In addition to lecturing at the University of Tokyo and Doshisha University, Professor Luney spent much of his five month stay interviewing Japanese government bureaucrats and leading administrative law scholars on the subject of “administrative guidance”—the largely informal process of bureaucratic influence on the private sector of life and industry in Japan. Although Professor Luney focused on the efforts of the Ministry of International Trade and Industry to control acquisition, distribution and allocation of natural resources and raw materials, he was especially interested in the relationship between government and private industry in that country. “Unlike the United States, where the relationship between the two is best characterized as ‘adversarial,’ in Japan the private industry/public sector relationship is more cooperative and reciprocal in nature. The absence of this adversarial posturing between government and business in Japan greatly affects the way business is done in that country.”

Professor Luney plans to publish several articles from his research on administrative guidance. He also intends to continue his comparative research on the Japanese and American government bureaucracies. “Unlike this country,” says Luney, “where high-level policy making positions in the federal government are typically held by inexperienced political appointees, in Japan the civil service—including all but the highest position in each ministry—is comprised entirely of career employees. Most have spent their entire

professional careers in government and have risen through the bureaucratic ranks, much as their counterparts have in the private sector.” Partly because of this promotion structure and partly because of the relatively “apolitical”—and prestigious—nature of their work, “Japanese bureaucrats are typically better trained, and more scrupulous than many of their counterparts in other nations.” Professor Luney believes that the Japanese civil service model offers helpful parallels for our own federal bureaucracy, much as American industry has of late begun to borrow from the management techniques of the Japanese private sector.

Professor Luney was greatly impressed with the students at the University of Tokyo, which he refers to as “the Harvard of Japan.” Their curriculum at the faculty of law was broader than the typical course selection of American legal studies. “There are no litigation oriented courses, such as trial practice and evidence, and the emphasis is more on providing a broad based legal education in both Japanese and international law. Most graduates of the faculty of law at the University of Tokyo enter business or public service.” In Japan, only the very few who manage to pass the extraordinarily difficult entrance exams of the legal Training and Research Institute (in a given year, roughly five hundred slots are available for some thirty thousand applicants) and complete the Institute’s two year course of study become practicing lawyers—usually prosecutors, defense attorneys, or judges.

Professor Deborah DeMott spent four months in Australia in 1986, where she jointly taught Securities Regulation with a member of the University of Sydney faculty and lectured on “Company Law” (the Australian equivalent of our Corporations or Business Associations course) at Monash University in Australia. She also made a brief speaking tour of New Zealand, where she lectured at the University of Otago and Canterbury University on mergers and acquisitions



*Percy Luney had the opportunity to get better acquainted with Professor Michida during his stay in Japan. Shinichiro Michida is a professor of law at Kyoto University. In spring of 1987, he taught a course on International Business Transactions with Luney at Duke Law School.*

in American business.

Professor DeMott became interested in Australian securities law through prior research on securities regulation in the Commonwealth countries and because of Australia’s active market in the area of corporate mergers and acquisitions. She noted that in Australia, unlike the United States, there is a “greater disenchantment with judicial activism in the area of securities litigation. This seems to be consistent with that country’s general attitude toward litigation—it has never been high on anyone’s agenda as a source of reform or change. It is a country which has more modest expectations of its judiciary.” Consequently, in Australia there are fewer limits on either the discretion or “business judgment” of corporate boards of directors, or on corporate raider activity.

Professor DeMott was frequently asked about the recent precedent-setting Delaware Supreme Court securities case, *Smith v. Van Gorkom*, 488 A.2d 858 (1985), and its implications for the erosion of the “business judgment rule” in Australia.



"There is a great deal of concern among many Australian attorneys that the *Van Gorkom* decision will undermine the traditionally largely discretionary, autonomous role played by the board of directors of an Australian company."

As a result of her Fulbright experiences, Professor DeMott will soon publish two articles in Australian journals: the first on shareholder litigation in the Commonwealth countries; the second on federalism problems in securities regulation law in Australia.

Professor Christie's interest in New Zealand's recent tort reforms, "in addition to a great deal of curiosity about the country," led him to apply for a Fulbright Travelling grant for the summer of 1985. (This was Professor Christie's second Fulbright Scholarship; in 1961-62, he was a Fulbright Scholar at Cambridge University, where he earned a Diploma in International Law.) During his summer in New Zealand, he lectured at four universities—the University of Auckland, Victoria University (Wellington), Canterbury University (Christ Church) and the

University of Otago—and taught Torts and Jurisprudence at the University of Otago.

Professor Christie was interested in studying the impact of New Zealand's recently enacted comprehensive accident compensation scheme. The plan, passed as the Accident Compensation Act of 1972, abolished the common-law tort system for accidental injury in New Zealand. In its stead, the New Zealand Parliament enacted a scheme resembling a modified, no-fault workers' compensation plan. Strict liability and intentional torts as common law remedies remained unaffected by the Accident Compensation Act. Professor Christie noted that the plan has been largely successful, mainly because torts for non-economic damages (that is, infliction of emotional distress) were not widely sought by plaintiffs prior to the Act. It is for this reason, he concludes, that such a no-fault plan would not gain acceptance in this country.

Professor Golding, who holds a joint appointment at Duke as Chairman of the Department of Philosophy

and professor of philosophy and law, lectured on jurisprudence at universities throughout Australia during the summer of 1985. At the University of Sydney, he "taught part of a term which involved regularly lecturing in a course on jurisprudence." At four other universities—the University of New South Wales, Adelaide, Melbourne and Queensland—Professor Golding "lectured mostly to the faculties of law." During his summer in Australia, he also had an opportunity to meet and exchange ideas with scholars from Australia and elsewhere. He attended and presented lectures at the Conference of the Australian Society for Legal Philosophy, the Second International Seminar on the Sources of Contemporary Law sponsored by the Ministry of Justice in Jerusalem, and the Twelfth World Congress on Philosophy of Law and Social Philosophy in Athens.

All four faculty members benefitted greatly from the opportunity to conduct research in their respective fields and learn from their counterparts at the universities which helped sponsor their visits.



*While in Australia, Professor DeMott took an eight day camel safari. Accompanied by two guides, a group of thirteen (all others Australian) mounted at the Camel Farm, which is an hour's drive south of Alice Springs. They rode to a base camp about 20 kilometers from the Farm, and, on subsequent days, took rides out into the desert.*



# Duke Law Alumni Pursue Diverse Second Careers



Christopher Britton '68

**The Author.** Christopher Britton, practicing attorney and Duke Law alumnus, class of 1968, has published his first novel, *Paybacks* (Donald I. Fine 16.95; Popular Library 3.95) According to its reviews, the novel contains "especially realistic court martial scenes with vivid presentation of legal points"; provides "exciting courtroom drama reminiscent of *The Caine Mutiny*;" and displays "an impressive knowledge of courtroom warfare." Such accolades are hardly surprising given the author's background. The highly acclaimed realism of the courtroom drama can probably be attributed to his continuing experience as a practicing attorney. He may have also drawn upon experience gained while still in law school. Britton took the job of deputy sheriff in Hillsborough while he was at Duke Law School. As part of that job, he also served as bailiff in court there, and he particularly remembers one fascinating murder trial during his tenure.

Though this is his first published novel, Britton says he has been writing for years—mostly poems and stories for friends. He also did extensive writing while at Duke Law School and not just briefs and memoranda. Chris wrote for the *Devil's Advocate*, the collection of satirical and amusing poems and stories published by Duke Law students. At that time, the *Advocate* was weekly and Britton was one of its main contributors.

The novel revolves around the beating death of a young Marine recruit at boot camp in San Diego and the subsequent court martial of his drill instructor (DI). The main character, Mike Taggart, is a young Marine attorney who has left his associate's position at a large Chicago law firm to complete his military service in the Marine Corps, including a tour of duty in Vietnam, and who finds himself serving as defense counsel for the drill instructor. The year is 1971, and, as the Marine Corps command presses for a quick trial to negate a public image condoning brutality, Taggart finds himself battling not only the prosecution but an unsympathetic press (with the exception of one young television newswoman who is at least sympathetic to Taggart if not to his client or the military system) and an ailing marriage characterized by a wife who would prefer the role of rising young lawyer's wife to that of military wife.

There are many interesting parallels between Taggart and Britton. Britton also interrupted the normal course of his legal career to fulfill his military service. He left his associate's position with Arter & Hadden in Cleveland after one year to serve three years in the Marine Corps. Why the Marine Corps? Britton explains that the Marines only required three years commitment if you enlisted. The catch was that they would not

guarantee legal jobs to attorneys, who were also required to go through regular basic training in addition to Officer Candidate School. Britton decided to take the shorter commitment and hope that the Marines would need another lawyer. He was not the only Duke law alumnus to take that deal, however; Britton went through Marine basic training with his friend and classmate, Mike Hardin. Britton also did a tour of duty in Vietnam, and, upon his return to the Marine base in San Diego, he served the Corps as a lawyer, which included defending some drill instructors who had been carried away by the physical training of their recruits. Though he never defended anyone against a murder charge, he particularly remembers defending a DI accused of stomping a recruit. The man was acquitted.

So how much of the novel is drawn from Britton's life? He admits that much of the book is real. In particular, the trial as well as the military background and settings and much of the interaction are an amalgam of Britton's experiences. Two of Taggart's fellow attorneys in the novel are closely modeled after two of Britton's friends in San Diego.

Other characters and situations in the novel are completely fictitious, however. Though he did work as an associate in a large midwestern firm before deciding to strike out on his own with a smaller firm in San Diego, he remembers his former firm fondly. It was not the legal factory requiring stereotyped personalities and lifestyles which Taggart feared rejoining in the novel. Indeed, Britton remembers his fellow attorneys there as being very supportive, particularly when he had to leave to fulfill his military obligation. He only decided not to rejoin them because he had fallen in love with San Diego. He is also quick to point



out that there has been no Veronica, Taggart's extracurricular love interest, in his life. In fact, he and his wife, Mona, have been sweethearts since they were seventh grade schoolmates back in Iowa. For Mona's sake, he also points out that Taggart's estranged wife, Cathy, who deplored his Marine Corps involvement is not modeled after his own experience. So, as all beginning writers are urged to do, he based his writing on what he knew and let his imagination take it from there.

Yes, Britton is working on another novel, but since he also has a busy practice, it may take a while to complete. He spent one year on the first draft alone of *Paybacks*. Rewriting and shepherding the manuscript through the publishing process took still more time. As Candace Carroll, '74, friend and fellow Duke Law alumna in San Diego opined, "I think he gave up sleeping for awhile." Chris made good use of his legal training during this process when he found it necessary to negotiate with his publisher regarding his edited manuscript. Evidently, the editor, a World War II veteran, made a number of changes which did not suit the tone of the novel. Britton listed the changes which were important to him, prioritized them and held a marathon negotiating session with the publisher from which he emerged with the most important passages intact.

**The Artist.** Rick Horton, '80, divides his time between his law office and his art studio in New York, which is not surprising since he also took some time to study art during his law school career. In 1978-79, following his second year, Horton received the North Carolina Artists Fellowship and spent the year living and working in Paris. He returned to the Law School—to the surprise of many who thought he would give up law for his art—and graduated in 1980.

Following graduation, he went to work for Reid and Priest on Wall Street for two years. During that time, however, he felt that he would like to have more time to devote to his



Rick Horton '80

Charles Springman

art. So in September of 1982, he left the security of the large firm and, bringing some clients with him, started his own firm in New York with fellow North Carolinian, David Lloyd. Horton's art actually brought the two partners together originally as they met when both were law students in North Carolina, and Lloyd bought some of Horton's work. "The firm has actually evolved to the point where I am able to spend about 95% of my time on my art at this point," reports Horton. Along with two law school professors who are of counsel to the firm, Lloyd handles the remainder of the legal work, in addition to serving as Horton's business manager.

Most of Horton's time then is spent in his studio—a loft on the top floor of a converted warehouse which sounds quite romantic. Horton, however, feels that too many would-be artists see only the romance and neglect the practical side of life. He likens surviving as an artist to being a one-man corporation. "I am everything from president and CEO to shipping clerk and garbage man."

Before establishing himself in his studio, Horton had lived, been educated and worked in North Carolina. He was born in Concord, North Carolina and received a B.S. in engineering at North Carolina State Univer-

sity before entering Duke Law School. Much of his work still resides in North Carolina in both private and public collections, including the North Carolina Museum of Art in Raleigh and the Duke University School of Medicine. In addition, he exhibits often in North Carolina. His work is also spreading throughout the country and the world. He has exhibited in galleries as far flung as Connecticut, Minneapolis, and San Diego; and his work is in public collections from the Musée National d'Art Moderne in Paris and the Puccini Museum in Italy to the Museum of Modern Art in New York.

Primarily a painter, Horton has also worked in a variety of media and techniques, including collage, object construction, drawing, and photography. In fact, Horton found that he could have launched a separate career as a photographer. His photographs have appeared in *Fortune*, *Business Week*, *Forbes*, *U.S. News and World Report*, and *Opera News*. He served as Director of Photography for several documentaries, including two for the American Broadcasting Company which took him around the world photographing famous people. The two films, "I Live for Art—Tosca" and "To Be—Hamlet", explored the personalities of people known for these



preeminent roles. For example, during filming of the Hamlet piece, he worked with Laurence Olivier, John Gielgud, Richard Burton, Maximillian Schell and Ben Kingsley. Although he enjoyed the photography, he has decided to devote himself to painting for now.

**The Entrepreneur.** All young associates are expected to participate in bar activities. Mike Harvey, '84, though a busy associate at Isham, Lincoln & Beale in Chicago, has found time for a different variety of "bar activities." He is part owner of two bars on Chicago's Northside in the Lincoln Park area. Actually, with two partners and a full-time manager, Mike does not have to spend too much time on these undertak-

ings. He does try to make himself available to answer questions or respond to problems and does a thorough inspection at regular intervals.

His partners, Jack O'Donnell and B. J. Nolan, are long-time friends. In fact, the three attended Holy Cross together, where they played on the same rugby team. They opened the first establishment, Mamie Riley's, at 2540 North Clark Street in October of 1986. Their first venture was fairly small but began to attract a good crowd from the neighborhood mainly by virtue of word-of-mouth advertising. Building on this success, the three partners opened The Hidden Shamrock, a slightly more ambitious undertaking, at 2723 North

Halsted Street in March of 1987. Food will be served at The Hidden Shamrock—mostly chili and sandwiches, though their Irish manager may also convince them to serve some Irish favorites, like shepherd's pie, to accompany the Guinness and Harp beers on tap.

Both establishments are "neighborhood-type taverns" with a 25-35 year old crowd, and both feature live Irish music during the week. Harvey reports, "The atmosphere is very relaxed and everyone seems to have a lot of fun . . . or at least I'm having a lot of fun." He invites all of our Chicago Duke Law alumni to drop in any time, or "if you're ever in Chicago, please stop in for a pint."



*Alumnus Profile***Making Waves on Wall Street***Gary Lynch, '75, Director of the SEC Enforcement Division**Ankers Capitol**Gary Lynch '75*

At the age of thirty-six, Duke Law School graduate Gary Lynch is the competent and innovative director of the Security and Exchange Commission's Enforcement Division. Under his leadership, the Division of Enforcement has sent shock waves through Wall Street by aggressively investigating and prosecuting big and small players alike for violations of the U.S. securities law. The list of successes attained by the SEC during Mr. Lynch's directorship is truly remarkable.

Gary Lynch grew up in rural Middletown, New York. Gary first became interested in the world of stocks through his father, who enjoyed playing the stock market as a hobby. Mr. Lynch earned his B.A. in 1972 from Syracuse University, where he was Phi Beta Kappa. From there, he entered Duke Law School and graduated in 1975. While at Duke,

he served on the Editorial Board of *Duke Law Journal*.

After graduating, Gary worked one year as an associate at a Washington, D.C. firm. Finding his experience less than satisfying, he left and traveled for a while, trying to decide if he really wanted to be an attorney. His motivation to join the SEC as a staff lawyer at the Division of Enforcement arose more from economic necessity than from a passion for securities or law enforcement. In his own words, however, once there he loved it. "I was given a case and told to run with it." Mr. Lynch quickly mastered the complexities of the investment world and progressed rapidly up the ranks.

From staff lawyer, Lynch became chief of the branch of the enforcement division which policed corporate takeover practices and then assistant director of enforcement. In 1982, at age 32, he was promoted to associate director of enforcement. When prior enforcement chief John Fedders resigned, Mr. Lynch was appointed acting director and then director of the Division of Enforcement in April, 1985.

In his position as Director, Mr. Lynch is responsible for overseeing and directing the efforts of the SEC's six hundred plus enforcement staff, including three hundred attorneys, most of whom are based in Washington, D.C. In addition, Mr. Lynch is responsible for working with and addressing the concerns of the presidentially appointed commission itself, while taking care to see that the complex and often turbid requirements of the securities law are enforced.

Since Mr. Lynch began his directorship in April, 1985, the Division

of Enforcement has racked up the following successes:

—Recovered \$7.8 million from a group of foreign investors who had used inside information to turn a high profit in the stock of Santa Fe International Corp. in 1981 before it was acquired by Kuwait Petroleum Corp.

—Required First Boston Corp., the first major investment banking firm ever accused of trading on inside information obtained from a client, to pay over \$400,000 in fines and restitution.

—Won a federal grand jury indictment of five individuals, including attorney Michael David, 27, an associate at New York's Paul, Weiss, Rifkind, Wharton & Garrison. The indictment charges an insider trading scheme in which confidential information concerning pending takeovers was taken from the law firm by Mr. David and passed on to two brokers in Drexel Burnham's arbitrage unit who used the information and traded in the securities for their clients.

—And, in the biggest success of all, initiated the largest insider trading case ever by charging Dennis Levine, Drexel Burnham Lambert Inc.'s merger and acquisition specialist, with establishing an elaborate insider trading scam in which he amassed about \$12.6 million dollars in illicit profits by trading on privileged information about upcoming mergers. The SEC won a preliminary injunction, freezing the assets of Mr. Levine. Mr. Levine cooperated with SEC investigators and helped put them on the path leading to Ivan Boesky, who had agreed to pay Levine for tipping him off on the mergers. Boesky signed an admission of guilt and



paid \$100 million in fines and restitution. Boesky has also agreed to cooperate with investigators, and this unprecedented, large-scale investigation continues to this day. The Boesky case has been headline news for months and has put to rest (at least for the time being) the perennial criticism that the SEC is too timid to go after the really big players.

—Continuing investigations into Boesky's dealings led to charges against Martin A. Siegel and Boyd L. Jeffries. Siegel, a principal architect of takeover strategies at two of Wall Street's most powerful firms, pleaded guilty to criminal charges of insider trading and also agreed to civil penalties requiring him to give up more than \$9 million in cash and assets. On three occasions, according to the SEC, Mr. Siegel secretly met agents of Mr. Boesky in public places, exchanged passwords and was given suitcases full of cash. The payments were in exchange for information regarding corporate takeover battles which he learned about as an investment banker at Kidder, Peabody & Company. Evidence supplied by Mr. Siegel has led to insider trading charges against other Wall Street figures. Expanding the reach of the investigation to the West Coast, Boyd Jeffries, founder and chief executive of Jeffries & Company in Los Angeles, agreed to plead guilty to charges of stock manipulation and helping Ivan Boesky break securities laws by concealing ownership of some stocks.

The result of these SEC investigations may have even more far reaching effects. As charges mount against some of Wall Street's best and brightest—not to mention its highest paid—sentiment grows in Congress and across the country for a radical change in trade regulations to combat what Senator William Proxmire of Wisconsin calls "a systematic pattern of abuse."

Gary Lynch and his enforcement division—unaffectionately dubbed the "Lynch Mob" by a New York securities lawyer—have realized these feats despite resources which seem inadequate, at least when judged by invest-



*Gary Lynch and Professor James Cox spoke at the inaugural meeting of the New York Area Duke Bar Association on "The Law, Lawyers and Insider Trading." l. to r. James Cox, James Crouse, President of the New York Area Duke Bar Association, Gary Lynch.*

Gary Lynch took time from his busy schedule to participate in the inaugural meeting of the New York Area Duke Bar Association on December 4, 1986. The evening began with a discussion of "The Law, Lawyers, and Insider Trading" by Gary Lynch and Professor James D. Cox from the Law School, followed by a cocktail reception. The event was very well received and the evening enjoyed by the approximately eighty Duke Law alumni in attendance.

This program is in keeping with an attempt to respond to law alumni requests to include substantive programs with the alumni events being scheduled now across the country. It also reflects what we hope will be a growing trend to invite more of our alumni to participate in these events, to which we traditionally send a Law School representative, to enhance discus-

sions of substantive legal areas.

The Law Alumni Office reports significant growth of local law alumni associations. There are presently twenty-nine such groups across the country, with eight more actively organizing. The number of law alumni events held in cities across the country has also significantly increased in recent years, from twenty-two such events in 1981-82 to well over fifty events in both 1985-86 and 1986-87.

If you are interested in finding out more about these programs, please contact the Law Alumni Office:

*Evelyn Pursley  
Assistant Dean or  
Maria Isikli  
Coordinator for Alumni Affairs  
3024 Pickett Road  
Durham, North Carolina 27706  
(919)489-5089; 489-5096*

ment world standards. Although Mr. Lynch has defended the adequacy of the SEC's \$111 million budget (About a third of this amount is for enforcement.), until this year, there had not been a staff increase since 1980. In the meantime, according to a report by Senator Timothy E. Wirth, D. Colo., since 1980 the volume of trading on the New York

Stock Exchange has increased more than 300 percent; the number of registered broker-dealers has increased more than 80 percent; investment company assets have tripled; and the volume of shares traded over the counter has increased by nearly 500 percent. This year, however, the SEC will be able to add thirty-five additional staff, including approx-



imately twenty-two attorneys, and they are seeking a budget of \$145 million. Such a budget increase would mean possible future staff increases.

In the meantime, Lynch does not bemoan the precipitous growth of the monolith on Wall Street his agency is charged with policing. He believes that time is better spent trying to figure out how most productively to allocate the staff and resources of the division rather than sitting back and saying that an effective job cannot be done.

Two factors contributing to the division's major successes are Mr. Lynch's management style and the capable leadership staff he has assembled. He notes "I approach my work the way I like other people to approach work. I like to face a problem and solve a problem, and not spend a lot of time philosophizing and theorizing about it. I put a big emphasis on problem-solving, and problem-solving quickly." District Court Judge Stanley Sporkin, one of the SEC's most noted enforcement directors, describes Mr. Lynch's staff as "a group of highly motivated people who are thinking all the time." The staff morale of the Divi-

sion of Enforcement is reportedly very high, and many of the country's top law graduates make the division their first choice of employment, despite the fact that wages are up to 60 percent less than what they could earn at top New York firms.

Although the insider trading cases are dramatic and receive the most publicity, Mr. Lynch has sought to develop and maintain diversity in the types of actions the SEC brings. The enforcement program is multifaceted—not one-dimensional. In fact, more of the SEC's resources are devoted to financial fraud and disclosure violations than to insider trading cases.

In addition to his success as Director of the Division of Enforcement, Gary Lynch has written several articles on insider trading and the legitimacy of defensive tactics in tender offers. For his work in enforcement, he was a 1984 recipient of the SEC Distinguished Service Award, the Commission's highest honorary award. Mr. Lynch was also named to the 1986 *Esquire Register*, an honor roll of 72 men and women under forty who are changing America. He has appeared

on national television broadcasts and has been featured in *Fortune*, *USA Today*, and *The National Law Journal*.

Mr. Lynch is a member of the D.C. Bar and serves as a member on the American Bar Association Subcommittee on Proxy Solicitations and Tender Offers and its Committee on Federal Regulation of Securities. In addition, he has prepared numerous outlines on securities law, which are often included in course materials for continuing legal education materials.

In addition to his duties with the enforcement division and his exhaustive array of professional activities, Mr. Lynch values his private family life. Though chasing down Wall Street criminals occupies the bulk of his time, he still finds time for gardening and for playing basketball on the SEC team.

This ambitious and successful 1975 graduate enjoys his job as Director of Enforcement and intends to continue working for the SEC for the time being. That spells good news for those interested in a business community that respects the law and plays by the rules, or else suffers the consequences.



## Book Review

## Justice et Argumentation

(Bruxelles: Editions de l'Université de Bruxelles, 1986; 1.500 FB)



Guy Haarscher. University of Brussels (Belgium). Doctor in Law 1971; Doctor in Philosophy 1977. Haarscher has served as professor of moral, political and juridical Philosophy at the Free University of Brussels since 1978 and Director of the Center of Philosophy of Law. He will make his second visit to Duke in the fall of 1987 to teach his course Law and Political Philosophy.

In *Justice and Argumentation*, Guy Haarscher and Leon Ingber have gathered a series of essays devoted to Professor Chaim Perelman's legacy to law and philosophy.

As justice is, for me, the prime example of a "confused notion", of a notion which, like many philosophical concepts, cannot be reduced to clarity without being distorted, one cannot treat it without recourse to the methods of reasoning analyzed by the new rhetoric. [...] Legal reasoning is fertile ground for the study of argumentation: it is to the new rhetoric what mathematics is to formal logic and to the

theory of demonstrative proof. (Perelman, *Preface to Justice, Law and Argument* at vii, 1980).

Chaim Perelman (1912-1984) was a world-renowned Belgian philosopher who made important contributions to legal philosophy and logic. He was born in Poland and lived most of his life in Belgium. His main affiliation was with the Université Libre de Bruxelles and Vrije Universiteit Brussel, where he taught logic, moral philosophy and reasoning under its rhetorical form. He often visited U.S. and other foreign universities and received several honorary degrees. In 1953 after a colloquium in Brussels, Perelman created and directed the legal section of the National Center for Logical Research, *l'École de Bruxelles*, which gave a new direction to research in legal logic. He started writing in 1945 (*De La Justice*) and published numerous books, some of which have been translated into English and other foreign languages. Among the most notable English language works are *The New Rhetoric: A Treatise on Argumentation* (University of Notre Dame Press, 1969; first published in French in 1958) and *The Realm of Rhetoric* (University of Notre Dame Press, 1982; first published in French; also translated into Dutch, German and Japanese), which is a further development of the *New Rhetoric*. Another major book, *Logique Juridique: Nouvelle Rhétorique* (1976) was translated into German, Dutch, Spanish and Italian.

Perelman's major contributions to philosophy, logic and legal theory are hard to present in a concise manner because his thoughts

touched on a variety of subjects. One of his major contributions is his challenge to the Cartesian theory that philosophical and scientific statements whose validity cannot be proved by irrefutable evidence are to be rejected.<sup>1</sup> As applied to law, the Cartesian approach reached its heights in the twentieth century with the doctrine of logical positivism. Perelman rediscovered the importance of persuasive reasoning and renewed a tradition going back to Aristotle. Through his study and exposé of the theory of argumentation, which he called the new rhetoric, Perelman opened up a wide area located between Cartesian rationality and emotion-controlled irrationality: the area of reason and reasoned justification.<sup>2</sup>

Perelman's theory of argumentation is based in part on the Aristotelian doctrine of dialectic reasoning. Dialectic reasoning has resort to arguments of all kinds (including pragmatic or equitable arguments and appeals to the dictates of justice) that cannot be reduced to deductive or simple inductive schemes which would satisfy the goal of Cartesian certainty.<sup>3</sup>

In *Justice et Argumentation*, Guy Haarscher and Leon Ingber have made a judicious choice of essays to illuminate the different directions taken by Perelman's thought and to show the variety of his influence. The essays are written by legal thinkers and philosophers from Belgium and other countries. The essays celebrate the interplay of philosophical reflection and legal thinking which is never cut off from legal reality and judicial practice.

The book contains fifteen essays,



all but two written in French; one is in English: "Raymond Aron and Chaim Perelman: Men for the Same Cause," by William Kluback, and one is in Italian: "Perelman and Kelsen," by Noberto Bobbio.

"Perelman's Thought and Search for Equality" is examined by Leon Ingber in the light of recent European Court of Human Rights and Belgian court decisions. Within the EEC the principle of equality between sexes is inscribed in article 119 of the Rome treaty and Directives 75/117 and 76/207 on equality of salaries. In practice, however, these provisions do not lead to the realization of the principle of equality between the sexes. This poses the important question of the "effectiveness" of legal norms. A new step must be taken, in the form of positive measures designed to correct past discriminations. The lesson here is that it is illusory to think that the text of the law is enough to overcome discrimination. The text of the law must also contain "principles of positive action" to persuade and condition public opinion and propose voluntary ways to accomplish proposed objectives. Equality is one of these "fragile values"<sup>4</sup> that has concerned Perelman in his quest for justice. It is not enough to legitimize it in a text of law; it has to be made effective.

The second essay by Raymond Vander Elst, "Justice and Legal Security," takes off from Perelman's essay on *Les Notions à Contenu Variable en Droit* (1984). It focuses on how to reconcile the need for legal security with the desire for justice. One way is through the judge's flexible interpretation of rigid legislative provisions to satisfy a goal of concrete justice. On the other hand, in certain areas, such as conflicts of laws, the objective of legal security should prevail over a global objective of justice (pp. 21-22). In conflicts, the rule applied is chosen on the basis of its abstract character, even if a different rule would be more favorable to one of the parties, or more equitable. To prevent injustices, the outer limit lies in the notion of public international order

which would put an end to the application of a foreign law as directed by the abstract conflicts rule.

The third essay by Luc Silance tackles the intriguing subject of "Logic, Sport, and Legal Orders." Perelman's treatise on argumentation renews the old tradition of rhetoric and Greek dialectic. His thesis is that the study of argumentation, the power to deliberate and argue as the distinct sign of a reasonable being, had been neglected for three centuries. As applied to the judge's reasoning in making a decision, Perelman's studies go against the commonly accepted syllogism: the major premise is the enunciation of the rule of law, the minor premise is the fact and the conclusion is the decision. The judge's practical reasoning does not proceed from a formally correct deduction on the basis of certain premises.

Silance applies this theory to an experiment comparing seven decisions from several countries including Belgium, France, and the United States, that apply the rules of the Olympic Charter or other athletic associations instead of national or international laws. An extreme example is boxing, a sport allowed in most countries in spite of criminal law provisions on assault and battery (p. 45). In such cases, courts apply rules of a legal order distinct from the state order: the law elaborated by private organisms, the international sport federations.

The next essay "Variations on the Theme of Tradition," by Paul-Alain Foriers, addresses the role of tradition in law and its authority in doctrinal writings and in case law.

Then Jean J.A. Salmon, in "International Agreements and Interstate Contradictions," picks up on Perelman's emphasis on the permanent dialectic, the constant dialog between the judiciary and the legislature, the latter modifying the law to conform it to public opinion. Perelman tried to illuminate the role of contradictions in the creation of legal rules. Salmon focuses on the problem of contradictions among states in the formation, application and modification of international agree-

ments. One example is the status of Hong Kong, which soon will be under the sovereignty of the People's Republic of China while maintaining a very extensive autonomous status, particularly in the economic area. The inhabitants will be in a country where two economic and social systems coexist.

The next essay by Francois Rigaux is on the "Judge as Minister of Meaning (Ministre du Sens)". In the *Traité de l'Argumentation* Perelman states that the judge has the difficult task of discovering the meaning of the words used by the legislator and possesses the awesome power to impress the authority of law on the judicial interpretation of a statute. Rigaux says that a legislative provision only takes its meaning after having been interpreted by the judge. The judge gives it meaning and direction. Realizing that Rigaux is a professor from a civil law country where statutes have a preeminent place, this statement is quite interesting because it reveals an agreement with the common law interpretation of a statute.

Hermann Petzold-Pernia writes on "Hermeneutics and Application of Law in Venezuela." Hermeneutics is the art or science of interpretation (in particular, of biblical texts) or interpretation itself.

The next essay on law and revolution by John Gilissen discusses whether a revolution creates a new legal order.

Then, Paul Orianne in "Legal Epistemology and Law Teaching" writes about Perelman's recommendation to introduce theoretical and practical courses on argumentation into the law school curriculum. This would make the students more sensitive to their society's values, which condition the good working of justice.

In "Legal Logic and Theory of Argumentation of Ch. Perelman," Jerzy Wroblewski reminds us that Perelman's theory of argumentation, or new rhetoric, is tied historically to the traditions of Greek philosophy, especially Aristotle's ideas. He quotes pertinent passages defining the new rhetoric as a theory of argumenta-



tion which is "nonformal reasoning that aims at obtaining or reinforcing the adherence of an audience," (p. 181, quoting, *The New Rhetoric and the Humanities* (1979), at 12).

Guy Haarscher's essay, "After Perelman," concludes the series. It helps us understand Perelman's legacy by placing it in context and tying its philosophical premises to the main currents of contemporary political and legal philosophy. Throughout his life, Perelman criticized Cartesian ideas embodied in certainty, clear and distinct ideas, intuition and deduction, and he denounced the powerlessness of rationalism to settle human conflicts. To Perelman, law is based on reason and argumentation. As a method of thinking the new rhetoric allows us to make a choice and to reach reasonable solutions. In legal reasoning, when the judge decides a case, he seldom applies the judicial syllogism. On the contrary, he makes a reasonable choice among several values, such as legal security, but also equity, social peace, changes in mores, effectiveness, etc. He makes a "reasonable"

choice, rather than a rational or objective one. There could be other choices considered reasonable by another individual. This theory, however, works only so far as there is a certain consensus (Haarscher refers to a *pacte social*) that the fundamental values organizing the lives of men must be justified in a free discussion and not imposed by an authority, by divine inspiration or by violence (p. 225). The new rhetoric implies a pluralistic society, where several good reasons can confront one another, where the rights of the minority or the rights of the accused are protected. In the face of reemerging religious intolerance, ambient racism and Stalinian non-thinking, Haarscher reminds us that as Sartre said, "on ne nous a rien promis" (no one promised us anything) and that Perelman's thinking must be further explored. We must go to the essential questions in light of the dangers threatening our pluralistic society.

1. See Bodenheimer, *Perelman's Contribution to Legal Methodology* 12 N.KY. L. REV. 391, 401

(1985). This article is part of a symposium in honor of Chaim Perelman.

2. *Id.* at 402.

3. *Id.* at 402.

4. The expression "valeurs fragiles" was used by Charles Leben in *Chaim Perelman ou les valeurs fragiles*, 2 Droits 107 (1985), which is another tribute to Perelman's contributions to the theory of law, written by a French professor.



*Claire Germain*  
Assistant Librarian and  
Senior Lecturer  
in Comparative Law  
Duke University  
School of Law Library



# SPECIALY NOTED

## Patterson Retires as Board of Visitors Chairman

William R. (Pat) Patterson, '50, is ending his second term as Chairman of the Duke Law School Board of Visitors this year. He presided over the annual meeting of the Board in January for the twelfth year. Both President Brodie and Dean Carrington expressed their appreciation to Patterson for his long and valuable service to the Law School. Many members of the Law School faculty also attended the meeting to express their appreciation. Patterson will now serve as an honorary life member of the Board of Visitors. Robert K. Montgomery, '64, of Gibson, Dunn & Crutcher in Los Angeles has accepted President Brodie's invitation to serve as Chairman of the Law School Board of Visitors beginning in January 1988.

Patterson, who has been an attorney with Sutherland, Asbill & Brennan in Atlanta since his graduation from Law School, is active in public service. He has also served as a Trustee of Lenoir-Rhyne College, a member of the American Law Institute, a founding trustee of the Southern Federal Tax Institute, a founding trustee of the Georgia Tax Conference, and a founding trustee of the Atlanta Tax Forum.

The Law School Board of Visitors was created by action of the University Trustees in January of 1963 to serve as a reporting and recommending body to the Law School administration, the University administration and the Board of Trustees. It also functions to promote better



*President Brodie looks on as Pat Patterson acknowledges the appreciation of the University President, the Law School faculty, and members of the Board of Visitors for his service as Chairman of the Board of Visitors.*

communication between the faculty and trustees and between the University and the general public. The Board meets once a year to review matters of administration, curriculum, and faculty and student progress and submits formal reports to the Board of Trustees regularly.

Members of the Board are appointed by the President of the University to six year terms and represent a broad spectrum of interests, including law alumni in private

practice, law alumni in other legal careers, and other distinguished personalities from outside the Law School. Care is also taken to ensure diversity of age and geographical distribution. Though invested with no official administrative responsibility or authority, as an arm of the University Board of Trustees, the Board's advice and recommendations carry significant weight, and its members perform a valuable service to the Law School.

## Changes in Law School Administration

Changes in the administrative structure of the Law School are annual events, but 1986-87 is a banner year for change.

At the beginning of the year, Professor Horace Robertson became Senior Associate Dean. He has taken on responsibilities in the areas of

research and support services for the faculty, relations with the university, including most budget matters, and oversight of all administration





*Horace Robertson*

internal to the School.

With respect to student matters, Dean Robertson is supported by Associate Dean Gwynn Swinson, who was promoted in January from Assistant Dean. Dean Swinson is responsible for all student affairs matters, including admissions, financial aid, recording, and placement.



*Gwynn Swinson*

Judith Horowitz became Assistant Dean for International Studies at the beginning of the year. Dean Horowitz administers the graduate degree programs for our international students and the Duke in Denmark program. She is also coordinator of the China Law Program which brings students to the Law School from the People's Republic of China. Her duties in these areas include admissions, orientation, counseling and alumni relations (in conjunction with the Law Alumni Office).

A purpose of the changes has been to re-direct the Dean to external affairs of the Law School. Dean Carrington will be devoting more time to alumni and development matters. In this field he is assisted by Assistant Deans Evelyn Pursley and Lucille Hillman. Dean Pursley commenced her duties at the Law School in 1985 with responsibility for alumni relations and the annual giving program. She also assisted the Dean with matters involving gifts to the Law School endowment. With this issue, Dean Pursley takes on a new duty, full responsibility for the *Duke Law Magazine*. She will henceforth be Assistant Dean for Alumni Affairs and Public Relations and will remain Director of Annual Giving. She will be the Law School liaison for the Law Alumni Association and its governing body, the Law Alumni Council, and for the National Council for the Law School Fund, the alumni advisory body for the annual fund.

An Assistant Dean for Major Projects, Lucille Hillman, came to the Law School in February to take responsibility for administering the School's efforts to raise funds for endowment and plant improvement. She thus stands on the front line of our effort to enhance the Law School building, a twelve million dollar project. She will serve as Law School liaison for the Major Projects Council, the alumni advisory board for capital fund raising. She will also serve as Director of the Private Adjudication



*Evelyn Pursley*

Foundation, which seeks financial support for the Private Adjudication Center from individuals and corporations. Dean Hillman brings to the Law School twenty years of fund raising experience, including two years at NYU School of Law and nine years at New York Law School.

Deans Pursley and Hillman share the task of keeping the dean and the senior faculty on the road in service to the School's external relations. Both maintain their offices in the Pickett Road Annex. The Annex now houses the Admissions Processing, Alumni Affairs, and Major Projects offices in addition to the Private Adjudication Center. The growth of this annex, which is almost three miles from the School, marks the intense need of the School for more space at its main location.



*Judy Horowitz*



*Lucille Hillman*



## Assistant Dean Pursley Joins the North Carolina Bar

Having passed the July 1986 North Carolina Bar Examination, Assistant Dean Evelyn Pursley became the latest member of the Duke Law School faculty to join the North Carolina Bar. She was presented to be sworn in before the North Carolina Superior Court by Associate Dean Gwynn Swinson, who is also licensed to practice law in North Carolina. Carmon Stuart, '38, presented Dean Pursley before the United States District Court for the Middle District of North Carolina where he had served as Clerk of the Court for twelve years before retiring, and where she was sworn in by the Honorable Eugene Gordon, '41.



L. to R.: Carmon J. Stuart, '38; Evelyn M. Pursley, '84; Eugene A. Gordon, '41.

## Law School Receives Gifts for Scholarships and Awards



Jack M. Knight

### Jack M. Knight Scholarship Endowment Fund

Friends and colleagues of Jack M. Knight, '71, at Robinson, Bradshaw & Hinson have established a scholarship endowment fund in his memory

at Duke Law School. Jack Knight died last April at his home in Charlotte. According to Gibson Smith, who served as the group's spokesperson in setting up the fund, "Scholarships will be named on the basis of outstanding academic potential and motivation as recommended by the Dean of the Law School. Applicants from North and South Carolina will be preferred." Assistant Dean Evelyn Pursley reports that the fund was established at a level which will allow scholarship funds to be awarded immediately, though Knight's colleagues hope that the fund principal will continue to grow as new gifts are received. The first Knight Scholar will be named in the fall of 1987. In addition to the income from the scholarship endowment fund the first award will include the memorial gifts earlier donated to the Law School by Jack Knight's classmates "so that he can be suitably remembered as the fine father, lawyer, scholar and husband, as well as friend, that he was to his classmates and others who knew him in the North Carolina Bar."

Jack Knight joined the Charlotte firm of Robinson, Bradshaw & Hinson as their tenth lawyer after graduating from Duke Law School in 1971, and he became a partner after only one year. He is remembered by his partner, Richard Vinroot, as "an exceptional lawyer and an exceptional, genuine person." Knight concentrated in the area of corporate acquisitions, securities and international transactions. As his wife Tena remarked, "You sent Jack all over the world and he thrived on it. He jogged by the American Embassy in Iran weeks before the overthrow of the Shah. He worked in Saudi Arabia and he even traveled to Yemen."

In expressing her pleasure in the establishment of the fund, Tena Knight found "this living tribute" to be particularly appropriate as Jack himself was a scholarship recipient while attending Duke Law School. In fact, she remembers Jack's "taking a bologna sandwich every day that first year. He never even *looked* at another piece of bologna after that."



Jack Knight distinguished himself at Duke Law School. Indeed, Professor Melvin Shimm remembers him as "among that handful of students who stand out across the years as exceptional." He served as Editor-in-Chief of the *Duke Law Journal* and graduated as a member of Order of the Coif. He also graduated first in his class, though Tena Knight remembers, "Jack always made me think he had failed his exams. Then he'd surprise me with something like first in the class."

The memory of Jack Knight will be kept alive at the Law School where "[h]e was delighted with the quality of the faculty, the diversity of his class and the firmness of friendships made at Duke Law School."



*Charles H. Livengood, Jr.*

### **Livengood Scholarship Endowment Fund**

Dr. Charles H. Livengood, III, recently established a scholarship endowment fund at the Law School in memory of his parents "[b]ecause," as he puts it, "of the great dedication my father felt to the Law School, and the mutually beneficial relationship he shared with you for so many years. . . ." In so doing, Dr. Livengood is continuing the generous tradition started by his mother, Virginia Livengood. In 1984, fol-

lowing Professor Charles Livengood's death, Mrs. Livengood asked to have memorial contributions which had been sent to the Law School granted to a current law student as financial aid. A Livengood scholar was named in 1986-87. When his mother died this fall, Dr. Livengood determined to perpetuate this scholarship by establishing an endowment fund. According to Assistant Dean Evelyn Pursley, in selecting scholarship recipients, Dr. Livengood has asked that preference be given to graduates of Davidson and Trinity (Duke undergraduate) and to North Carolinians.

Charles H. Livengood, Jr. served on the Duke Law School faculty from 1948 through 1981. Professor Livengood, who was himself a 1931 graduate of Duke University, also served as University Marshal from 1953 to 1961. He was a nationally known expert in the field of labor law and worked in several aspects of that field. He was in private practice with law firms in New York City and Durham, North Carolina; he served in the United States Department of Labor as regional attorney for Kentucky and Tennessee; he authored *Federal Wage and Hour Law* in addition to writing on the subject for numerous legal publications; he served as consultant to the United States Senate Subcommittee on Labor Relations in 1950; and between 1957 and 1960, he was an arbitrator with the Federal Mediation and Conciliation Service, the American Arbitration Association, and the North Carolina Department of Labor.

Professor Livengood is well remembered and highly regarded at the Law School. Professor emeritus Francis Paschal remembers him as the finest seminar instructor at the Law School. Professor John Weistart, who was both a student and a colleague of Professor Livengood, remembers his clarity and precision in writing. Professor Melvin Shimm remembers his fine sense of humor. Now, his memory will be kept alive at the Law School through his son's generosity in establishing this living memorial.

### **Smith Award Endowment**

Each year, the graduating student who has compiled the most outstanding academic record at Duke Law School has traditionally received the Willis Smith Award. This award was originally established by Willis Smith, a Raleigh lawyer who graduated from Trinity College in 1910 and who served as a United States Senator and a Duke University Trustee. Two of Willis Smith's sons attended Duke Law School. Willis Smith, Jr. graduated from the Law School in 1947 and practiced law in Raleigh until his death in a plane accident in 1971. Lee C. Smith graduated from the Law School in 1953 and practices law in Raleigh with Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan.

This fall, Lee Smith established a permanent endowment fund at the Law School to perpetuate this award. Though the award has traditionally consisted of books on a legal subject of the recipient's choice, Mr. Smith has left the form of the award in future to the discretion of the Dean of the Law School.

### **Moore & Peterson Award**

The Dallas law firm of Moore & Peterson has established an annual award for first year law students at Duke Law School. The firm presently consists of 63 attorneys, several of whom are graduates of Duke Law School. Moore & Peterson has established this award in recognition of the high quality of legal education at Duke Law School and in appreciation for the Duke law students who have participated in their summer program and/or joined their firm as lawyers. Awards of \$500 each will be made to the three students who achieve the highest grade in each of the large sections of first year contracts, civil procedure and property courses. A representative of Moore & Peterson will formally present the awards in the fall when he or she is at the Law School interviewing.



# Alumni Activities

## CLASS OF 1933

*Rufus W. Reynolds*, Chief Bankruptcy Judge for the Middle District of North Carolina, allegedly retired on October 1, 1986. He will be on recall status for six months to finish up some of his larger cases and to assist during the transition period of his successor.

*Sam G. Winstead, Jr.* has been honored by the establishment of a new merit scholarship for undergraduates in the College of Arts and Sciences at the University of North Carolina. The scholarship was established by the Carl B. and Florence E. King Foundation of Dallas in honor of Winstead, who received his undergraduate degree from UNC, for his more than 30 years of service as attorney for Carl King and as a trustee of the King Foundation.

## CLASS OF 1941

*Warren C. Stack* became "of counsel" to the firm of Tucker, Hicks, Moon, Hodge and Cranford in Charlotte, North Carolina in March 1987.

*Hervey S. Moore, Jr.* is returning to private practice with the law firm of Mason, Griffin & Pierson, where he will serve of counsel. In December 1986 he was honored for exemplary service on the bench, most recently as Presiding Judge of the Civil Part, Law Division, Mercer County, New Jersey.

## CLASS OF 1946

*Jeroll R. Silverberg* became a charter member of the American chapter of the International Academy of Matrimonial Lawyers in February 1987. The IAML, founded in October 1986 in London, is dedicated to encouraging and facilitating dialogue among matrimonial lawyers from different countries.

## CLASS OF 1948

*Robert P. Barnett* was elected Vice-Chairman of the Board of Trustees

for the Medical Center of Delaware in November 1986.

*John G. Poole*, a senior member of the Miami law firm Papy, Poole, Weissenborn & Papy, opened a Tampa office in June 1987. The firm is considering further expansion in Florida.

## CLASS OF 1951

*Arnold B. McKinnon* was named Chairman and Chief Executive Officer of Norfolk Southern Corporation. He was formerly Executive Vice President of Marketing.

## CLASS OF 1952

*Lee H. Henkel, Jr.* was appointed to the Federal Home Loan Bank Board by the President in November. The board regulates the nation's savings and loan industry.

## CLASS OF 1954

*Paul Hardin III*, President of Drew University in Madison, New Jersey, received an honorary Doctor of Laws degree from Adrian College in May 1987 for his contribution to the field of law and in appreciation of and respect for his leadership of United Methodist higher education.

## CLASS OF 1956

*Carlyle C. Ring*, Vice President and General Counsel of Atlantic Research Corporation, was appointed a member of the Permanent Editorial Board for the Uniform Commercial Code. The Board has the responsibility for monitoring current developments, preparing official comments interpreting the Code and making recommendations for updating the Code. The Board is composed of twelve members, six appointed by the National Conference of Commissioners on Uniform State Laws and the other six appointed by the American Law Institute.



K. D. Zotter

*John Beard '60*

## CLASS OF 1960

*John Q. Beard* was elected a fellow of The American College of Probate Counsel, an international association of lawyers. Its purposes include improvement of the standards of attorneys specializing in wills, trusts, estate planning and probate and the modernization of the administration of our tax and judicial systems in these areas. Membership is by invitation of the Board of Regents.

*C. David Lundquist* became General Secretary (Chief Executive Officer) of the General Council on Ministries of the United Methodist Church on August 1, 1986. The General Council on Ministries is the program coordination, evaluation and research agency for the entire United Methodist denomination.

## CLASS OF 1962

*Thomas W. Graves, Jr.*, former Executive Vice President of North Carolina Citizens for Business and Industry, was named its President and Staff Executive.

*Vincent L. Sgrosso* was elected Vice President and Associate General



Counsel of the BellSouth Corporation, the Atlanta-based telecommunications holding company, in March 1987. Sgrosso joined Southern Bell in 1968 as an attorney in the company's Jacksonville, Florida office and transferred to Atlanta in 1969. After being promoted to solicitor in 1972 and general attorney in 1976, Sgrosso was named general solicitor of BellSouth in 1984.

#### CLASS OF 1963

*Mark B. Edwards* was named to the Board of Governors of the North Carolina Bar Association June 20 during the Annual Meeting of the Association in Asheville, NC. His term will expire in June 1990.

A partner in the Charlotte firm of Weinstein & Sturges, his primary areas of practice include business law, tax law and estate planning.

#### CLASS OF 1964

*Patrick H. Bowen* was elected a Vice President of Allied Stores Corporation in March 1987 and Secretary of the Company in April 1987. Also appointed General Counsel, Bowen has assumed responsibility for the Legal Department.

*J. Robert Elster* was named to the Board of Governors of the North Carolina Bar Association on June 20 during the Association's Annual Meeting in Asheville, NC. His term will expire in June 1990.

A partner in the Winston-Salem office of Petree Stockton & Robinson, Elster's primary areas of practice include civil litigation, and commercial and professional malpractice defense work.

*John Leech*, a partner in the Cleveland law firm of Calfee, Halter & Griswold, was elected Chairman of the Board of Trustees of the Health Trustee Institute. The Institute was funded by the Cleveland Foundation to work with hospital administrators to help improve the effectiveness of hospital governance.

*Robert Montgomery* has accepted President Brodie's invitation to become Chairman of the Law School Board of Visitors for a term beginning on January 1, 1988.

#### CLASS OF 1966

*Jonathon T. Howe*, currently President and founding senior partner of Howe & Hutton, Ltd., was selected by the Illinois Institute for Continuing Legal Education to serve on the faculty. IICLE faculty members are law practitioners who have demonstrated expertise in their fields and who volunteer their time to help members of the bar stay abreast of legal developments and expand their knowledge of various areas of law practice.

*Eric Michaux*, partner and President of the Durham law firm of Michaux and Michaux, was elected Chairman of the Board of Law Examiners for North Carolina.

#### CLASS OF 1967

*John T. Berteau*, a partner in the Sarasota, Florida law firm of Williams,



*Eric Michaux '66*

Parker, Harrison, Dietz & Getzen is author of: *Steps To Avoid Beneficiary Conflicts Over Bequest of Tangible*

## Law Firm News

In one of the largest law firm mergers ever, two major Virginia firms combined forces in January 1987. McGuire, Woods & Battle, based in Richmond, and Boothe, Prichard & Dudley, based in Northern Virginia, have formed a new firm of approximately 300 lawyers, one of the nation's largest law firms and the largest group of lawyers in the state practicing in one firm. The new firm, named McGuire, Woods, Battle & Boothe, has seven offices in Virginia and one in Washington, D.C.

Six attorneys of McGuire, Woods, Battle & Boothe are Duke Law School graduates: Robert L. Burrus, Jr., '58; E. Duncan Getchell, Jr., '74; John W. Patterson, '72; O. Randolph Rollins, '68; Joseph L.S. St. Amant, '74; Robert Richardson Vieth, '84.

There's a Duke connection between two law firms which took part in the largest merger in

the history of North Carolina, creating a new firm of 108 lawyers.

Powe, Porter and Alphin of Durham and Raleigh and Moore, Van Allen & Thigpen of Charlotte and Raleigh merged in October 1986 to become Moore and Van Allen.

Six attorneys of Powe, Porter and Alphin are Duke Law School graduates: Charles R. Holton, '73; Nick A. Ciompi, '73; Nancy Russell Shaw, '73; A. Margie Happel, '78; Laura Jean Guy Long, '72; and Paul M. Green, '85.

Five attorneys of Moore, Van Allen, Allen & Thigpen are Duke Law School graduates: C. Wells Hall, III, '73; Kenneth S. Coe, '76; Donald S. Ingraham, '82; Richard Wilson Evans, '82; and Jean Ann Gordon Carter, '76.

The new firm will maintain offices in all three cities—Durham, Raleigh and Charlotte—with 59 lawyers in Charlotte and 49 in the Research Triangle area.



*Personal Property*, 12 J.Est.Plan. 356-61 (1985).

*Lanty L. Smith* was elected to serve on the 27-member board of First Union Corporation in April 1987. Smith has served as President and a member of the Board of Greensboro, North Carolina-based Burlington Industries, Inc. since October 1986.

#### CLASS OF 1968

*Carl F. Bianchi* was selected as one of the recipients of the 1987 National Public Service Awards, sponsored annually by the American Society for Public Administration and the National Academy of Public Administration. Bianchi, administrative director of the courts in the State of Idaho since 1973, has been instrumental in establishing a judicial system that is a model for the country in its simplified court structure, administrative organization, business-like management and expeditious disposition of cases.

#### CLASS OF 1969

*Norman E. Donoghue*, a partner in the law firm of Dechert Price & Rhoads, is Vice-Chairman of the Board of Directors of We the People 200 Inc. We the People 200 Inc. is a not-for-profit corporation established to administer the City of Philadelphia's national celebration of the 200th anniversary of the U.S. Con-



*L. Alan Goldsberry '69*

stitution. Donoghue also serves on the executive committee of the Princess Grace Foundation-USA, a national organization supporting young artists in theater, dance and film. He was a co-founder and President of Philadelphia Volunteer Lawyers for the Arts and was Co-chair of the Board of the International Visitors Center of Philadelphia.

*L. Alan Goldsberry* recently left private practice to accept an appointment by Ohio Governor Celeste as Athens County Common Pleas Court Judge. He will face election in the fall of 1988.



*Hal C. Hedrick, Jr. '70*

#### CLASS OF 1970

*Hal C. Hedrick, Jr.* was promoted to corporate secretary of the LTV Corporation in Dallas in April 1987. He will be responsible for board of director activities, Securities and Exchange Commission filings, corporate bylaws, stock transfers and other secretarial functions of the corporation and its operating subsidiaries. Hedrick joined LTV as a corporate attorney in 1979.

*Kenton L. Kuehnle* became a partner in the Columbus law firm of Thompson, Hine & Flory in Ohio.

#### CLASS OF 1971

*Sylvia L. Beckey* is now Special Counsel in the New York regional office of the U.S. Securities & Exchange Commission.

*Joan Cooney*, in private practice in New York, is Director of the Juvenile Law Education Project, Legal Air Society in Queens, New York. She was recently appointed to Governor Cuomo's Juvenile Justice Advisory Group, which advises the governor on juvenile justice legislation and programs.



*Christine M. Durham '71*

*Christine M. Durham*, Associate Justice for the Utah Supreme Court, recently received an award for distinguished and sustained achievement from Wellesley College, of which she is also an alumna. Appointed in 1982 she was Utah's first female district court judge and is now that state's first female supreme court justice.

*Karla H. Fox*, associate professor of business environment and policy at the University of Connecticut, recently co-authored a textbook—*The Legal Environment of Business*. The 626-page volume provokes students to ponder moral dimensions applied to modern cases.

*Randolph J. May* has joined the Washington, D.C. law firm of Bishop, Liberman, Cook, Purcell & Reynolds as a partner. He is head of the communications law department.

*M. John Sterba, Jr.* of New York City became chair of the 920-member Corporate Counsel Section of the New York State Bar Association in January 1987. In 1986 he served as chair-elect of the section.



**CLASS OF 1972**

*Hugh M. Dorsey, III* was awarded an honorary degree by Savannah College of Art and Design, where he is Chairman of the Board of Trustees.

**CLASS OF 1973**

*Daniel T. Blue, Jr.*, managing partner with the law firm of Thigpen, Blue, Stephens & Felders in Raleigh, was elected to the membership of The American Law Institute, Philadelphia at its last meeting. Blue, a math major at North Carolina Central University, also gave the fifth annual Marjorie Lee Browne Distinguished Alumni Lecture to math and computer students at North Carolina Central in November 1986.

**CLASS OF 1974**

*Ellie G. Harris* recently received her Ph.D. in finance from Northwestern University. She is currently assistant professor of finance at the School of Business in Indiana University in Bloomington, Indiana. Her research involves applications of game theory to topics in corporate finance and, particularly, to issues related to corporate takeovers.

*L. Lynn Hogue* was appointed associate dean of the College of Law at Georgia State University.

*Thomas E. McLain*, who specializes in Japanese business and legal affairs, was appointed by The Balcor Company to expand its institutional asset management business overseas, with an initial focus on the Far East. McLain was named a First Vice President for Institutional and International Business Development. Balcor, a unit of American Express Company, is an investment management firm with businesses based in real estate, lending and related industries. McLain was a partner in the Los Angeles law firm of Manatt, Phelps, Rothenberg & Phillips, where he is currently of counsel.

**CLASS OF 1976**

*Arthur J. Minds* is Vice President of National Operations for the Los Angeles-based Murdock Management Company, which develops and manages commercial real estate.

**CLASS OF 1977**

*Carolyn B. Kubl*, formerly Deputy Solicitor General of the United States and Deputy Assistant Attorney General, Civil Division, U.S. Department of Justice, rejoined the Los Angeles law firm of Munger, Tolles & Olson as a partner in September 1986.

*Geoffrey H. Simmons* has been named the recipient of the 1987 Pro Bono Service Award by the North Carolina Bar Association. The award was presented June 18 during the Association's Annual Meeting in Asheville, NC. The award was established to recognize North Carolina attorneys who have shown outstanding commitment to serving the legal needs of the poor and disadvantaged by providing pro bono services.

**CLASS OF 1978**

*Deborah Bauser* became a partner in the law firm of Shaw, Pittman, Potts & Trowbridge in Washington, D.C.

*William B. Bunn*, who received an M.D. in addition to a J.D. at Duke, recently accepted the position of Director of Occupational Health and Environmental Affairs for Bristol-Myers Company, Pharmaceutical Research and Development Division. He also accepted an appointment at Yale University School of Medicine and will be teaching in the Departments of Epidemiology and Internal Medicine.

*Michael Jenkins*, was appointed to the Executive Committee of the Alumni Association of Haverford College in Pennsylvania, from which he graduated in 1975. Jenkins is a partner in the Los Angeles law firm of Richards, Watson & Gershon, where his principal areas of practice include municipal law, land use and environmental regulation and civil rights litigation.

*Gregory S. Lewis* became a partner with the law firm of Morgan, Lewis & Bockius in its Washington, D.C. office. Lewis is a member of the firm's Labor Section. In addition to co-authoring numerous articles on labor law issues, Lewis is Director of the Society for Education in the Performing Arts and past President

of the Choral Arts Society of Washington, D.C.

*Linda A. Malone*, assistant professor of law at the University of Arkansas Law School, is author of: *The Future of Transferable Development Rights in the Supreme Court*, 73 Ky.L.J. 759-93 (1984-85) and *A Historical Essay on the Conservation Provisions of the 1985 Bill*, 34 U.Kan.L.Rev. 577-97 (1986).



*Samuel Mason '78*

*Samuel Mason* recently became a partner in the Philadelphia law firm of Montgomery, McCracken, Walker & Rhoads, practicing in the firm's Corporate Department.

**CLASS OF 1979**

*Jeffrey C. Coyne* became a partner of Graham & James in Los Angeles. His primary emphasis is in the areas of bankruptcy and insolvency.

*Robert T. Harper* became a partner in the Pittsburgh law firm of Berkman, Ruslander, Pohl, Lieber & Engel in January 1987.

*Edward W. Kallal, Jr.* became a partner in the Atlanta law firm of Sutherland, Asbill & Brennan.

*Steven K. Robison* became a partner in the law firm of Montgomery, Elsner and Pardieck in Seymour, Indiana in December 1986.

**CLASS OF 1980**

*Blain B. Butner* was elected Treasurer of the Younger Lawyers Division of the Federal Bar Association for 1987.



# Philadelphia Area Law Alumni

On May 9, 1987, a group of Philadelphia area Duke Law School alumni successfully defended its championship in the annual Philadelphia Bar Association Young Lawyers Charity Softball Tournament. Gary Biehn ('84—White and Williams), Jon Drake ('84—Dechert Price & Rhoads), Jerry Novick ('84—Wolf, Block, Schorr & Solis-Cohen), George McFarland ('84—Saul, Ewing, Remick & Saul), Brian Cary ('85—Skadden, Arps, Slate, Meagher & Flom), Steve Scolari ('84—Stradley, Ronon, Stevens & Young), Tucker Boynton ('79—Stradley, et al.), and Dave Lockwood ('84—Stradley, et al.) were Duke Law Alumni on the team. George Brunner (Villanova '87) and Fred Levin (Villanova '86—Stradley, et al.) completed the team as honorary Duke Law Alumni by virtue of their participation on the Duke Law Alumni Champion Team in the 1986 Tournament. The Philadelphia Bar Association has challenged the Duke team to defend its championship in 1988.



*Shirley L. Fulton*, a prosecutor since 1982, was recently appointed to a Mecklenburg County District Court judgeship by North Carolina Governor James Martin.

*Justin G. Klimko* was elected a shareholder of the law firm of Butzel Long Gust Klein & Van Zile, one of Michigan's largest law firms. He is a member of the State Bar of Michigan Corporation, Finance and Business Law Section, the Detroit Bar Association Securities and Commodities Law Committee and the American Bar Association Section on Corporation, Banking and Business Law.

*W. Alan Lautanen* became a partner in the San Diego law firm of Gray, Cary, Ames & Frye in January 1987.

*Edward J. Schneidman* became a partner in the Chicago law firm of Mayer, Brown & Platt in January 1987.

*Lori E. Terens* became a partner in the firm of Ulmer, Murchison, Ashby, Taylor & Corrigan, Jacksonville, Florida in February 1987.

*Priscilla P. Weaver* became a partner in the Chicago law firm of Mayer, Brown & Platt in January 1987.

*Lisa T. Witlin* received her M.D. from Johns Hopkins Medical School in May and plans to do medical malpractice law. Witlin recently won the Schwartz Award for a research paper which she entered in a competition sponsored by the American College of Legal Medicine.

## CLASS OF 1981

*Richard A. Hauge* was appointed County Attorney in New Castle County, Delaware in January 1987. He served as First Assistant County Attorney for the eighteen months prior to this appointment. His past experience includes four years in

the private law firm of Funk, Franta & Hauge and serving as attorney for the State House of Representatives.

*Cecily Hines* recently returned to the practice of law as an in-house attorney at ADC Telecommunications, Inc. in Minneapolis.

*Donald J. Rendall, Jr.*, formerly Assistant U.S. Attorney for the District of Vermont, became an associate of the law firm of Sheehey, Brue, Gray & Furlong, Burlington, Vermont in February 1987.

*Robert A. Useted* became a partner in the St. Louis firm of Kohn, Shands, Elbert, Gianoulakis & Giljum in February 1987.

## CLASS OF 1982

*Peter A. Cotorceanu* recently joined the Annapolis law firm of Ronald R. Holden to specialize in estate planning.

*Fern E. Gunn* was elected Vice-President of the North Carolina



Association of Women Attorneys in January 1987. She is presently employed as a staff attorney and Executive Director of the North Carolina Board of Legal Specialization of the North Carolina State Bar.

*Paul Russell Hardin* recently left the Atlanta law firm of King & Spalding to join the Sports Enterprises Division of the Robinson-Humphrey Company in Atlanta.

*Julian E. Whitehurst* became a member of the Orlando, Florida law firm of Lowndes, Drosdick, Doster, Kantor & Reed in February 1987.

*James F. Wyatt, III* has begun his own law practice, specializing in criminal and civil cases, in Charlotte, North Carolina.

#### CLASS OF 1983

*Mark S. Calvert* is now Associate General Counsel at Carolina Power & Light Company in Raleigh, North Carolina.

*Jeffrey D. Hutchings* is now an associate with the law firm of Shaw, Pittman, Potts & Trowbridge in Washington, D.C.

#### CLASS OF 1984

*Sol W. Bernstein* is now an associate with Sidley & Austin in New York City.

*Audrey McKibbin Moran* is now with the State Attorney's Office, the Fourth Judicial Circuit of Florida, Duval County Courthouse in Jacksonville, Florida.

*Floyd B. McKissick, Jr.* is now with the law firm of Faison, Brown, Fletcher & Brough in Durham, North Carolina.

#### CLASS OF 1985

*Harry P. Brody* is author of *Fields*, a book of poetry, published by Ion Books in Memphis, Tennessee. Brody is with the law firm of Caudle & Spears in Charlotte, North Carolina.

*Neil D. McFeeley* is author of *Appointment of Judges: The Johnson Presidency*, the first in-depth study of the judicial selection process in the Johnson years and one of the few books that has analyzed any individual president's process. McFeeley is an attorney at the law firm of Eberle, Berlin, Kading, Turnbow & Gillespie in Boise, Idaho.

*David A. Trott* is a member of the law firm, Trott and Trott in Bloomfield Hills, Michigan.

#### CLASS OF 1986

*Gwynn T. Swinson*, who received her LLM in December of 1986, was recently promoted to Associate Dean for Student Affairs and Admissions at Duke Law School. Dean Swinson came to the Law School as Assistant Dean for Admissions in January 1984 and became Assistant Dean for Student Affairs and Admissions in August 1985.

## Personal Notes

'73—*Michael Stewart* and his wife announce the birth of their daughter, Lindsey Lauren, on August 29, 1986.

'74—*John P. Bailly, Jr.* married Lee Ann Lounsbury on March 29, 1987. Jack is Assistant Counsel at the New York State Department of Social Services in Albany, New York.

'77—*Amy Tenney Levere* and her husband are happy to announce the birth of their son, Michael Benjamin Levere, on December 4, 1986.

'80—*Blain B. Butner* and his wife, Peggy, announce the birth of their first child—a daughter, Sarah Thiel Butner—on January 14, 1987.

'82—*Paul Russell Hardin* married Melanie Wilson Hardy in February 1987 in Kingston, North Carolina. Hardin recently joined the sports enterprises division of the Robinson-Humphrey Company in Atlanta.

—*L. Jean Swofford* married Marc S. Firestone on May 23, 1987. Swofford is an associate at the law firm of Arnold & Porter in Washington, D.C.

'83—*Laura Stuart* married Timothy B. Taylor on April 4, 1987. Laura is now in the San Diego office of Sheppard, Mullin, Richter & Hampton.

—*Nora M. Jordan* and *W. Allen Reiser*, both class of 1983, were married in November 1986. Both are associates in the New York law firm of Davis, Polk & Wardwell.

—*Serena G. Simons* married Fred Barbash on April 25, 1987 in Washington, D.C. Simons is an associate at Miller & Chevalier in Washington, D.C.

'84—*Doug Cannon* and his wife, Kristin, announce the birth of their daughter, Mary Anne, on December 17, 1986.

—*Michael P. Kaelin* married Carol Gruendel on October 25, 1986 in

New York City. Kaelin is an associate in the New York law firm of Healy & Baillie.

—*Marc Leaf* and *Mary Woodbridge* '85 announce the birth of their son, John Sarkin, on February 23, 1987.

—*George C. McFarland, Jr.* was married to Elizabeth Lawrie Kennedy on October 11, 1986 in Pennsylvania. George is an associate in the Philadelphia firm of Saul, Ewing, Remick & Saul.

—*Nancy E. Scott* was married to David Paul Henderson on February 15, 1986.

—*Richard Zletz* and his wife, Jenny, announce the birth of their first child—a daughter—in January 1987.

'85—*Siobhan T. O'Duffy* and *Pressley McAuley Millen, III*, both class of 1985, were married in September 1986. Siobhan is an associate with Gould & Wilkie. Pressley is with Sullivan & Cromwell.



—*Mary Woodbridge and Marc Leaf '84* announce the birth of their son, John Sarkin, on February 23, 1987.

'86—*Richard S. Boulden* married Deborah Anne Goodwin on December 27, 1986 in Duke Chapel.

—*Elizabeth A. Johnson and Mark Daryl Gustafson*, both class of 1986, were married on April 11, 1987.

—*Elizabeth McColl Quattlebaum*

is recuperating nicely from her serious accident last summer in Colorado and recently began full-time practice at the law firm of Smith, Helms, Mulliss & Moore in Charlotte, North Carolina. She reports, "I'm so appreciative of all the communication I have received from friends at Duke."

'87—*David Berger* married Susan Holderman on March 8, 1987 in Greensboro, North Carolina.

—*Susan Gwin* married David Ruch on March 14, 1987 in Atlanta, Georgia.

—*Alice F. Higdon and Harlan I. Prater, IV*, both class of 1987, were married on May 30, 1987 in Quincy, Florida.

—*Emily Oates and Alan Wingfield*, both class of 1987, were married on May 16.

—*Marion A. Schreiber* married Donald Franklin May, II on February 28, 1987 in Bethesda, Maryland.

## Obituaries

### CLASS OF 1930

*Emerson T. "Curly" Sanders*, a longtime Burlington attorney and former North Carolina state senator, died April 1987 in Alamance Memorial Hospital. Sanders was assistant coach of football, boxing and wrestling at Duke University for four years before moving to Burlington in 1935. He was a member of the North Carolina State Bar Association, the American Bar Association and a member and former president of the Alamance County Bar Association. He practiced law for more than 50 years before retiring in 1982.

### CLASS OF 1934

*R. Wallace Maxwell* died November 25, 1986 after an illness in Waynesburg, Pennsylvania. A prominent Greene County attorney, Maxwell was senior member of the Maxwell and Davis law firm. He was one of the oldest members of the Greene County Bar Association in terms of length of service and a member of the Pennsylvania Bar Association. From 1949 to 1952 and, subsequently, from 1975 to 1977, he served as mayor of Waynesburg. He was also active in community and church affairs.

### CLASS OF 1936

*Leon T. Rice*, the last living name partner in the law firm of Womble Carlyle Sandridge & Rice, died on April 26, 1987 in Winston-Salem, North Carolina. Rice was acknowl-



*Leon T. Rice '36*

edged by his peers as among the first and best tax lawyers in the state. A South Carolina native, Rice graduated from Furman University and then attended Duke Law School on a full tuition scholarship.

Rice always credited a favorite law professor at Duke, Charles L.B. Lowndes, with influencing him to choose tax law. After graduation from Duke, he practiced in the Office of Chief Counsel of the IRS in Washington, D.C. before joining the firm which would become Womble Carlyle Sandridge & Rice in Winston-Salem. The firm, which is over 100 years old, now ranks among the 200 largest law firms in the country. Rice had semi-retired this fall after completing his fiftieth year as an attorney.

Rice devoted himself to public service in Winston-Salem. He was on the Board of Trustees of Wake Forest University, was Chapter Chairman of the American Red Cross, President of the Family and Child

Service Agency and President of the Community Council. Rice was also a founding member of the Knollwood Baptist Church.

Leon Rice served as the fiftieth reunion coordinator for the Classes of 1936-37 at Duke Law School in September 1986 and spearheaded the effort to establish the *Law and Contemporary Problems* endowment fund. In recognition of the energy and creativity he devoted to this role, he received the Charles A. Dukes Alumni Achievement Award for 1986-87.

### CLASS OF 1942

*Kenneth J. Arwe* died on May 5, 1987 in Keene, New Hampshire. A partner in the Keene law firm of Goodnow, Arwe, Ayer, Prigge & Wrigley, Arwe served as Keene's city attorney for several years. He was also a member of the Keene Planning Board. Active in community activities, Arwe helped to form the Community Chest, forerunner to the Monadnock United Way, and was a member of its Board of Directors; was a trustee and Chairman of the Keene Unitarian Universalist Church; was Chairman of the Board of the Salvation Army; and President of the Keene Lions Club.

### CLASS OF 1949

*Robert G. Welton* died on October 21, 1986 in Houston, Texas.

### CLASS OF 1953

*Richard C. Thompson* died at his home on September 20, 1986. He is buried in Hickory, North Carolina.





Duke University School of Law  
Durham, North Carolina 27706

*Alumni Affairs  
Annual Fund  
Public Relations*

*Telephone (919) 489-5089  
489-5096*

Dear Fellow Duke Law Alumni:

We are all proud to know that Duke Law School ranks among the top law schools in the nation academically. We can also take pride in the fact that Duke Law alumni are supportive of their school. For the past several years over forty percent of our alumni have pledged to the Law School Annual Fund Campaign, which means that our participation rate has doubled since 1980. Few law schools boast a higher participation rate. (Though it would be nice to surpass Yale, or even our neighbor to the west, Wake Forest, where over fifty percent of the alumni annually contribute to the school.) Though the size of the average gift contributed by alumni has also increased over time, we cannot continue to rely on large gifts from only a small group of alumni. We need the assistance of each of you to help increase the annual contribution to the Law School through the Annual Fund.

The 1987-88 Annual Fund Campaign runs from July 1, 1987 through June 30, 1988. Gifts to the Duke Law School Annual Fund undergird the school's operating budget providing for needs that endowment funds, often designated for specific purposes, do not address and that tuition revenues fall short of covering. These funds may be used to provide additional financial aid to current students, to supplement faculty salaries, and to purchase library resources.

I urge you to give careful thought to your contribution. Take advantage of matching gifts if you work for a firm or company with a matching gift program. Join a leadership gift club or move to a higher gift club level. Let's send a message to the faculty and administration that we appreciate all they are doing to keep our law school at the forefront nationally and that we want to do our part to ensure that Duke Law School can continue to provide one of the finest legal education programs in the country.

Your gift *does* make a difference. Please join me in generously supporting the Duke Law School Annual Fund Campaign when you are called by a current student during the telethon or asked to participate by your class agent.

Sincerely,

Donald B. Craven '67  
Chairman  
Duke Law School Annual Fund



*As reported in the article on the Duke Bar Association, one constant at Duke Law School is the fact that law students enjoy socializing, and when they get together, they will poke fun at just about every aspect of law school life as this collection of songs from across the years shows.*

### To the tune of "The Daring Young Man on the Flying Trapeze"

We've sung to the men on the flying trapeze  
So let's sing to others more daring than these  
We'll sing to our shysters with collitch degrees  
All in the name of the law.

We've learned how to go on a bender  
And rise the next morning for class  
To exploit the feminine gender  
And sleep through our courses yet pass.

#### CHORUS:

He went through law school with the greatest of ease  
The smiling young man who is now after fees  
His acts will be led by judicial decrees,  
All in the name of the law.

Insomnia has kept us awake while in class  
Our profs have all fed us on hot air and gas  
Then crammed us exams they expect us to pass  
All in the name of the law.

Three years we have been cross-examined  
Three years we have been on the spot  
But now we are out with a vengeance  
To show the whole world what we've got.

#### (CHORUS)

We'll drift through our cases with the greatest of grease  
And panic the juries with soft soap stories  
Charge widows and orphans extortionate fees  
All in the name of the law.

We'll make all the bar exams harder  
To keep future shysters at bay  
And keep them from sharing the larder  
That we will rake in every day.

#### (CHORUS)

When an ambulance passes we'll be in its wake  
Fat fees from thin plaintiffs we'll joyfully take  
And evade every law legislatures can make  
All in the name of the law.

On every important occasion  
We'll mouth a few broad platitudes  
With politics we'll keep liason  
And keep Baptist attitudes.

#### (CHORUS)

We'll take every case to lose it or win  
We'll defend the bootlegger who brings us our gin  
We'll even defend the original sin  
All in the name of the law.

So fill up your glasses with whiskey  
Swiggle a little more corn  
We'll get you well soused in the evening  
And then plead your case in the morn.

#### (CHORUS)

We'll easily tell what each flaw is  
In every judicial decree  
If we don't quite know what the law is  
We can all tell you what it should be.

And for the House or the Senate we will run  
While justice is blind we can still have our fun  
For we've all found out what strange things still  
are done  
All in the name of the law.

#### (CHORUS)

*From Carmon Stuart, '38*

### My Favorite Things

Securities reg. and corporate taxation,  
Oil and gas, interviews on vacation,  
Tubes in my mailbox,  
and then real estate,  
These are a few of the things that I hate.

Fed. tax in the morning and then antitrust,  
See all my dreams for success turn to dust.  
Second year stinks.  
There's no debate.  
These are just some of the things that I hate.

When the firms come,  
And reject me,  
And I'm feeling sad,  
I simply remember I'm not a first year,  
And then I don't feel so bad.

*Song from "Yankee Doodle Dukie,"  
Musical finale of FLAW Day 1987  
by Joel Bell, Class of '87*

*If you have a favorite poem, song or skit from law school days, please send a copy to the Law Alumni Office so that they can be enjoyed by others at Class Reunions and other appropriate occasions.*



*Agenda***Law Alumni Weekend, September 11-12, 1987***Friday, September 11, 1987*

- 2:00 p.m. Registration Desk Opens.  
Lobby, Law School
- 2:00 p.m. Meeting of Law Alumni Council.  
Moot Courtroom, Law School
- 6:00 p.m. Reunion Class Cocktails and Dinners.  
Sheraton University Center

*Saturday, September 12, 1987*

- 9:00 a.m. Coffee and Danish.  
Second Floor Lounge, Law School
- 10:00 a.m. Professional Program.  
Moot Courtroom, Law School
- 12:00 p.m. Pig Pickin' catered  
by Bullock's Barbecue.  
Gross Chem Lawn & Portico
- 2:00 p.m. Rediscover Duke and Environs  
(free time)
- 5:30 p.m. Tail Gate Party.
- 7:00 p.m. Duke vs. Northwestern  
Football Game.  
Wallace Wade Stadium

*Sunday, September 13, 1987*

- 9:00 a.m. Breakfast at the Sheraton University  
Center for Barristers attending the  
weekend festivities.\*
- 10:30 a.m. Meeting of the National Council of the  
Law School Fund at the Sheraton  
University Center.

*Reunion Coordinators*

- Joint 1941, 1942 & 1943: Ralph Lamberson  
(804) 253-2377
- 1947: Henry A. McKinnon, Jr.  
(919) 739-6446
- 1952: Fred Folger, Jr.  
(919) 786-6541
- 1957: Gerald Bard Tjoflat  
(904) 791-3416
- 1962: Vincent L. Sgrosso  
(404) 529-8231
- 1967: Wayne A. Rich, Jr.  
(304) 345-2200
- 1972: Jeff Portnoy  
(808) 521-9221  
Ronald L. Reisner  
(201) 229-6700
- 1977: Donald M. Etheridge  
(919) 684-3955
- 1982: David Chenkin  
(212) 223-0400  
Bernard H. Friedman  
(206) 223-1313

\* *Barristers* of the Law School are alumni/ae and friends who contribute \$1,000 or more annually to Duke Law School. Contributors of \$500 or more annually are *Barristers* if they are seventy years of age or older; judges, teachers, government officials or graduates of less than seven years.



*Members of the Class of 1951, along with their spouses and Mel Shimm, enjoyed their reunion get-together last September.*



*Just published*

# Encyclopedia OF THE American Constitution

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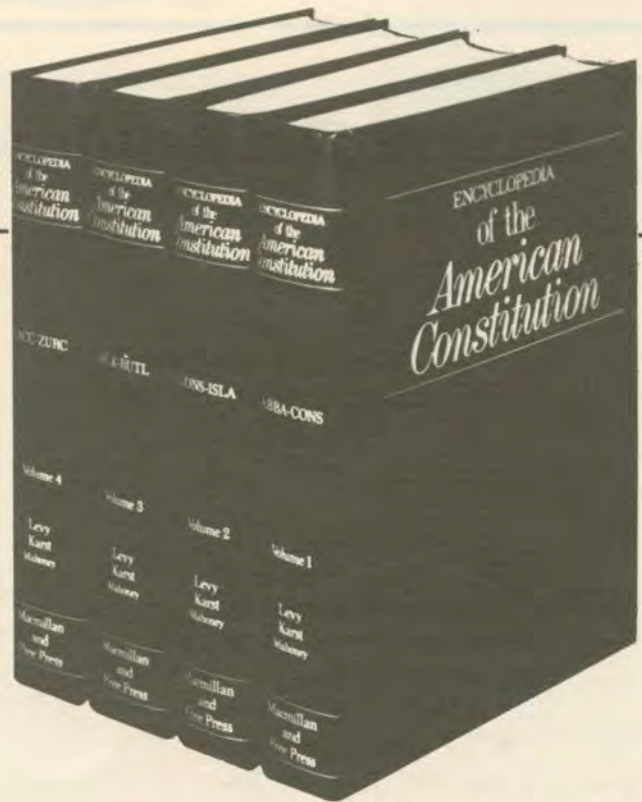
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