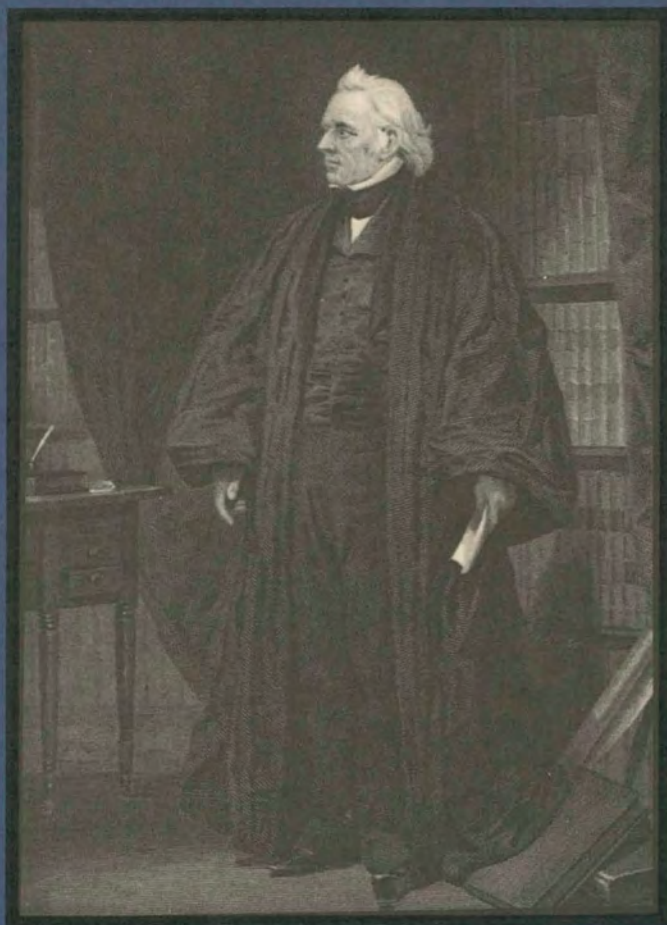


Duke Law Magazine

SUMMER, 1990



On the Bench

Duke Law Magazine

DEAN

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About the Cover

Associate Justice Joseph Story of the United States Supreme Court is pictured in an engraving from an original painting by Chappel. Justice Story, who was appointed to the Court at the age of thirty-two, served from 1812 to 1845. Used with permission of the Collection of the Supreme Court of the United States.

From the Dean

In these few pages, I want to share information with you about our most recent faculty appointments, new initiatives in the international area, the Law School Alumni Association and Council, and the status of our planning for the new addition to the Law School.

Faculty Appointments

In the 1988-89 academic year, the Law School added to its faculty two persons with tenure—Jefferson Powell, whose scholarly work is a mix of constitutional history and constitutional jurisprudence, and Neil Vidmar, a social psychologist whose research includes empirical studies of aspects of the litigation process. This year two persons have agreed to begin their academic careers at Duke.

Madeline Morris is a graduate of the Yale University undergraduate college and law school. She is just completing a clerkship with Judge John Minor Wisdom of the U.S. Court of Appeals for the Fifth Circuit. In her first year at Duke, she will teach a course in employment discrimination and a first-year small section in criminal law with its accompanying research, writing and advocacy components. Her research interests already include federal sentencing, federal and state constitutional rights to equal educational opportunity, and issues in the area of employment discrimination.

Laura Underkuffler is a graduate of Carleton College, the William Mitchell College of Law, and is just completing the Doctor of Juridical Science degree at the Yale Law School. She has extensive legal professional experience, including being a partner in a litigation law firm, an attorney in a state public defender's office, and an



Dan Crawford

instructor in two law schools. In her first year at Duke, she will teach a course in evidence and a first-year small section in property with its accompanying research, writing, and advocacy components. Her research interests include federal sentencing, religion and law under the First Amendment, and legal history.

We are delighted to welcome these new appointments to Duke. During the 1990-91 academic year, our appointments efforts will largely focus upon the field of public international law, because of Professor Horace Robertson's retirement in January 1990, and upon appointments of minorities to the faculty.

International Dimensions

No university of the first rank can today ignore international studies and programs. The curriculum and degree programs at the best research universities in the United States will increasingly encompass the international dimensions of various subject matters, reflecting the increased integration

of the world's economies and mobilization of people and the rapid speed of information flows.

In response to the need for the international dimension in the Law School, the faculty has increased the number of foreign faculty visitors who teach and perform research at the Law School. Also, the Duke University School of Law is the only law school in the United States that offers students the special opportunity to begin their juris doctor studies in the summer in order to pursue a formal joint-degree program combining the juris doctor degree with a master of laws degree in international and comparative law. This J.D./LL.M. degree program attracts to Duke a significant number of students with a special interest in international, comparative, or foreign law. About thirteen percent of our juris doctor student body is enrolled in this program.

These students have several special requirements for the LL.M. degree. In particular, they are required (i) to take a course on comparative legal institu-



Laura Underkuffler

tions during their first year; (ii) to take the course on Research Methods in International, Comparative, and Foreign Law; (iii) to attend our four-week summer program on international and comparative law in Copenhagen, Denmark (the so-called "Duke in Denmark" program); (iv) to prepare a supervised master's thesis in an area of international or comparative law; and (v) to demonstrate competence in a modern foreign language.

The "Duke in Denmark" program is a residential program, involving about sixty participants, approximately one-third of whom are from Duke University and the other two-thirds of whom are from countries other than the United States. The faculty comes from our Law School and several foreign universities.

Our Danish hosts have been particularly helpful to Duke in planning local arrangements and events, in raising funds for Danish students to attend the program, and in curricular development. Notwithstanding the excellence of the program development in Denmark, the Law School will move this program to Brussels,

Belgium, beginning the summer of 1991. The program itself will not change in any important way, but the location in Brussels will provide the participants in the program an opportunity to see first-hand the European Commissions, the European Court of Justice, the International Court of Justice at The Hague, the U.S. Mission to the European Community, NATO, and various international law firms. The program will also be offered by the joint efforts of our Law School and the Law Faculty of the Free University of Brussels (i.e., Universite Libre de Bruxelles). The faculties of both Universities are committed to providing a significant opportunity for law students and young lawyers to spend time in an academic setting in Brussels that also permits them to gain first-hand knowledge of the important European Community and regional and international organizations located there. Our presence in Brussels will also provide a spring-board from which to develop an internship program for students in European and international organizations in Europe.

Students interested in international, comparative, and foreign law participate in a broad range of extra-curricular activities in the Law School. They operate an active International Law Society, which maintains a speakers forum. The School of Law's Jessup Competition Moot Court team won the regional championships in both 1989 and 1990. Students have published an *International and Comparative Law Annual* and the faculty has recently approved the conversion of the *Annual* into a biannual publication called the *Duke Journal of Comparative and International Law*, one issue of which will always be devoted to European Community Law.

The Law School also has an LL.M. program for thirty to thirty-five young foreign lawyers. This program brings to the School an extraordinary group

of students from many countries with a broad range of interests. During the spring semester break, both the J.D./LL.M. (in international and comparative law) and the LL.M. foreign students participated in a week-long series of briefings and meetings with representatives of international, government, and trade organizations in Washington, D.C. and New York City. Many of our alumni assisted the Law School in arranging meetings and seminars, including **Erik O. Autor '88**, **Louis J. Barash '79**, **James E. Buck '60**, **Donna Coleman Gregg '74**, **Andrew S. Hedden '66**, **John A. Howell '75**, **Gary G. Lynch '75**, **Edgar J. Roberts, Jr. '63**, and **Michael P. Scharf '88**. I warmly thank these alumni for their contributions to the students' meetings.

The Law School's next efforts to improve its international dimension will be the search for a replacement to Professor Robertson, who retired this year, in public international law. I personally will be involved in the development of a few excellent exchange programs with foreign universities for our J.D./LL.M. students as a part of their LL.M. curriculum.



Madeline Morris

Law Alumni Association and Law Alumni Council

All of our alumni belong to the Law School's Alumni Association, and we request each year that you make an annual dues payment to this Association. I want to be sure that our alumni understand what this organization does and how its programs financed by your dues are an important part of the Law School's outreach to its alumni and the alumni contacts with our current students.

The Law Alumni Association is composed of all the Law School's alumni, and is governed by the Law Alumni Council of seventeen members and officers. The current president of the Law Alumni Association is **Vincent Sgrosso '62** from Atlanta, Georgia and the president-elect is **Richard "Chip" Palmer '66** of New York City. The officers and the Council direct all of the Association's activities, which include planning the reunion weekends; selection of alumni recipients for annual awards to recognize extraordinary public service; supervision of the forty local alumni organizations in the United States, Japan, Taiwan, and Europe; planning the Annual Career Conference held each February by Law School alumni for the benefit of the current students; planning two alumni seminars for current students on topics important to the practice of law and the legal profession; supporting financially summer jobs for students in areas of public interest law; and publishing the Law Alumni Directory.

Because of the speed and cost savings created by desktop publishing, the Law Alumni Council will now publish the Law Alumni Directory each year. In my travels to alumni, I have heard much appreciation of the utility of this Directory. A substantial portion of the Alumni Association dues will be used to finance the annual publication of the Directory. All of these activities



Professor John Weistart (far left) and students participating in the 1989 Duke in Denmark program enjoy an outing in Copenhagen.

create a community among our alumni and very importantly bring alumni back to the Law School to enjoy each other and to assist the School in training and counseling its current students. I hope that all alumni will increasingly spend time in these alumni activities.

Progress in Planning for our Building Addition

I have been regularly using these pages to keep you informed of the progress in our plans for our new building addition. At this time, the architects are beginning the construction document phase for the new addition. Their work should be completed by the end of 1990 or early in 1991. Simultaneously, I will be spending most of my time completing the fund-raising for the project financing of the \$14 million new addition by the spring of 1991. This fund-raising is about fifty percent completed at this

date, and I am working with groups of alumni to complete the other fifty percent by next spring. We hope to be able to break ground on the new addition by the summer of 1991. This new addition will enable the Law School after many years to operate in an adequate physical plant relative to the size of its faculty and student body, plus modernize to a great extent the library's space in the building.

Our next publication is the Law School's 1989-90 *Annual Report*. In that *Report*, I will provide you a fuller financial report about the School and its capital planning and a broader coverage of current issues in legal education.

Pamela B. Gann

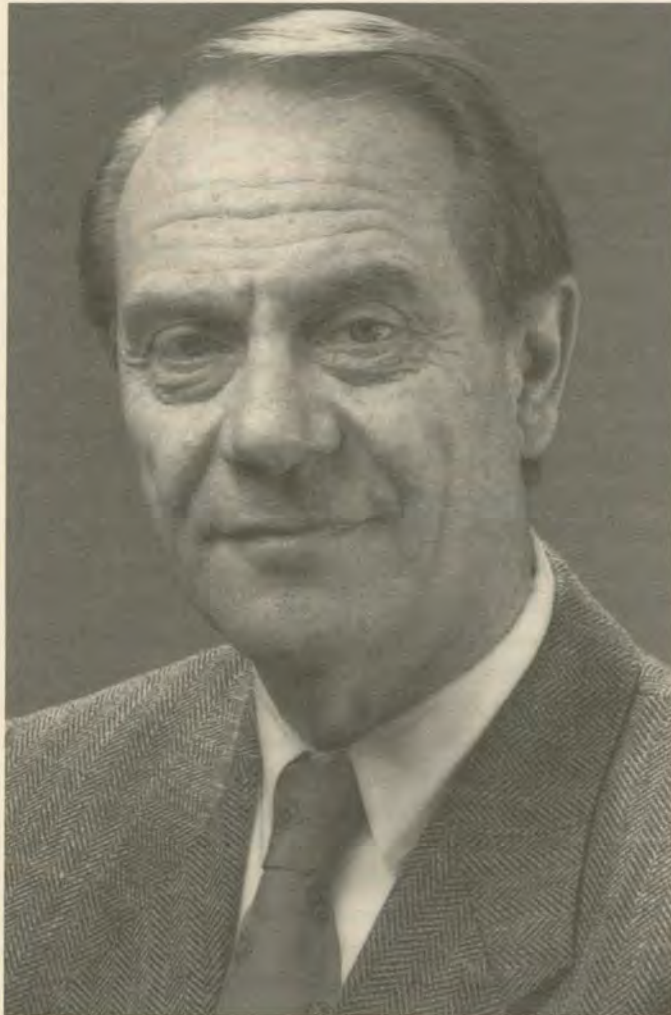
Pamela B. Gann
Dean

Forum

German Unification:

Political and Legal Aspects of Current Events

Herbert L. Bernstein



Professor of Law, Duke University. A native of Germany, Professor Bernstein has been at Duke since 1984. In Germany, he was a practicing member of the bar and a professor of law at Hamburg University. He also taught at the University of California from 1967 to 1971, and since 1958 he has been affiliated with the Max-Planck Institute of Foreign and Private International Law. His writing concerns international law, conflict of laws, insurance and business law. This article is from a lecture delivered in the Law School on November 28, 1989, sponsored by the International Law Society.

At present there is an abundance of speculation about the future of Central and Eastern Europe, including the prospect of German unification. Much of this discussion is geared only to the most recent events in the various countries of that region. It is also very much focused on individual actors and the question for how long one or the other, especially Mr. Gorbachev, is likely to be in power. This style of debate reflects the attention span of a public dominated by television.

In order to gain a better perspective on the German and the East-European question, I will attempt, first of all, to revisit the historical process of the last forty-five years which led to the present situation. Against this background I will then analyze the normative data and certain political structures which are likely to influence further developments in the region under consideration.

Historical Process

On November 9, 1918 a German Revolution in Berlin and other cities brought down the Kaiser and led to the end of World War I, as a consequence of which the entire political landscape in Eastern Europe was changed dramatically.

On November 9, 1989 a German Revolution in Berlin and other cities brought down, at least for all practical purposes, the Berlin Wall, the most visible manifestation of the Cold War in Europe. Once again the political landscape in Eastern and Central Europe appears to undergo a process of rapid change.

There were two other events in recent German history marking November 9 as a fateful date. On November 9, 1923 a group of Nazis, including Hitler, attempted a coup against the Weimar Republic. After their rise to power in 1933, the Nazis celebrated this event every year as the day of national "Erhebung," meaning uprising as well as elation. And on November 9, 1938 they staged the "Reichskristallnacht," until then the worst pogrom of Jews in Germany, foreshadowing the Holocaust.

The Berlin Wall symbolized more than Germany's partition. It stood for an order of things which has prevailed in Europe for many decades, just as the Kaiser, along with the Czar and the Austrian Emperor, stood for an older European status quo which lasted for several decades.

Both before World War I and after World War II, a small number of powerful nations dominated the political

The Berlin Wall symbolized more than Germany's partition. It stood for an order of things which has prevailed in Europe for many decades. . .

scene in Europe. Toward the end of the 19th century and early in this century, Britain, France, and Italy were the dominant Western powers, while Russia, Austria and Germany were the major players in Eastern and Central Europe. The Poles, the Czechs, the Slovaks, and many other peoples in the Balkans, the Baltics and elsewhere in Eastern Europe had no voice or a very minor role in politics. After World War II, a terribly devastated and impoverished Europe was in effect in the hands of only two major powers: the United States and the Soviet Union. These two nations emerged from the second Great War of this century as the "Superpowers."

One of them centered outside of Europe, the other at its fringes, the Superpowers have been global antagonists as well as the crucial powers in Europe for more than four decades. Their geographical, ethnic, and social make-up is completely different, their historical experiences are quite diverse, their official ideologies diametrically opposed. Coming from such inconsistent backgrounds, they became allies for a brief period in World War II, as when they entered into agreements providing for a vaguely defined post-War world order under the aegis of the United Nations and created two fairly clearly defined spheres of influence in Europe. They also appeared to have agreed on certain principles and even on many details of the policy to be pursued in Germany after its defeat.

This appearance soon proved to be false. But in 1944-45 the Soviet Union on the one hand and the United States on the other, acting together with its ally Great Britain, set up a mechanism and rules for the control of Germany under occupation. Later, France was permitted to participate in the occupation regime in Germany. After the unconditional surrender of the German army in May 1945, the four powers, on June 5, 1945, issued the "Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany." This document is of great political and legal significance still today. After the opening of the Berlin Wall and the other dramatic changes in East Germany, the 1945 Declaration will in fact assume renewed importance after many years of a rather dormant existence.

The Declaration of June 1945 stated that no central government existed in Germany and that the four governments therefore assumed supreme authority with respect to Ger-

many. An accompanying "Allied Statement on Control Machinery in Germany" was to the effect that supreme authority in Germany would be exercised by the Commanders-in-Chief, each in his zone of occupation, and jointly through the Allied Control Council in Berlin, in matters affecting Germany as a whole. The Allied Kommandatura for Berlin where each of the four powers occupied and controlled one of four sectors, was charged with the exercise of four-power control of the entire city. It must be remembered that the presence of British, French, and U.S. troops in Berlin was not the immediate result of military action in World War II; Soviet troops alone had conquered the city. Contingents of the Western allies moved into Berlin on the basis of an agreement with the Soviets. As a *quid pro quo*, this agreement also provided for the withdrawal of British and American forces from territories they had occupied in Mecklenburg, Thuringia and Saxony. These territories became part of the Soviet zone of occupation.

The Declaration of June 5, 1945 also stated that the four powers had no intention to effect the annexation of Germany, and it continues: "The Governments [of the four powers] will hereafter determine the boundaries and the status of Germany or of any area at present being part of German territory." At the Potsdam Conference in July and August 1945, the Soviet Union, the United States, and Britain decided to place certain German territories east of the Oder-Neisse line under Polish administration until a peace treaty would determine the permanent status of these territories.

The Potsdam Protocol and the June Declaration also reformulated principles and policies for the treatment of Germany previously stated at the Yalta Conference of February 1945 and worked out in greater detail at meetings of expert groups in London.

Profound disagreement soon developed between the United States and its Western allies on the one hand, and the Soviet Union on the other, over the execution of these policies. Each side blamed the other for serious breaches of their mutual undertakings. There was never any genuine consensus on the proper interpretation of any of the big-D objectives: Democratization, Denazification, Demilitarization, and the Decentralization (Demonopolization or Decartellization) of Germany's economy. In fact, even among

After the opening of the Berlin Wall and the other dramatic changes in East Germany, the 1945 Declaration will in fact assume renewed importance after many years of a rather dormant existence.

In Berlin there was complete freedom of movement between East and West until August 13, 1961, the day the Wall began to go up.

the Western allies these objectives were not always uniformly understood and pursued. Especially the British Labour government sometimes tried to put ideas of its own into effect in Germany, and so did various French cabinets, whether they were dominated by Gaullists, Centrists, or Leftists. On the whole, however, American hegemony was quickly and firmly established not only in Germany, but throughout the Western world.

The Marshall Plan of 1947 and the NATO Treaty of 1949 are well-known milestones in a process by which the United States assumed a leadership position after World War II which it had failed to assume after World War I. Conditions were of course much more favorable to the United States now than they had been then. The second World War saw a host of victors, but only one real winner. The United States emerged from that War as the one country which was immeasurably stronger after the War than before—economically, militarily, and politically. All the other countries including Britain and France had suffered enormous losses during the War, and were soon to lose all of their colonial possessions.

The role of the United States as one of the two hegemonial powers in Germany and Europe began to crystalize even before the Marshall Plan of 1947 and the founding of NATO in 1949. As early as 1946, Secretary of State Byrnes gave a speech in Stuttgart in which he announced a significant reversal of U.S. policy toward Germany. Economic recovery rather than punishment was the new motto; reparations out of ongoing production had to stop immediately. The Soviets, on the other hand, enforced their reparation demands in East Germany for many years to come. They, as well as Britain and France, also dismantled machinery and other industrial equipment in their zones of occupation. Under the combined pressure of striking Germany workers and a disapproving U.S. government, Britain and France had to discontinue this policy.

The United States also took a leading role in forging first the American and British zones and then all three Western zones into an economic unit in 1947-48. A drastic currency reform was pushed through in 1948, which proved to be the turning point in West Germany's economic recovery. Finally, the German states in the three zones were given a mandate to form a federal government on the basis of a new constitution. This led to the enactment of the Basic Law

and the formation of the Federal Republic of Germany in 1949.

All of these steps taken under American leadership initially met with sometimes vehement opposition, resistance, or reservations, either from America's allies or from the Germans, or both. The American position, however, always prevailed. Needless to say the Soviets protested all of these developments. The Soviet representatives left the Control Council in the spring of 1948. Immediately after the currency reform in June 1948, the Soviets imposed a blockade on West Berlin to force Berlin and the Western powers into compliance with certain Soviet demands and, if possible, to move Western troops out of Berlin. This was answered by the air lift, and after ten months, the blockade was terminated on May 12, 1949.

By the end of 1949 we find two states in Germany: the Federal Republic comprising the three Western zones, and the German Democratic Republic in the Soviet zone. Until 1955, these two entities were subject to severe restrictions of their powers. In West Germany the Occupation Statute enacted by the United States, Britain, and France in 1949 set out in detail the powers reserved to ensure the accomplishment of the basic purposes of the occupation, including control over the foreign relations of the Federal Republic and its capacity to enter into international agreements. An Allied High Commission replaced the military governments. Analogous arrangements were made by the Soviets in their zones.

The border between the two German states remained fairly open in the first few years of their existence. In Berlin there was complete freedom of movement between East and West until August 13, 1961, the day the Wall began to go up. It should also be remembered that in June 1953 workers in East Berlin and throughout East Germany initiated an uprising which threatened to overthrow the East German regime, until the uprising was crushed by the Soviet forces. This happened three years before similar uprisings in Poland and Hungary in 1956, and fifteen years before Dubcek's rise to power in Prague in 1968. In none of these cases did the West risk an intervention. This can be seen as a tacit agreement between the two Superpowers to respect each other's

In other words, the Soviet Union sought an affirmation of the division of Germany and Europe, as soon as it became apparent that West Germany could not be prevented from joining the Western alliance, not even by an offer of German unification.

Khrushchev reminded the Western powers of the fact that they were in Berlin by virtue of an agreement with the Soviets rather than as a result of military action.

sphere of interest in Europe, as they were established at the end of World War II.

In the late 1940s, the United States had articulated its policy of containment to the effect that the Soviet Union should not be allowed to expand any further in Europe; that is, it should be prevented from expansion beyond the line it had reached in Germany, Czechoslovakia and Hungary as a result of World War II. The flip side of this coin obviously was that within its realm in Eastern Europe the Soviet Union was free to exercise its form of hegemony. To be sure, Secretary of State John Foster Dulles proclaimed a policy of roll-back rather than containment. But when the events in East Germany, Poland, and Hungary in 1953 and 1956 seemed to call for an application of his policy, he did not practice it. He knew well enough that the national interest of the United States did not justify an intervention, when this might have led to a third world war. A roll-back of sorts occurred only in one European country: Austria. But Austria was a special case; here the Soviets and the United States, Britain, and France agreed in 1955 on a mutual withdrawal and a neutral status. Stalin had suggested a similar arrangement for Germany in 1952: a Germany unified with its neutrality secured by a small German army, but no foreign troops permitted on its territory. The United States, backed by its allies, and Adenauer, backed by the majority of West Germans, rejected this proposal. The idea of a unified, neutralized, and re-armed Germany appeared horrifying to Adenauer as well as to the Western allies. They preferred the process of West Germany's integration into the Western alliance to continue. In 1952 (at the time of Stalin's proposal) this process had just begun. West Germany and France, together with Italy, Belgium, the Netherlands, and Luxemburg, formed the European Coal & Steel Community, the forerunner of the more comprehensive Economic Community established in 1957-58. The plan for a European Defense Community was launched. After its failure in 1954, West Germany and Italy were admitted to NATO membership to enable West Germany to re-arm under allied control. In this context in 1955 the Occupation Statute of 1949 was repealed and the Allied High Commission dissolved on the basis of a treaty which the Federal Republic concluded with Britain, France, and the United States. This treaty also provided that "the Federal Republic shall have the full authority of a sovereign state

over its domestic and foreign affairs." This statement, however, is subject to important restrictions laid down elsewhere in the treaty. These provisions are pertinent to the question of German unification, and I will return to them shortly.

Once the formation of a separate West German state and its integration into the Western alliance had become a *fait accompli*, the Soviet Union could do nothing but accord East Germany an analogous status of ostensible sovereignty and integration into the Warsaw Pact, which it did in 1955. The Soviets immediately went one step further though. They recognized the Federal Republic and established diplomatic relations with the West German state. A corresponding step with respect to the German Democratic Republic ("G.D.R.") was taken by the three Western powers seventeen years later, in 1972.

In other words, the Soviet Union sought an affirmation of the division of Germany and Europe, as soon as it became apparent that West Germany could not be prevented from joining the Western alliance, not even by an offer of German unification. The stability of the status quo, however, was constantly threatened as long as the people in the G.D.R. were able to move to West Germany and did so in great numbers. This happened throughout the fifties. The G.D.R. tried to stop this exodus at the border to West Germany in the second half of the fifties. But this measure remained ineffective, because East Germans could go to East Berlin, then move freely to West Berlin and take a plane from there to West Germany. This prompted Khrushchev to issue a Berlin ultimatum in 1958 demanding drastic changes in the status of West Berlin including a withdrawal of the Western forces from the city. Khrushchev reminded the Western powers of the fact that they were in Berlin by virtue of an agreement with the Soviets rather than as a result of military action. Claiming fundamental breaches of this agreement, the Soviets attempted to rescind it.

The West, led by the United States, weathered this second Berlin crisis fairly well. One of its better moves was to point out to the other side that a rescission of the agreement providing for the presence of Western forces in Berlin would inevitably call for Soviet withdrawal from certain East German territories. As you will remember, these territories

After 1961, Germans in West Germany, realizing that others would not do the job for them, for the first time began discussing seriously what they themselves could do to ease the consequences of the division of Berlin and Germany.

...the Berlin agreement of 1971 contains unambiguous statements reaffirming the rights and responsibilities which the four powers derived from Germany's defeat and Allied occupation.

had originally been occupied by British and American troops and were turned over to the Soviets in exchange for the Western sectors of Berlin. Thus the two sides found themselves deadlocked over Berlin, for the second time since World War II.

It was in this situation, with the flow of East Germans to the West reaching new heights, that the East German Communists developed their plan of a Wall in Berlin and of fortified, tightly controlled borders with West Germany. It seems that the Soviet leadership and Communist leaders in East European countries were shocked when they were consulted about these plans. It also seems that the Soviets withheld their approval for quite some time and finally gave it but reluctantly. When the plans were carried out beginning on August 13, 1961, the United States and its allies again forewent even the slightest attempt at intervention. Arguably, the risk this time would have been smaller and more controllable than in 1953 and 1956 with the uprisings in East Germany, Poland, and Hungary. Also the legal basis for an intervention was arguably stronger, because the four-power regime in Berlin was at stake. But it had become painfully clear during the second Berlin crisis that the legal guarantees for West Berlin's viability were far from being satisfactory. The Western representatives at the War and post-War meetings with the Soviets at which the status of Germany and Berlin was determined had failed to work out sufficient guarantees.

After 1961, Germans in West Germany, realizing that others would not do the job for them, for the first time began discussing seriously what they themselves could do to ease the consequences of the division of Berlin and Germany. Obviously, negotiations with the Soviets, other East-European countries, and with the authorities in East Berlin were necessary to accomplish this. Certain extreme Cold War positions, including the West German government's claim to be the only legitimate representative of the German people, had to be given up. Also the existing borders in Eastern Europe had to be recognized as inviolable. After many years of sometimes acrimonious domestic debate, and difficult international negotiations, West Germany concluded a series of treaties with the Soviet Union, Poland, Czechoslovakia and East Germany providing for the normalization of their relationships in the first half of the

1970s. This included the making of considerable payments and the rendition of aid to Poland, Czechoslovakia, and East Germany. In a closely coordinated action together with West Germany's overture to the East, the United States, Britain and France negotiated an agreement with the Soviets in 1971 which provided greatly improved guarantees for Berlin.

Normative Data

Closer analysis of some of the legal instruments mentioned earlier will help to assess Germany's present legal status. The Declaration of June 1945 by which the governments of the four occupation powers assumed supreme authority with respect to Germany, to be exercised jointly in matters affecting Germany as a whole, has not lost its legal effect. To be sure, the machinery created for the exercise of joint authority, the Allied Control Council, ceased to function in 1948 when the Soviets withdrew from it at the onset of the first Berlin crisis. But the four powers have always been careful not to relinquish their supreme authority in matters affecting Germany as a whole. Also they have not given up their rights as occupation powers in Berlin.

When the two German states were formed in 1949, the three Western powers approved the West German constitution, the Basic Law, not without reservation. The German drafters of the constitution were determined to include Berlin as a state in the Federal Republic of Germany. The text of the constitution expressed this intention quite clearly. The pertinent provisions, however, were suspended by the Western powers when their Military Governors decreed that Berlin was permitted only to delegate representatives without voting rights to the legislature in Bonn and that the federal authorities shall not govern Berlin. Furthermore, the Occupation Statute of 1949 reserved control over foreign relations and Germany as a whole to the occupation powers. The Soviets retained their corresponding rights when they allowed the formation of the G.D.R. in 1949.

As mentioned before, a treaty went into effect in 1955 which purported to establish West Germany as a sovereign state. This Convention on Relations between the Three Powers and the Federal Republic of Germany, however, also provides, in Article 2, that the three powers "retain the rights and the responsibilities, heretofore exercised or held by them, relating to Berlin and to Germany as a whole in-

The Berlin agreement of 1971 reaffirmed the position of the three Western allies that their "sectors do not belong to the Federal Republic and shall not be governed by it."

... it is hard to believe that many non-Germans are really enthusiastic about the prospect of a united Germany with close to eighty million people representing an economic power unmatched by any European nation.

cluding the reunification of Germany.”

When the Soviets also undertook to terminate their occupation regime in 1955, their reserved powers were less clearly stated. In the immediately following period, especially during the second Berlin crisis of 1958-61, it seemed sometimes from certain pronouncements by the Soviet Union, as if the Soviets had virtually abandoned their rights and responsibilities in Germany. But the Berlin agreement of 1971 contains unambiguous statements reaffirming the rights and responsibilities which the *four* powers derived from Germany's defeat and Allied occupation. It is not unreasonable to assume that the Soviet leadership in 1971, unlike Khrushchev in the late fifties, considered it to be in their interest to retain a legal claim to a certain control over Germany as a whole and Berlin, even though that required recognition of corresponding powers of the Western allies.

It is also not unreasonable to surmise that the present Soviet leadership is well aware of the existence of these mutual rights and responsibilities held by them and the three Western powers. Repeated statements by Soviet representatives to the effect that German unification is not on the agenda, must be seen in light of these normative data.

German unification would seem to be by definition a matter affecting Germany as a whole. Indeed, the 1955 Convention makes that explicit. Thus the two German states have no legal power to act on this matter. Rather, this power is held jointly by the Soviet Union and the three Western allies. Likewise, the status of Berlin is controlled, as a matter of law, not by German authorities, but by the four powers. The Berlin agreement of 1971 reaffirmed the position of the three Western allies that their “sectors do not belong to the Federal Republic and shall not be governed by it.”

These normative data are probably found to be somewhat reassuring not only by the Soviets. Germany's European neighbors may welcome them too; and so may people in the United States. Our rhetoric in the West has for decades supported the West German claim to unification. But it is hard to believe that many non-Germans are really enthusiastic about the prospect of a united Germany with

close to eighty million people representing an economic power unmatched by any European nation. Even though President Bush and other officeholders in the West have announced that they are not troubled by this prospect, this is hardly the prevailing sentiment.

There are, however, certain normative data which leave little, if any room for the American president or his counterparts in Britain and France to take a stand against German unification. Thereby the three powers would not only disavow policies they have professed to pursue for decades, but they would breach an international treaty. The Convention on Relations between the Federal Republic and the Three Powers provides in Article 7 that “the parties to this Convention will cooperate so as to realize with peaceful means their common goal: A united Germany with a constitution similar to that of the Federal Republic and integrated into the European community.” Clearly, this provision was a Western concession to Adenauer who was under constant attack in the early- and mid-fifties from the Social Democrats and others who charged him with an intention to abandon German unity in favor of integration of West Germany into the Western alliance. This included challenges of serious violations of the West German constitution.

Similar charges were made when the Social-Liberal coalition normalized the relations with Eastern Europe and East Germany in the seventies. Various cases involving constitutional challenges against this so-called Ostpolitik were brought in the Federal Constitutional Court in West Germany. The court held that German unification is constitutionally mandated and an abandonment of this goal would be unconstitutional.

These normative data may be considered by many as less welcome than the ones discussed before. It must also be remembered that, as long as no peace treaty has been concluded, the status of former German territories in the East is not finally settled. Neither of the two German governments, which have recognized the new borders as inviolable, can legally act for Germany as a whole. This does of course not preclude a political commitment of the two governments and all responsible political actors in Germany to a recognition of the Polish border as final. Such commitment is absolutely necessary for stability and peace in Europe.

Neither of the two German governments, which have recognized the new borders as inviolable, can legally act for Germany as a whole.

The containment and control of Germany's military power will have to be accomplished by an all-European security system guaranteed by the United States and the Soviet Union.

Power Structure

Given the mixed messages coming from the normative data and given the highly volatile present situation in Central and Eastern Europe, it is more than a little unsettling to observe the change in power structures in Europe. The fixation of both Superpowers on military strategic thinking and their resulting arms race has in the end not strengthened their power bases. It has undermined them and has led to the decline of Soviet-American hegemony in Europe. Neither of the Superpowers can control events in Europe nearly to the same extent they could for forty years. Malta will not change that; Malta is not Yalta.

While the decline of Soviet hegemony is all too obvious, America's position in the Western world today is also very different from the dominant role it played for decades. The trade imbalance and the budget deficit resulting in a constantly increasing U.S. government debt are some of the indicators of change. The recent rift with West Germany over nuclear and chemical weapons located on German territory and over other issues is another indicator.

NATO was designed, in the words of its first Secretary General, "to keep the Russians out of Western Europe, to keep the Americans in, and to keep the Germans down." The organization has accomplished this triple purpose of assuring American presence and hegemony along with double containment vis-a-vis the Soviets and the Germans extremely well for an amazingly long post-War period. But this period has ended, and NATO has never been developed into more than a military alliance, as was originally envisaged. It is probably too late for that now.

In the long run NATO will not be viable as a military alliance. In view of the changes in the East, the public in our Western democracies will not support an organization which has lost most of its purposes. The containment and control of Germany's military power will have to be accomplished by an all-European security system guaranteed by

the United States and the Soviet Union. Maybe NATO and the Warsaw Pact can be transformed into such a system.

As I see it, the most important power structure today which could help to keep events in Central and Eastern Europe under control is the European Community. West Germany is firmly imbedded in the Community. It is a little known fact that even East Germany has had free access to the Common Market from its inception in 1958. Austria is now seeking membership in spite of its internationally guaranteed status of neutrality. East European countries like Czechoslovakia, Hungary, and probably soon Poland, are eager to associate themselves with the Community. The process of intensified integration expressed in catchword fashion by the concept of "Europe 1992" is well under way. The only element of retardation at the moment is Margaret Thatcher, but she may not last much longer. The Europeans, but also her own people, seem to be losing patience with her.

In Germany nobody in his right mind is opposed to these processes. Continued German integration into the Community is not only an often repeated policy of all major political groups. The vast majority of Germans is certainly behind it. They do not want a German "Sonderweg." This, together with the remnants of four-power control over Germany as a whole and over Berlin, would seem to be the best guarantee against unchecked developments in undesirable directions in the region.

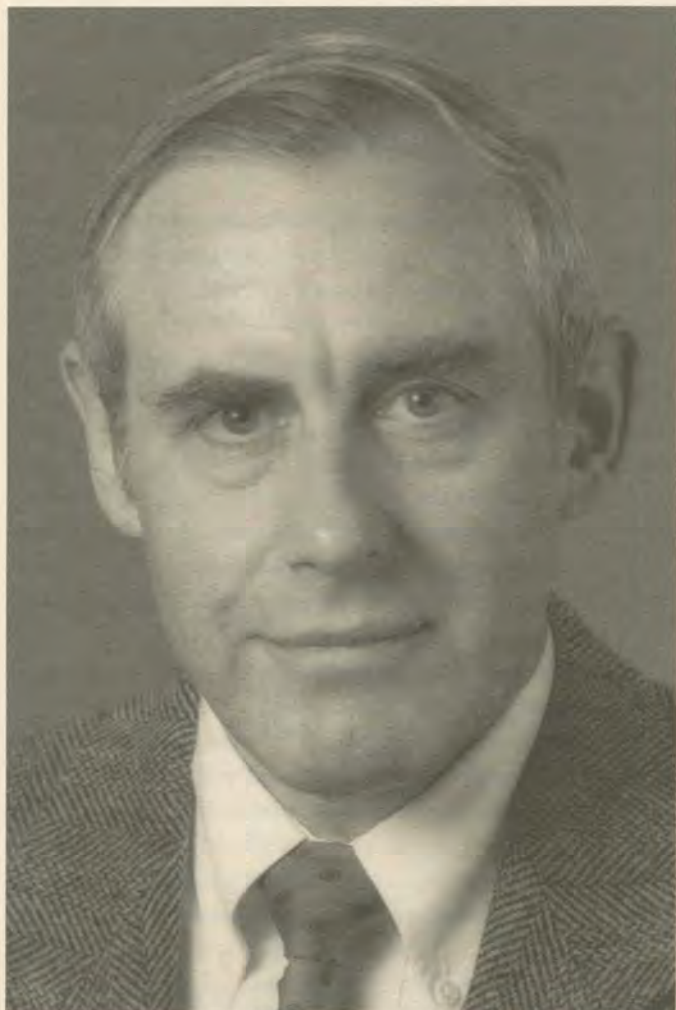
Of course, once unification occurs with four-power approval, this will mean the end of four-power rights and responsibilities in the exercise of "Supreme Authority" in Germany. Also, given Germany's economic strength, it will inevitably play a key role in the Community, united or not. But its neighbors will still be better off with Germany within, rather than without, the Community. A return to fully sovereign nation-states in Europe could spell disaster.

We see already that with the decline of Superpower hegemony in Europe many of the national and ethnic conflicts dating back to the pre-World War I era are re-emerging. While the improvement of economic conditions may help to ease these conflicts, it will take a lot of diplomatic sophistication and ingenuity, and it will take statecraft to keep them from erupting. Thus, diplomatic skills and statecraft are in great demand at a time when our Western television-democracies are poorly prepared to cultivate these virtues. We have reason to be concerned. *Nostra res agitur.*

The Hushed Case Against a Supreme Court Appointment:

Judge Parker's "New South" Constitutional Jurisprudence, 1925-1933

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He was hailed as an exponent of the "New South" when nominated in 1930 by President Herbert Hoover for Associate Justice of the United States Supreme Court.¹ But Judge John J. Parker of the United States Court of Appeals for the Fourth Circuit soon found himself politically marooned between the Scylla of alleged racism and the Charybdis of a reputed anti-labor predisposition.² In a Senate confirmation process run amuck, Parker's judicial record compiled after his appointment to the appellate bench in late 1925 received little attention—with the exception of *United Mine Workers of America v. Red Jacket Consolidated Coal and Coke Co.*³ wherein lay putative evidence of his anti-labor proclivities. From that single case and from his 1920 North Carolina gubernatorial campaign speeches, critics transmogrified the jurist; he personified alternatively the consummate nullifier of the legal rights of blacks and labor and the defender of white supremacy and private property.⁴

Yet Parker on the bench proved no zealous proponent of either racism or private property, although few cases involving black Americans reached the circuit court in the 1920s and early 1930s. Instead, the judge, then in his forties, developed and expounded an authentic "New South" constitutional jurisprudence which implicitly nurtured the economic conditions necessary for southern growth.⁵ It was a jurisprudence which might well have given pause to some of his confirmation opponents who hailed from rival sections of the nation. Their apprehensions, if they existed, remained unarticulated. Instead, they attacked the Supreme Court nominee on more politically efficacious grounds.

As an appellate court judge, Parker was no advocate of economic laissez-faire. Rather, he labored to unleash state police power as a vehicle for realizing economic development in the southern states, a topic previously considered in the *Duke Law Magazine*.⁶ Nor did he, unlike southern traditionalists, perceive of local or even regional economic development as a means of protecting white supremacy from erosion by broad nationalistic tides responsive to national economic and political integration.⁷ Such regional chauvinists regarded national regulation of economic life as a precursor to centralized control of race relations in the South. They and their predecessors railed against federal judges and federal courts seen as diabolical instruments of northern



Judge John J. Parker following his appointment in 1925 by President Calvin Coolidge to the United States Court of Appeals for the Fourth Circuit shown holding a cane, a gift from Amos M. Stack, his former law partner in Monroe, NC.

economic and political exploitation of the South.⁸ Parker stood apart from these sometimes deafening and demagogic critics of the national judiciary. He was an ardent judicial nationalist, but one with a pronounced regional bias,⁹ especially on matters relating to southern economic life.

Balancing Law and Policy

Cases which pitted national interests against southern regional interests tested Parker's fidelity to the tenets of judicial nationalism. Activism on the part of the federal government could promote development of an economically viable "New South." On the other hand, Hamiltonian initiatives from Washington could have the opposite effect.¹⁰ How to temper national policies injurious to regional growth perplexed Parker in cases in-

volving national banking, electric power and railroad freight rate policies.

Federal Reserve Bank of Richmond. Parker as lawyer had represented southern country banks then warring against the Federal Reserve's "par clearance" system. In the United States Supreme Court he had defeated the central bank's attempt to establish a national clearinghouse system whereby onerous exchange charges were imposed on checks tendered at Reserve Bank counters by country banks.¹¹ Once on the bench, Parker implicitly questioned the Reserve system's centralizing tendencies as a development antithetical to southern interests. Yet, he proved unable to curb the Federal Reserve Bank of Richmond. "I have been sweating for a week over the opinion" in *Federal Reserve Bank v. Early*, he wrote. After reading "all of the cases cited and a great many others and...looking at the case from every angle," he acknowledged that the national clearinghouse's claim to the deposit balance of one of South Carolina's numerous insolvent banking institutions seemed unassailable. "I started out to write an

opinion on the other side of the proposition," he confessed, "but I found that it would not write that way."¹²

A disappointed Parker held that "the deposit balance in favor of the insolvent bank should be applied to checks as the Federal Reserve Bank contends."¹³ The decision effectively accorded a preferential claim on deposit reserves of failed banks to remote users of the Federal Reserve clearinghouse system over claims of local depositors and other creditors of such insolvent financial institutions.

Southern Utilities. Parker had previously affirmed the exercise of governmental power as against the right of private property asserted by timber owners in a case wherein national and regional interests in developing Great Smoky Mountains National Park had been complementary.¹⁴ Federal condemnation of the Duke-owned Southern Power Company's right-of-way across Nantahala National Forest, however, encouraged close scrutiny of this interference with the keystone of the region's economic infrastructure. As the utility's brief stressed, the electric power generated by the company went out "to cities and towns, cotton mills, and other industrial enterprises, and to the public generally," and the transmission lines in question also "constitute[d] the sole connecting link between the system of the defendant and that of the Georgia Railway & Power Company and... the system of other power companies lying to the south of the defendant's system." To sever vital connections between power grids in the region would cause irreparable loss to the public.¹⁵

Parker agreed with counsel's assessment. The land in question had been obtained for laudable conservation purposes which hardly suffered from rights-of-way enjoyed by public utilities. But interference with their lines would certainly "involve inconvenience with loss to the public and needless expense to the government."¹⁶ Furthermore, Congress had never intended to endow the Department of Agriculture with power "to condemn the rights-of-way of railway and power companies for forestry purposes merely because they happen to be situated on forest lands acquired by the government."¹⁷

Intrastate Freight Rates. Freight rates established by the Interstate Commerce Commission had far-reaching implications for southern life. The I.C.C.-fixed rates constituted a national internal tariff system perceived as responsible for perpetuating the South's colonial economy and

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How to temper national policies injurious to regional growth perplexed Parker in cases involving national banking, electric power and railroad freight rate policies.

subordinating it to the economic hegemony of the northern metropole.¹⁸

To be sure, Parker affirmed exercises of Congress' power to regulate interstate commerce in order to protect that commerce from harmful consequences flowing from intrastate activities.¹⁹ But like Chief Justice William Howard Taft, he saw a clear distinction between freight shipped in intrastate commerce and that carried in interstate commerce.²⁰ The distinction became significant for local consumers, shippers, and producers because classification of commerce as intrastate meant subjecting goods used within the several states to rates set by state agencies at levels often below those authorized by the I.C.C.²¹ In an opinion which Parker deemed among his "most important," he rejected a regional rail carrier's contention that petroleum shipped interstate by sea to a tank storage depot at the port of Wilmington and thereafter distributed in railroad tank cars to some 20,000 Tar Heel customer constituted "continuous shipments in interstate commerce."²² Instead, he held in *Atlantic Coast Line Railroad and Seaboard Air Line Railway Co. v. Standard Oil Company of New Jersey* that at Wilmington the oil and gasoline "came to rest and lost their identity in complainant's storage tanks and were mingled with its general stock."²³ Consequently, shipments from the North Carolina port constituted "independent movements" within the meaning of a Brandeis-coined Supreme Court test. The applicable rates became those approved by the North Carolina Corporation Commission for intrastate shipments rather than the higher I.C.C.-fixed interstate rates.²⁴ I.C.C. rates and orders encountered similar judicial hostility in another case, but several which portended either lower costs or enhanced intra-regional competition or both were approved.²⁵

At the critical decisional points where federal judges enjoyed discretion, Parker's regional proclivities surfaced. His decision-making approach involved the parsing of often complex facts of cases wherein national power was arrayed against southern regional interests in economic viability. That same approach also manifested reasoned exposition of statutes and constitutional doctrines, and a pragmatic, if usually implicit, policy determination compatible with the tenets of the "New South" creed. It was an approach which suffused judicial resolution of conflicts involving the southern bituminous coal industry.

Southern Coal Industry

On no other subject did the Fourth Circuit confront greater national-regional tensions than in cases which related to the labor intensive bituminous coal industry of the southern Appalachians. And, in no other area did a policy-based pro-South jurisprudence so strikingly emerge during the decade before the New Deal than it did in defense of the threatened coal industry. At stake were that industry's transportation costs regulated by the I.C.C.; its labor costs dependent on avoidance of high uniform and nationwide union wage scales; and its price-fixing powers. Favorable resolution of these three key issues meant apparent preservation of regionally important mining enterprises. To the federal court in the 1920s came southern coal operators to relate doleful tales of their bare survival, tales which became the focus of the court's attention.

The trial and appellate judges in the circuit heard about intersectional economic strife that soared to new heights in the Harding-Coolidge era. Coal shortages and escalating prices during World War I had induced a boom in bituminous coal and related development of new mines in the southern Appalachians. With demobilization and enhanced competition from petroleum and natural gas, the coal industry confronted vast surplus capacity, an inelastic demand for its product, and slipping prices and profits.²⁶ Operator survival in this laissez-faire jungle meant cuts in either or both key factors which determined coal costs to the consumer: transportation and labor.

Lake Cargo Coal Case. *Anchor Coal Co. v. United States* called into question I.C.C.-fixed coal freight rates and the consequences for the region's economy of such nationally established charges.²⁷ The suit by southern operators to enjoin rates on their coal shipped into the lucrative Great Lakes industrial market reflected acute intra-industry and intersectional rivalry for dominance in "Lake Cargo Coal." Northern operators in the Central Competitive Field stretching from western Pennsylvania into Illinois enjoyed a natural advantage in their geographical proximity to industrial markets, an advantage offset by prevailing union wage scales which raised their production costs to levels exceeding those of the southern operators.²⁸

Inroads made by southern bituminous in Great Lakes markets evoked protests from northern operators and action by the I.C.C. At issue were the "Lake Cargo Coal" rates charged by railroads. Rates on a per ton basis from nearby northern fields ranged below those charged remote producers in southern West Virginia, Kentucky, and Tennessee. Higher total transportation costs, even if much lower per mile, required that southern operators achieve the smallest possible per ton rate differential from mine to market. Between mid-1922 and mid-1927 the differential between the benchmark Pittsburgh and Kanawha rates stood at twenty-

As an isolated and low wage labor market, the South enjoyed a competitive edge in common markets against products from regions with higher labor costs and/or more capital intensive industries.

five cents. But in August 1927 the northern carriers, with I.C.C. permission, reduced their rates by twenty cents, thereby increasing the differential to forty-five cents. Southern railroads retaliated. They lowered their rates by the same amount and restored the former twenty-five cent differential. Appeals for protection by the northern carriers won an I.C.C. order directing their sectional competitors to suspend the unauthorized twenty cent rate reduction and to justify its reinstatement.²⁹

When their justification failed to satisfy the commission, southern coalmen, led by Wall Street lawyer John W. Davis, went into the United States Court for the Southern District of West Virginia to enjoin enforcement of the agency's rate suspension order and justification requirement.³⁰ Three days of what Parker termed a "strenuous hearing" was followed in March 1928 by his selection as author of the three-judge district court's opinion.³¹ The *Lake Cargo Coal Rate* opinion reflected his conviction that the I.C.C.'s rate suspension order presented "a question fraught...with the gravest consequences to the future of the country, if the power asserted... can be sustained." Answering this question required an activist approach. It would be necessary, he stated at the outset, "to look behind" the I.C.C.'s conclusions on the reasonability of rates "and ascertain exactly what it is that it has done, and upon what facts and upon the application of what principles it has arrived at its conclusion."³² What the agency had done seemed self-evident to resident District Judge George W. McClintic. It had played sectional favorites, affording "a 'special providence' for the Ohio and Pittsburgh coal operators, rather than thinking of the consumers in the north-western states or the southern carriers or coal operators."³³

The immediate question before the court involved statutory construction. Had Congress empowered the agency to make national economic policies? Quoting voluminously from commission reports reciting the collapsed state of the beleaguered bituminous industry in the North, Parker thought it

perfectly evident...that, in reducing the rates from the northern field, and in directing the cancellation of the reduction from the southern field, the Commission was primarily concerned, not in fixing rates, but in

fixing the differential which was to prevail between the two fields and that the Commission based its action upon the shift of tonnage from the northern to the southern field and the industrial conditions resulting therefrom.³⁴

Wielding of the rate-fixing power to correct displacement of northern coal in the Lake Cargo market was not, he declared in echoing McClintic, a regulation of rates, but rather a regulation of "industrial conditions under the guise of regulating rates." The Commission had considered production and employment as well as transportation in "an effort to equalize industrial conditions or offset economic advantages [of the South]."³⁵

In reaching its rate decision, the I.C.C. had relied on the 1925 Hoch-Smith Resolution, a farm relief measure, which authorized the agency to adjust rates in order to correct those found "unjust, unreasonable, unjustly discriminatory, or unduly preferential, thereby imposing undue burdens, or giving undue advantage as between the various localities and parts of the country."³⁶ Parker held in the *Lake Cargo Coal Rate* case, the federal judiciary's first interpretation of the resolution, that the statutory language constituted "no more than a general declaration that freight rates shall be adjusted in such a way as to provide the country with an adequate system of transportation." Surely Congress had never intended "by this language to create in the Commission an economic dictatorship over the various sections of the country, with power to kill or make alive." Today, the I.C.C. took aim at southern coal. Tomorrow, he warned, its target could be "cotton manufacturing...fruit growing...furniture manufacturing, in short,...every branch of industry."³⁷

If the I.C.C. had exceeded its rate-fixing powers, could Congress remedy the deficiency by empowering the regulatory agency to weigh intersectional economic conditions in setting rail tariffs? Probably not. In an *obiter-dictum*, Parker invoked the Supreme Court's regionally beneficial decision in *Hammer v. Dagenhart*,³⁸ a case that had arisen out of the North Carolina textile industry. The decade-old precedent

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A northbound Norfolk and Western freight in the "Lake Cargo" trade, hauling bituminous coal from mines in southern West Virginia, steams near Circleville, Ohio, thirty miles south of Columbus, on October 5, 1933.

solidly supported his contention that Congress "could not give the Commission power to fix rates to equalize industrial conditions." Regulation of production lay within the police powers of the states, a power reserved to them by the Tenth Amendment. Furthermore, Parker suggested, but did not decide, that such a rate-fixing basis likely violated the due process clause of the Fifth Amendment in that the rates promulgated would necessarily be "unreasonable and constitute an unprecedented interference with the industrial conditions of the country."³⁹ Dixie's hardpressed coal industry would be especially disadvantaged by the national regulatory agency's rate-making policies.

Red Jacket. New South industries seemingly needed protection not only from unfavorable freight rates set by the I.C.C., but also from the imposition of national labor standards. As an isolated and low wage labor market, the South enjoyed a competitive edge in common markets against products from regions with higher labor costs and/or more capital intensive industries.⁴⁰ Standardized national wages and working conditions threatened this regional advantage, thereby inflicting economic losses on both southern producers and their labor forces.⁴¹ The United Mine Workers of America (UMWA), in its quest for monopoly control over the price of all coal mine labor, posed just such a threat to regional economic development. Without judicial intervention to foil unionization, an advocate for the southern operators predicted, "the Union will succeed in the end in forcing... non-union mined coal of West Virginia out of competition in the markets of the country with the coal produced by Union operators and miners under Union rules and regulations and sold at prices determined by the Union."⁴²

The violent and emotion-laden labor conflict in the bituminous coal fields of southern West Virginia, dramatized for modern movie audiences by director John Sayles in his 1987 production film "Matewan,"⁴³ reached the Fourth Circuit court sixty years earlier. The primary issue in *United Mine Workers of America v. Red Jacket Consolidated Coal and Coke Co.* involved application of the Sherman Anti-Trust Act to John L. Lewis' union then seeking to organize the West Virginia miners.⁴⁴ The Act's application hinged, in turn, on discovery

of a relationship between the UMWA's organizational strategies and interstate commerce.

Resolution of the jurisdictional question reflected Parker's fidelity to judicial nationalism. He acknowledged Chief Justice Taft's holding in the *First Coronado* case wherein Taft declared "that coal mining is not commerce, and that ordinarily interference with coal mining could not be said to be interference with interstate commerce." But Parker entertained "no doubt that...interference with coal mining did interfere with interstate commerce in coal as a natural and logical consequence."⁴⁵ The Taft Court had said as much in its *Second Coronado* decision.⁴⁶ The rule of that case, not that of *First Coronado*, applied to *Red Jacket* because the union, by calling a strike in order to organize the bituminous coal fields of West Virginia, surely "intended to interfere with the shipment of coal in interstate commerce" even in the absence of any evidence of interference with the actual transportation of coal.⁴⁷

The facts spoke for themselves. The 316 coal companies joined as parties in the *Red Jacket* case produced 40,000,000 tons a year, over ninety percent of which went into interstate commerce. "Interference with the production of these mines," he reasoned, "would necessarily interfere with interstate commerce in coal to a substantial degree." This result suggested a conspiratorial intent, within the scope of the Act, to prevent interstate shipments of southern coal. "It was only as the coal entered into interstate commerce," Parker noted, "that it became a factor in the price and affected defendants in their wage negotiations with the union operators. And in time of strike, it was only as it moved in interstate commerce that it relieved the coal scarcity and interfered with the strike."⁴⁸

Once Parker's broad conception of national commerce power had brought the UMWA's local organizing activities within the court's federal question jurisdiction, he considered the scope of freedom to be accorded the union in its efforts to penetrate and organize the West Virginia coal miners employed under anti-union "yellow dog" contracts.⁴⁹ Resolution of this issue depended on the nature of the



Routes of the intersectional "Lake Cargo" bituminous coal trade from southern West Virginia to Lake Erie ports via the Chesapeake and Ohio Railway Co., Hocking Valley Railway (consolidated with C. & O. Ry. in 1930), and the Norfolk and Western Railway Co. as well as the C. & O. and N. & W. rail link with Chicago.

union and on Supreme Court precedents. The UMWA, headquartered in Indianapolis in the midst of the Central Competitive Field, clearly acted as a remote third party interloper whenever its organizers appeared in West Virginia. Thus Parker correctly regarded the conflict not as one between that state's coal operators "and their [non-union] employees over wages, hours of labor, and other causes, but [one]...between them as non-union operators and the international union which is seeking to unionize their mines."⁵⁰

Hitchman Coal and Coke Co. v. Mitchell,⁵¹ a case originating in the Fourth Circuit and decided by the High Court in 1917, together with that circuit's 1926 decision in *Bittner v. West Virginia-Pittsburgh Coal Co.*⁵² controlled the extent of permissible strategies available to unions such as the UMWA. Both precedents advanced injunctions as remedies for protecting non-union or "yellow dog" contracts under the constitutionally based "liberty of contract" doctrine previously approved by the Supreme Court in *Adair v. United States* and *Coppage v. Kansas*.⁵³ Language of the *Hitchman* decree had pervaded the *Bittner* opinion authored by Parker's senior colleague, Edmund Waddill, Jr., as well as the trial court's rendition of *Red Jacket*.⁵⁴

Hitchman barred union organizers from peacefully persuading workers under "yellow dog" contracts to break their contracts by joining the union while remaining in their employer's work force. It also prevented union agents from merely persuading employees to join up and, honoring their contracts, leave their employment in order to strike. This anti-enticement provision was augmented by another preventing persuasion of "any of plaintiff's employees to refuse or fail to perform their duties as such."⁵⁵ *Hitchman* and its progeny, including *Bittner*, effectively walled off non-union workers in the southern bituminous fields from the blandishments of national union organizers.

UMWA efforts to distinguish *Hitchman* by confining its prohibitions to union-organizing strategies involving violence, fraud and/or deceit, factors present in *Hitchman* but not in *Red Jacket*, foundered on the sweeping language of the *Hitchman* decree which restrained even "peaceful persuasion."⁵⁶ Nor did section 20 of the 1914 Clayton Act apply.⁵⁷ That section prohibited issuance of injunctions against nonviolent persuasion tactics used by unions. *Duplex Printing Press Co. v. Deering* had made clear, however, that this statutory restraint on federal judicial power applied only to conflicts between an employer and his own employees or prospective employees.⁵⁸ It did not protect a remote third party union's peaceful intervention on behalf of the employer's workers and all other similarly situated employees. Chief Justice Taft thereafter modified *Duplex* in *American Steel Foundries v. Tri-City Central Trades Council* to permit peaceful persuasion when the union involved was a geographically local one.⁵⁹

The UMWA fit within neither the *Duplex* nor *Tri-City* interpretation of the Clayton Act's protective shield. With a membership generously pegged by Parker at 475,000 and with local affiliates spanning the North American continent, the union bore precious little resemblance to the geographically confined Tri-City Central Trades Council composed of thirty-seven craft unions in a cluster of three Illinois

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towns.⁶⁰ And the UMWA's goals were different too. It sought not standardization of wages and working conditions in a confined locality, but their standardization on a national industry-wide basis.⁶¹

Impelled by advice received from dying colleague John C. Rose and by his own latent sympathy for working men and women which had emerged in political appeals made in the 1920 gubernatorial campaign as well as in judicial opinions, Parker limited the *Hitchman* doctrine.⁶² He held that union agents might peacefully persuade non-union employees to leave their employment and join the union in order to go on strike and to refrain from entering the employee's workplace during a strike against it. What the Union could not do was,

to approach a company's employees, working under a contract not to join the union while remaining in the company's service, and induce them, in violation of their contracts, to join the union and go on strike for the purpose of forcing the company to recognize the union or of impairing its power of production.⁶³

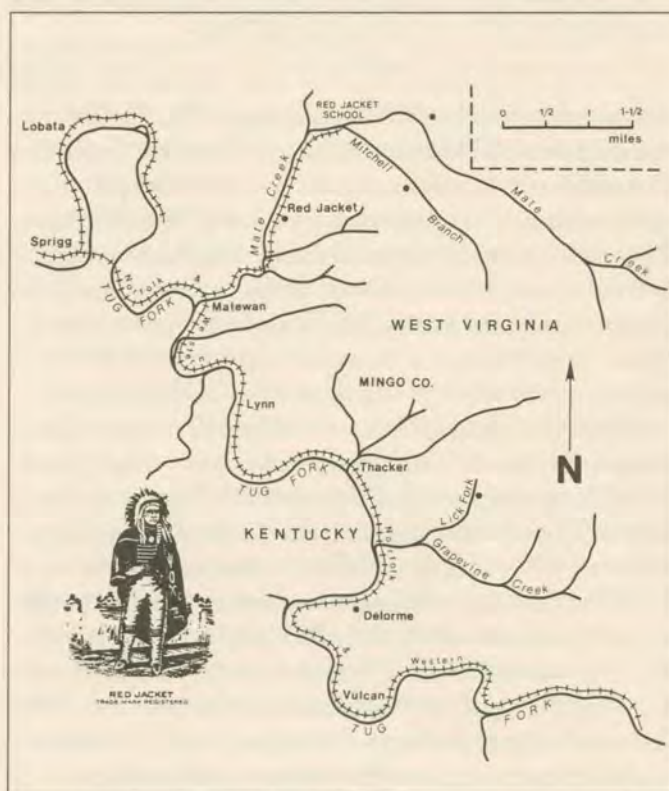
"*Hitchman*," Parker declared, "is conclusive of the point involved here." But the sole "point involved" was actual or attempted contract-breaking, an unlawful act which only occurred when an employee joined the union while remaining in the employer's workforce. *Red Jacket's* decree, as he stated, was "certainly not so broad as that of the decree approved by the Supreme Court in *Hitchman Coal and Coke Co. v. Mitchell*... which also enjoined [any] interference with the contract by means of peaceful persuasion."⁶⁴

Red Jacket reflected a cautious balancing of the competing interests of a nationwide labor union and a regional industry within the rigid confines of the labor law current at the time.⁶⁵ Parker weighed organized labor's interest in communicating its message to non-union miners, recruiting them into union ranks, organizing the mines, thereafter developing a collective bargaining relationship conducive to improved standardized wages and working conditions for individual southern coal miners. At the same time, he took account of the interests of the bituminous operators. Their regionally important production and employment capabili-

ties depended on offering their soft coal at marginally lower market prices which, in turn, rested partially on wage scales remaining below uniform industry-wide scales prescribed by the UMWA and on the enforcement of "yellow-dog" contracts as a defense against injurious strikes intended to promote the union's goals.

Appalachian Coals, Inc. Notwithstanding protection accorded the faltering soft coal industry by the *Lake Cargo* and *Red Jacket* decisions, conditions in the southern coalfields went from bad to worse as the Great Depression began. Shrinking markets, sinking prices, and demoralization of an ever smaller labor force caused desperate operators in Virginia, West Virginia, Kentucky, and Tennessee to establish a sales cartel early in 1932. Appalachian Coals, Inc. consisted of 137 producers who, in 1929, mined fifty-four percent of all bituminous extracted in the southern fields and twelve percent of total soft coal produced east of the Mississippi River. Their sales predominated in competitive markets from the Carolinas and Georgia westward to Indiana, southern Michigan, and the Great Lakes region. Once the cartel had been created, the Department of Justice acted to enjoin the agency's operations under the Sherman Anti-Trust Act.⁶⁶

Following hearings on *United States v. Appalachian Coals, Inc.* before a three-judge district court wholly composed of circuit judges, Parker expressed doubts about the erstwhile



Mines of Red Jacket Consolidated Coal and Coke Company, Thacker Coalfield, Mingo County, West Virginia. Mines of the Red Jacket Company are denoted by dots.

Map U.S. Geological Survey, Dept. of the Interior, W. Va.-Ky.-Va. Mingo Quadrangle (1928); logo-letterhead: letter from Landon C. Bell to Clark, U.S. Court of Appeals, Fourth Circuit, June 28, 1935. *Red Jacket*, Records of U.S. Cir. App., Record Group 276 (4th Cir.) 54-A-0177, Box 49, File No. 7-10; 025-5-1 (available at Federal Records Center, Philadelphia, Pa.). Map by Susan N. Havrilesky.

cartel's capacity for success in stabilizing coal prices.⁶⁷ Yet, he "started into the case with the feeling that the combination ought to be upheld and that it could be upheld under the decisions in the *Steel* and *Harvester* cases."⁶⁸ The association, he reasoned, had "been acting fairly and openly, in an attempt to organize the coal industry and to relieve the deplorable conditions resulting from over-expansion, destructive competition, wasteful trade practices, and the inroads of competing industries."⁶⁹

However justifiable the combination, hopes for eluding the Anti-Trust Act were soon dashed by close examination of Supreme Court precedents and of the decision in *United States v. American Can Co.* handed down by his late appeals court colleague, Judge John C. Rose.⁷⁰ The then federal district judge in Maryland used the Supreme Court's "rule of reason" standard to distinguish monopolies arising out of natural and legitimate business expansion from those caused by unnatural and illegitimate acquisitions intended to re-

Parker adjudicated appeals that enabled him to help shape economic life from West Virginia and Maryland to South Carolina and from the Appalachians to the Atlantic.

strain interstate trade or to create monopolies.⁷¹ Appalachian Coals Inc. clearly fell into the latter category. Agency members, independent coal operators who together controlled "a substantial part of the trade," had agreed to fix uniform selling prices in order to eliminate competition among themselves. Such an agreement suggested a plan to fix monopoly prices in consuming markets "forbidden by the Sherman Act."⁷²

Parker regretted the conclusion. "We sympathize with the plight of those engaged in the coal industry, whether as operators or as miners," he wrote, "but we have no option but to declare the law as we find it. We cannot repeal acts of Congress nor can we overrule decisions of the Supreme Court interpreting them." Quite possibly a cooperative coal marketing agency offered the sole hope for relieving the industry's economic distress. That remedy, however, was one "which addresses itself to the lawmaking branch of the government."⁷³

The Supreme Court, not Congress, soon acted to protect a major regional industry. A week prior to Franklin Roosevelt's first inauguration, Chief Justice Hughes held that an unreasonable restraint of trade did not arise from mere establishment of a cooperative enterprise which affected market conditions, especially when that combination

Parker's constitutional jurisprudence developed from 1925 to 1933 was a defensive jurisprudence endowed with a high, if rarely articulated, policy content.

had a laudable purpose and, as Parker had shown, no capacity for becoming a monopolistic menace. The Court took cognizance of the reality that "when industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry."⁷⁴ The Sherman Act did not mandate that outcome.

Reversal by the High Court both bemused and pleased Parker. The Court had reached its conclusion, he noted, by overruling "some of its former decisions, which, of course, that Court has a right to do." That its policy-actuated holding overturned his own opinion did not make him "feel at all bad for I think that I would have decided the case exactly as the Supreme Court did if I had not felt bound by its former decisions."⁷⁵

Conclusion

John J. Parker's performance, especially in cases involving important questions of southern regional economic development, spawned a "New South" constitutional jurisprudence that required a delicate balancing of national and regional interests. He was constrained by the abilities of aggrieved parties to litigate and appeal, by the reach of federal jurisdiction, by existing judicial precedents, and by the circumscribed position of a judge on an intermediate appellate court. Nevertheless, Parker adjudicated appeals that enabled him to help shape economic life from West Virginia and Maryland to South Carolina and from the Appalachians to the Atlantic.

Conflicts between state and national powers or between regional entrepreneurs and national regulations detrimental

Emerging in the twilight of an expiring economic order, this sometimes national and sometimes regional constitutionalism was marked by a combination of realism and optimism, by a sober reflection on the painful economic plight of the region, and by eternal optimism about the future of the South's human and natural resources.

to southern economic interests tested the judge. Aware that the South stood outside the nation's economic mainstream, Parker labored to clothe such regional interests with judicial protection. But he evaluated national regulations in terms of specific economic costs and benefits which the region derived from them. Ulterior motives associated with preservation of the racial *status quo* did not figure in his assessments. In fact, his lone pre-nomination judicial opinion which spoke directly to the race question actually threatened the racial *status quo* at its most sensitive points, intermarriage and residential living patterns.⁷⁶

The financially pressed southern bituminous coal industry received his special solicitude. Elements of dual federalism and Marshallian nationalism combined in his adjudication of these coal cases to produce a pragmatic, policy-oriented, and regionally biased southern constitutional jurisprudence as proffered in the *Lake Cargo* case and as realized in the controversial *Red Jacket* decision. The latter invoked a broad nationalistic conception of the commerce power combined with a balanced consideration of union-operator relationships then controlled by a series of Supreme Court decisions based on the "liberty of contract" doctrine. Although favorable to the operators, his *Red Jacket* decision necessarily protected the jobs of southern miners while at the same time according some union access to employees working under "yellow-dog" contracts.

Parker's constitutional jurisprudence developed from 1925 to 1933 was a defensive jurisprudence endowed with a high, if rarely articulated, policy content. Emerging in the twilight of an expiring economic order, this sometimes national and sometimes regional constitutionalism was marked by a combination of realism and optimism, by a sober reflection on the painful economic plight of the region, and by eternal optimism about the future of the South's human and natural resources. Neither these considerations nor their policy consequences could have been received with equanimity by his critics who espoused the interests of rival geographic sections.⁷⁷ A pall of silence enveloped this eminently rational, albeit politically untenable, grounds for opposing elevation of a "New South" jurist to the Supreme Court. Far more simple and effective was it in 1930 to assail Judge Parker as a "white supremacist" and sworn enemy of labor.

⁷⁶The President's News Conference of March 21, 1930: *Nomination of a Supreme Court Justice* in PUBLIC PAPERS OF THE PRESIDENTS: HERBERT HOOVER, 1930, 98-99 (1976); *From the "New South" to the Supreme Court*, 105 LITERARY DIGEST 12 (1930).

⁷⁷See Watson, Jr., *The Defeat of Judge Parker: A Study in Pressure Groups and Politics*, in 50 MISS. VALLEY HIST. REV. 213-34 (1963).

⁷⁸18 F.2d 839 (4th Cir. 1927); President Calvin Coolidge nominated Parker on Oct. 3, 1925 (recess); U.S. REGISTER OF THE DEPARTMENT OF JUSTICE 18 (1927); the President again nominated Parker on Dec. 8, 1925; CONGRESSIONAL REC., 69th Cong., 1st sess., 1925, 67, pt. 1: 499; the Senate confirmed Parker on Dec. 14, 1925; see *id.* at p. 769.

⁷⁹See Watson, *supra* n.2.

⁸⁰On Henry W. Grady and the "New South" creed, see D. GRANTHAM, SOUTHERN PROGRESSIVISM: THE RECONCILIATION OF PROGRESS AND TRADITION xvi (1983).

⁸¹Fish, *Judge Parker and The Public Service State*, DUKE L. MAG., Summer 1985, at 37.

⁸²Scheiber, *Federalism, The Southern Regional Economy, and Public Policy Since 1865*, in AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH, 73-80 (D. Bodenhamer & J. Ely, Jr. eds. 1984).

⁸³*Id.* at 91-93.

⁸⁴Parker, *The Federal Jurisdiction and Recent Attacks Upon It*, 18 ABA J. 435 (1932); Hewlett v. Schadel, 68 F.2d 502 (4th Cir. 1934) (wherein Parker praised the nationalizing virtues of general federal common law then current under Swift v. Tyson, 16 Pet. 1, 18 (1842)), *rev'd*, Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); United States v. Lindgren, 28 F.2d 725 (4th Cir. 1928) (holding that the Merchant Marine (Jones) Act of 1920 (533, ch. 250, 41 stat. 1007) pre-empted Virginia's wrongful death statute), *aff'd*, Lindgren, Adm'r v. United States, 281 U.S. 38 (1929); Ferris v. Wilbur, 27 F.2d 262, 265 (4th Cir. 1928) (upholding U.S. Navy's storage of high explosives in close proximity to private property); United States v. Tyler, 33 F.2d 724 (4th Cir. 1929), *aff'd*, 281 U.S. 497 (1929) (upholding constitutionality of federal estate tax).

⁸⁵Scheiber, *supra* n.7, at 85-86, 92.

⁸⁶Farmers' & Merchants' Bank of Monroe, N.C. v. Federal Reserve Bank of Richmond, Va., 262 U.S. 651 (1923).

⁸⁷Letter from John J. Parker to Elliott Northcott (Dec. 21, 1928) (regarding Federal Reserve Bank of Richmond, Va. v. Early, 30 F.2d 198 (4th Cir. 1929)) (John J. Parker Papers, box 18, Southern Historical Manuscripts Collections, University of North Carolina, Chapel Hill, N.C.).

⁸⁸Federal Reserve Bank, 30 F.2d at 199, *aff'd*, Early v. Federal Reserve Bank of Richmond, Va., 281 U.S. 84 (1929) (Holmes, J.); see also Craven Chemical Co. v. Federal Reserve Bank of Richmond, Va., 18 F.2d 711 (4th Cir. 1927) (holding the Federal Reserve Bank not negligent in handling a check drawn on a bank which failed during transit of the check).

⁸⁹Suncrest Lumber Co. v. North Carolina Parks Commission, 30 F.2d 121 (W.D.N.C. 1929).

⁹⁰Transcript of Record, Answer of Appellee, Case No. 2764, United States v. Southern Power Co., 31 F.2d 852, 9, 17 (4th Cir. 1929), filed Aug. 17, 1928.

⁹¹*Southern Power Co.*, 31 F.2d at 856.

⁹²Letter from John J. Parker to William C. Coleman (Mar. 12, 1929) (Parker Papers, *supra* n.12, box 18); see *Southern Power Co.*, 31 F.2d at 856.

⁹³See Woodward, *Orgins of the New South: 1877-1913 in 9 A HISTORY OF THE SOUTH* 312-17, ch. 11 generally, (W. Stephenson & E. Coulter eds. 1971).

⁹⁴United Mine Workers of America v. Red Jacket Consol. Coal & Coke Co., 18 F.2d 839 (4th Cir. 1927) (applying Sherman Anti-Trust Act to union interference with local coal mining, the output of which was intended for interstate shipment).

⁹⁵Atlantic Coast Line R.R. Co. v. Standard Oil Co., 275 U.S. 257, 272 (1927) (wherein Taft, C.J. approvingly noted Parker's distinction between intra- and interstate commerce drawn in the related case of Atlantic Coast Line R.R. Co. & Seaboard Air Line Ry. Co. v. Standard Oil Co., 12 F.2d 541 (4th Cir. 1926)).

⁹⁶See Houston, East & West Texas Ry. Co. v. United States, (The *Shreveport* Case), 234 U.S. 342 (1914) (Hughes, J.).

⁹⁷Untitled memorandum, circa Mar. 1930 (Parker Papers, *supra* n.12, box 6); *Atlantic Coast Line R.R.*, 12 F.2d at 541 (memorandum on cases nos. 1441-42); *id.* (Parker Papers, *supra* n.12, box 48).

⁹⁸12 F.2d 541-44 (4th Cir. 1926), *cert. denied*, 273 U.S. 712 (1926).

⁹⁹*Id.* at 545-46 (1926) (quoting Brandeis, J. in *Baltimore & Ohio Southwestern R.R. Co. v. Settle*, 260 U.S. 166, 173-74 (1922) that:

the reshipment, although immediate, may be an independent intrastate movement. The instances are many where a local shipment follows quickly upon an interstate shipment and yet is not to be deemed part of it, even though some further shipment was contemplated when the original movement began.)

¹⁰⁰United States v. Munson S.S. Line, 37 F.2d 681 (4th Cir. 1930) (holding that the steamship line need not file its rate schedule with the I.C.C. because the line's relationships with connecting rail carriers excluded "a common management for continuous carriage or shipment within the meaning of the Act of Feb. 4, 1887, § 1, 24 Stat. 379" (Interstate Commerce Act), thereby obviating any possibility of monopolistic price-fixing by a railroad endowed with power over water carriers and their rates), *aff'd*, 283 U.S. 43 (1930) (Hughes, C.J.); Chandler

v. Pennsylvania R.R. Co., 11 F.2d 39 (4th Cir. 1926) (upholding I.C.C. interstate freight rates on potatoes shipped intrastate from points in Virginia to ports in that state and clearly destined for foreign export); Atlantic Coast Line R.R. Co. v. United States, 48 F.2d 239 (4th Cir. 1931) (affirming I.C.C. orders requiring regional carriers to grant lower through route rates to shipments carried by one line in competition with another under the common control of the regional carriers).

²⁶M. BARATZ, THE UNION AND THE COAL INDUSTRY 33 (1955); H. MANSFIELD, THE LAKE CARGO COAL RATE CONTROVERSY: A STUDY IN GOVERNMENTAL ADJUSTMENT OF A SECTIONAL DISPUTE 21-27 (1932).

²⁷25 F.2d 462 (S.D.W.Va. 1928).

²⁸See M. BARATZ, *supra* n.26, at 43; J. LAMBIE, FROM MINES TO MARKET: A HISTORY OF COAL TRANSPORTATION ON THE NORFOLK AND WESTERN RAILWAY 14 (1954); D. CORBIN, LIFE, WORK AND REBELLION IN THE COALFIELDS: THE SOUTHERN WEST VIRGINIA MINERS, 1880-1922 4 (1981).

²⁹H. MANSFIELD, *supra* n.26, at 264.

³⁰Anchor Coal Co. v. United States, 25 F.2d 462, 463, 469-70 (S.D.W.Va. 1928).

³¹Letter from John J. Parker to Edmund Waddill, Jr. (Mar. 23, 1928) (Parker Papers, *supra* n.12, box 18); Letter from John J. Parker to Edmund Waddill, Jr. (Mar. 26, 1928) (Parker Papers, *supra* n.12, box 18).

³²Anchor Coal, 25 F.2d at 464.

³³Letter from George W. McClintic to John J. Parker (Mar. 27, 1928) (Parker Papers, *supra* n.12, box 56).

³⁴Anchor Coal, 25 F.2d at 470.

³⁵*Id.* at 471-72.

³⁶Anchor Coal, 25 F.2d at 473-74 (quoting Act of Jan. 30, 1925, ch. 120, 43 Stat. 802, amending Act of Feb. 28, 1920 (Esch-Cummins), ch. 91, 41 Stat. 456).

³⁷*Id.* at 474.

³⁸247 U.S. 251 (1918).

³⁹Anchor Coal, 25 F.2d at 472, *acc'd* Ann Arbor R.R. Co. v. United States, 281 U.S. 658 (1930) (VanDevanter, J.).

⁴⁰G. WRIGHT, OLD SOUTH, NEW SOUTH: REVOLUTIONS IN THE SOUTHERN ECONOMY SINCE THE CIVIL WAR 163 (1986).

⁴¹See S. WOOD, CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA: CHILD LABOR AND THE LAW (1968).

⁴²Brief for Appellees at 234, United Mine Workers of America v. Red Jacket Consol. Coal & Coke Co., 18 F.2d 839 (4th Cir. 1927), filed Oct. 13, 1926, Case Nos. 2492-2503.

⁴³Reviewed by Vincent Canby, N.Y. Times, Aug. 28, 1987, §3 at 3; M. BUCKLEY, FILMS IN REVIEW, Dec. 1987 at 38, 614; see also J. SAYLES, THINKING IN PICTURES: THE MAKING OF THE MOVIE "MATEWAN" (1987).

⁴⁴United Mine Workers of America v. Red Jacket Consol. Coal & Coke Co., 18 F.2d 839, 843-46 (4th Cir. 1927).

⁴⁵United Mine Workers of America v. Coronado Coal Co. (First Coronado Case), 259 U.S. 344, 407-08 (1922) (citing Hammer v. Dagenhart, 247 U.S. 251, 272 (1918)). Parker stated that

coal mining is not interstate commerce, and the power of Congress does not extend to its regulation as such. . . . Obstruction to coal mining is not a direct obstruction to interstate commerce in coal, although it, of course, may affect it by reducing the amount of coal to be carried in that commerce.)

Chief Justice Taft, however, had asserted that "a direct, material and substantial effect" on price or supply of coal or a subjective intent to control those variables would transform a local and indirect obstruction into an interstate and direct one. *Id.* at 411. On Parker's interpretation of Taft's opinion, see memorandum on cases nos. 2492-2503, United Mine Workers of America v. Red Jacket Consol. Coal & Coke Co., 18 F.2d 839, 5 (4th Cir. 1927) (Parker Papers, *supra* n.38, box 48); see Norfolk & Western Ry. Co. v. United States, 52 F.2d 967, 971 (W.D.Va. 1931) (Parker J. stating that "coal mining is a business entirely separate and distinct from the business of transportation. . . . It has been expressly held that the mining of coal is not commerce even though the coal when mined is to be used or transported in commerce. . . ."), *aff'd*, 287 U.S. 134 (1932) (Roberts, J.).

⁴⁶Coronado Coal Co. v. United Mine Workers of America (Second Coronado Case), 268 U.S. 295, 309-10 (1925).

⁴⁷Red Jacket, 18 F.2d 839, 845 (4th Cir. 1927); memorandum on cases nos.

2492-2503, *supra* n.45.

⁴⁸Red Jacket, 18 F.2d at 845.

⁴⁹*Id.* at 845-46, 848-49.

⁵⁰*Id.* at 841.

⁵¹245 U.S. 229 (1917), *rev'ing* Mitchell v. Hitchman Coal & Coke Co., 214 F.2d 685 (4th Cir. 1914) (Pritchard, J.).

⁵²15 F.2d 652 (4th Cir. 1926).

⁵³208 U.S. 161 (1908); 236 U.S. 1 (1915).

⁵⁴Bittner v. West Virginia-Pittsburgh Coal Co., 15 F.2d 652, 657 (4th Cir. 1926); Red Jacket, 18 F.2d at 842.

⁵⁵Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 261-62 (1917) (enjoining the union "from interfering or attempting to interfere with plaintiff's employees so as knowingly and willfully to bring about the breaking by plaintiff's employees, present and future, of their [non-union] contracts of service known to the defendants to exist.").

⁵⁶See Brief for Appellants, Red Jacket, 18 F.2d 839, 190 (4th Cir. 1927), cases nos. 2492-2503 filed Oct. 4, 1926.

⁵⁷Act of Oct. 25, 1914, ch. 323, § 20, 38 Stat. 730, *construed* in Red Jacket, 18 F.2d at 849.

⁵⁸254 U.S. 443, 471 (1921).

⁵⁹257 U.S. 184, 209-10 (1921).

⁶⁰*Id.*; Red Jacket, 18 F.2d at 840, 844, 849; American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 195 (1921).

⁶¹Red Jacket, 18 F.2d at 844.

⁶²Letter from John C. Rose to John J. Parker (Mar. 12, 1927) (Parker Papers, *supra* n.12, box 17); Greensboro [N.C.] Daily News, June 27, 1920, at 2 (assailing failure of North Carolina to enact a workman's compensation law); Charlotte [N.C.] Observer, Oct. 30, 1920, at 3 (attacking absence of state labor protection laws for women and children in mills and factories); *id.* Apr. 18, 1920, at 8 (stating that "laboring men have a right to organize. . . . [and] collectively, to enter into agreements with employers."); see Manly v. Hood, 37 F.2d 212 (4th Cir. 1930); George A. Fuller Co. v. Brown, 15 F.2d 672 (4th Cir. 1926).

⁶³Red Jacket, 18 F.2d at 849.

⁶⁴*Id.*, *cert. denied*, 275 U.S. 536 (1927).

⁶⁵See Bedford Stone Co. v. Journeyman Stone-Cutters, 274 U.S. 37 (1927).

⁶⁶United States v. Appalachian Coals Inc., 1 F. Supp. 339, 339-40 (W.Va. 1932) *see* Act of July 2, 1890, ch. 647, § 4, 26 Stat. 209.

⁶⁷Appalachian Coals, Inc., 1 F. Supp. at 339, 348.

⁶⁸Letter from John J. Parker to Morris A. Soper and Elliott Northcott (Sept. 13, 1932) (Parker Papers, *supra* n.12, box 22) (referring to United States v. United States Steel Co., 251 U.S. 417 (1920) and United States v. International Harvester, 274 U.S. 693 (1927), both of which held that mere size did not constitute a violation of the Sherman Act).

⁶⁹Appalachian Coals, Inc., 1 F. Supp. at 341.

⁷⁰*Id.* at 343-48 (referring to United States v. American Can Co., 230 F. 859 (D. Md. 1916)).

⁷¹United States v. American Can Co., 230 F. 859, 902 (D. Md. 1916).

⁷²Appalachian Coals, Inc., 1 F. Supp. at 348.

⁷³*Id.* at 349.

⁷⁴Appalachian Coals, Inc., 288 U.S. 344, 372-74 (1933).

⁷⁵Letter from John J. Parker to Edwin Yates Webb (Mar. 20, 1933) (Parker Papers, *supra* n.12, box 23).

⁷⁶In City of Richmond v. Deans, 37 F.2d 712 (1930) Parker wrote the court's per curiam opinion holding unconstitutional under the equal protection clause of the Fourteenth Amendment a municipal ordinance barring occupancy of residential dwellings "where the majority of residences on such street are occupied by those with whom such person is forbidden to intermarry" as stipulated in Virginia's Racial Integrity Act of 1924. The Supreme Court denied the City's petition for a writ of certiorari, 281 U.S. 704 (1930). See Parker's Memorandum on case no. 2900, City of Richmond v. Deans, 37 F.2d 712 (1930) (Parker Papers, *supra* n.12, box 48); Loving v. Virginia, 388 U.S. 1 (1967) (holding unconstitutional the state's anti-miscengenation statute, a revised version of the Act to Preserve Racial Integrity of Mar. 20, 1923, 1924 Va. Acts 534, at issue in the Deans case).

⁷⁷See Letter from William Edwin Chilton, Jr. to Lee S. Overman (Apr. 23, 1930) (John J. Parker Confirmation File, SEN71B-A3, tray 14, Records of the U.S. Senate, RG 46, National Archives, Washington, D.C.).

Capital Gains and the Laffer Curve

The Uneasy Case for a Lower Capital Gains Tax

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As this article goes to press, Congress is again considering the Administration's proposals to lower, by as much as 30%, the federal income tax rate applied to gains on the sale of certain capital assets. A similar proposal last year appeared to enjoy majority support in both houses of Congress, but was blocked by end-of-session procedural maneuvers in the Senate. Favorable rates on capital gains were, of course, a fixture of the pre-1986 tax landscape. In the Tax Reform Act of that year, however, Congress, acting in the name of tax reform, repealed the provisions that created those favorable rates.

The proposal to restore favorable treatment of capital gains is intensely controversial. It was, in fact, one of very few tax issues debated seriously in the 1988 presidential

campaign. The controversy has centered primarily around the revenue effects of the proposal, and on its impact on the distribution of the income tax burden. On the revenue question, the Administration has claimed that its current proposal would actually *increase* overall tax revenue by \$12.5 billion over the next five fiscal years. Others—most prominently, the Joint Committee on Taxation of the U.S. Congress—have contested those claims, asserting that the proposed 30% reduction will instead reduce revenues derived from taxation of capital gains by \$11.4 billion.

The burden question seems less a matter of factual dispute than one of tastes as to the ideal distribution of tax burdens. Both sides agree generally that relatively high-income taxpayers will enjoy most of the immediate dollar benefits of a capital gains cut. Supporters of the bill point out that middle-income taxpayers have capital gains, too. This is true enough, but hardly convincing evidence that the benefits of a rate cut on capital gains would be wide-spread. Taxpayers have gains on capital assets because they have capital in the first place. And the more they have of it, the more they stand to gain from lowering the tax rate on capital gains.

Put in this simple way, the issue seems to reduce to a political litmus test. If one prefers as progressive a tax as is politically possible, and wants to be sure that revenues are not compromised, one could hardly support a capital gains rate cut. In a simpler world, this would probably be the case. The point of this article, however, is to argue that, taking into consideration a number of features that are firmly entrenched in the Internal Revenue Code, it may make sense to support a capital gains tax rate cut regardless of one's general political orientation.

Underlying this argument is a judgment that the current rates on capital gains are highly inefficient. Lowering those rates seems likely to produce considerable welfare gains, at little cost in tax revenue. Since those welfare improvements will be enjoyed mainly by high-income taxpayers, it seems appropriate that those taxpayers be targeted for slightly higher rates of tax on ordinary income. Because elimination of inefficiencies increases total welfare, the benefits of a capital gains rate cut coupled with an increase in ordinary income tax rates can be allocated in such a way that *all* taxpayers are better off: higher-income taxpayers would pay more actual dollars of tax, but enjoy enhanced total utility because

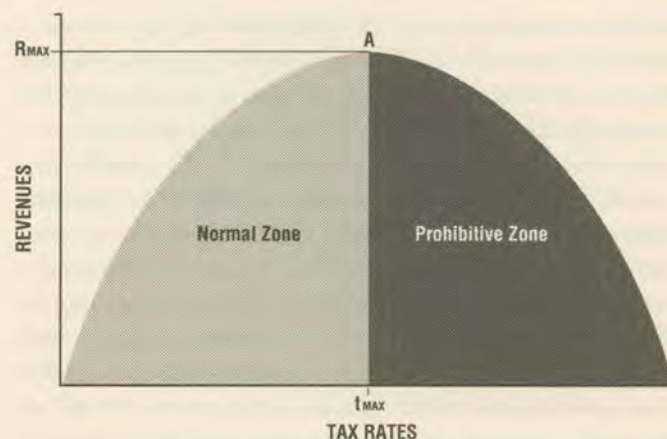
of efficiency gains that affect the returns they enjoy on their investments; middle-and lower-income taxpayers would benefit from either a reduction in the federal budget deficit, or from additional government expenditures financed by the extra taxes collected from higher-income taxpayers.

The notion that all taxpayers would benefit from tax changes whose most dramatic feature is a reduction in capital gains tax rates faced mainly by the wealthy, is a notion that is widely thought to have been discredited by the rate cuts enacted by the Economic Recovery Tax Act of 1981. That Act is (accurately) thought to have had much to do with the huge escalation in budget deficits in the early 1980s, and (inaccurately) thought to have proven that cutting tax rates inevitably reduces revenues. The inaccuracy of this latter piece of the conventional economic wisdom is an important element in the argument for lower capital gains rates, and is considered extensively in the first part of this article. The second section considers several of the prominent arguments against reducing capital gains tax rates. A brief concluding section conveys my summary views narrowly favoring paired enactment of a capital gains rate cut, and a modest increase in the ordinary income tax rates affecting high-income taxpayers.

Efficiency and the Capital Gains Tax

Illustrating some aspects of the inefficiencies of applying high tax rates to capital gains is facilitated by reference to the "Laffer curve." A Laffer curve expresses geometrically the relationship between tax rates and total revenues raised by those rates. The most enthusiastic proponents of Laffer curve analysis typically portray the curve as having an approximately parabolic shape, as shown in the accompanying figure. From this curve, it can be seen that as rates rise from zero, revenues rise as well. They may rise approximately proportionately at first (so that, for example, a doubling of rates may almost double revenues), but the proportionality of the curve tapers off as it rises, so that any particular percentage increase in rates is associated with a smaller percentage increase in revenue. Tax rate increases are, in other words, subject to a diminishing returns phenomenon. At some point (shown as point A on the figure), the marginal revenue derived from additional increases in tax rates becomes negative. The range of the curve to the right of point A is sometimes referred to as the "prohibitive zone," reflecting the presumption that lower tax rates are preferable to higher ones, if revenue is constant.

The Laffer curve has never been taken very seriously by the economics establishment. This disdain is not, I think, based so much on the view that the theory is flawed as it is on the view that the theory lacks novelty. After all, even Adam Smith noted—at least in the special context of selective excise taxes—that high tax rates, "by diminishing the



consumption of the taxed commodities...frequently afford a smaller revenue to government than what might be drawn from more moderate taxes."¹

Though that is as clear a statement of the Laffer curve phenomenon as one could ask for, Arthur Laffer and the other proponents of this theory nevertheless deserve credit (or perhaps blame) for bringing the theory into the public policy debate over the structure of the American tax system. It does not take great imagination to see the political appeal of Laffer curves: the possibility that the government could increase revenue by cutting taxes presents the kind of have-your-cake-and-eat-it-too public policy choice that seems to enjoy enduring popularity with the ever-optimistic American electorate.

Of course, this possibility is only available to a government that has previously adopted tax rates that are in the prohibitive zone of the curve. Since that is a highly irrational position for a government to be in, one would think that that was generally unlikely. But it has been politically useful for Laffer curve proponents to tolerate a considerable fuzziness about where the prohibitive zone begins, what point on the curve the tax system occupies at any particular time, and even what tax rate is being used for this purpose (highest marginal rate? average marginal rate? average effective rate? etc.) The significant revenue losses associated with the 1981 Reagan tax cuts are at least partly attributable to a failure to address these questions; accounts differ on the question of whether that failure was due primarily to the unfortunately Panglossian outlook at the top of that Administration, or cynicism in the ranks.

The unfortunate revenue effects of the 1981 Act rightly counsel a certain caution in the use of Laffer curve analysis. It does not altogether discredit that form of analysis, however. What must be kept in mind is that not all taxes—or all parts of a single system, such as the federal income tax—respond in the same way to changes in rates. A fundamental rule of taxation is that all taxes tend to discourage, at the margin, the activities burdened by the tax. This is, indeed, the phenomenon that explains why Laffer curves are shaped

as they are: as rates increase, they tend in themselves to decrease the size of the tax base against which they are assessed. As revenue is plotted along a Laffer curve, an increasing rate is multiplied by a decreasing tax base; sooner or later, increases in the rate will in most cases be overwhelmed by decreases in the tax base. But the points at which that happens may vary widely among different taxes. Within the income tax, it seems very likely that different types of income, and perhaps different types of taxpayers, will display differing diminishing returns effects in the face of increasing tax rates.

The sensitivity to rate change is to some degree measurable, and is referred to in the public finance literature as "tax elasticity." A tax, or a part of a tax, that exhibits relatively large changes in the tax base in response to relatively small changes in the rate is said to be "highly elastic." Tax elasticity is undoubtedly influenced by a number of factors, but surely one of the most important of these is the availability of avoidance opportunities. Where tax avoidance is easy and inexpensive, even relatively low rates may induce enough avoidance behavior to place the tax rate in a Laffer curve prohibitive zone. Conversely, where avoidance is difficult, expensive, or both, even a very high tax rate can be well within the normal (i.e., revenue-increasing) zone of the appropriate Laffer curve.

In the American tax system, the tax on gains from the sale of capital assets is surely easier to avoid than taxes on most other types of income. To begin with, our system generally taxes only realized gains—those that can be computed on the sale or exchange of the asset. The realization event is normally within the complete discretion of the taxpayer. Further, many things that the tax law might be able to treat as taxable events are not so treated. Gifts of property are not realization events, nor are transfers of property at death. Further, a number of transactions that are considered to be realization events are nevertheless not recognized for tax purposes, including dispositions of property in connection with a divorce, exchanges of like-kind property, and certain transactions in which proceeds of a disposition of property are promptly re-invested in similar property.

It does not take great imagination to see the political appeal of Laffer curves: the possibility that the government could increase revenue by cutting taxes presents the kind of have-your-cake-and-eat-it-too public policy choice that seems to enjoy enduring popularity with the ever-optimistic American electorate.

One finds in the capital gains area yet another instance of the ubiquitous second-best phenomenon: if the tax system makes one important departure from a theoretically perfect set of rules, the second-best set of rules may be a set that includes another, offsetting departure from the perfect rule set.

Many of these rules may be the result of poor Congressional policy choices. The income tax would be more conceptually sound, and fairer, if it taxed inflation-adjusted annual asset appreciation, or, at a minimum, if it taxed accumulated asset appreciation at death. But the Congressional decisions in this area have for the most part been quite deliberate, in response to perceived limitations of administration, or perhaps in some cases to lobbying muscle. The shortcomings of these decisions have been asserted forcefully and repeatedly, yet the basic rules enumerated above have remained in place. At some point, it makes sense simply to accept them as they are, and change those things that seem both in need of, and amenable to, change.

The tax rates on capital gains are surely amenable to change. Most tax policy analysts would argue, however, that conforming the ordinary and capital gain rates in the 1986 Tax Reform Act was an important stroke of tax reform—one that should be retained. This view is based on the understanding—with which I generally concur—that capital gain income is conceptually indistinguishable from any other kind of income, and that comprehensive taxation therefore requires that it be taxed just like any other income, lest unnecessary distortions be introduced into the income tax.

The fallacy of this position is that it ignores the fact that capital gains cannot, because of the deeply entrenched realization requirement, be treated similarly to ordinary income in any event. Congress decided in 1986 that it would tax certain *realized* capital gains as though they were ordinary income. But all this accomplishes is a modest displacement of the distortion: the distinction between capital gains and ordinary income has been mostly eliminated, but only at the cost of exacerbating the distinction (and distortion) between realized and unrealized gains.

One thus finds in the capital gains area yet another instance of the ubiquitous second-best phenomenon: if the tax system makes one important departure from a theoretically perfect set of rules, the second-best set of rules may be a set that includes another, offsetting departure from the perfect

rule set.² In the tax system (or indeed any complex rule system), in other words, two wrongs may be the next-best thing to a right. Examples in the tax area of the second-best phenomenon may illustrate this point. If nation A were compelled by treaty to exempt from excise taxes all grain imported from nation B, then nation A's excise tax system might produce less distortion if it exempted grain produced in other countries as well, even though the best system would involve no grain exemptions at all. An actual example from our own tax system is the decision to impose a realization requirement on the sale of publicly traded stocks and bonds, rather than giving tax effect to the annual changes in value of those securities. This choice is difficult to justify in isolation, but becomes reasonable when the difficulties of annual appraisal of *other* capital assets, such as land, are considered. If the tax system must depart from the conceptually pure notion that wealth change yields income in the case of land, then perhaps it should do so with respect to all capital assets, as a second-best solution.

Of course, the general theory of second-best does not necessarily prove that any particular additional departure from an optimal tax structure will reduce distortion—the theory may only suggest that such an outcome is possible. My argument is that if the realization requirement is taken as a given, then taxing realized gains at lower rates may well reduce the distortions induced by the realization requirement.

This is a difficult assertion to prove; indeed, I doubt that any very rigorous proof of either the assertion or its contradiction is possible. I will not in any event attempt a proof here. Rather, I will offer some anecdotal illustrations of the types of distortion that relatively high capital gains taxes may induce, in the hope that the plausibility and generality of those examples will be in themselves persuasive of my point. I will then offer some evidence of the inefficiency of high capital gains taxes based on the revenue estimates associated with the Administration's proposals.

The Nature of the Distortion. The principal distortion created by the combined effects of a realization requirement and a relatively high tax on realized gains has to do with the decision to dispose of assets.³ This is sometimes referred to as the "lock-in" effect. Quite simply, it reduces the liquidity of a taxpayer's store of wealth. One can imagine a number of ways in which illiquidity could adversely affect taxpayers' decision-making, resulting in lower utility for those taxpayers.

One scenario would involve investors who may wish at some point to alter the relationship between their consumption and investment activities. For example, A may be a middle-aged taxpayer who finds she no longer needs or wants a large house, would prefer a smaller, less expensive one, and would like to invest some part of the house's value in common stocks.⁴ B may be a young professional who has

made successful investments in growth stocks, and would now like to convert those assets into a down payment on a house to accommodate his growing family. In each of these cases, if the disutility of avoiding the realization event that stands between the respective taxpayers and their goals becomes large, they will presumably proceed toward their goals, adverse tax consequences notwithstanding. But some marginal taxpayers in these situations at any given time will decide, at least partly under the influence of tax considerations, that they would be better off deferring their plans for awhile, suffering some loss of utility in the meantime.

Another scenario involves a simple desire for diversification—usually for the purpose of reducing risk. A may own a large amount of the stock of one corporation, while B owns a large amount of the stock of another firm in a different industry. Both taxpayers could diversify their portfolios by buying some of each other's stock. If the desire for diversification is strong enough, they may proceed with that possibility. But, at the margin, at least some taxpayers who might wish to diversify will avoid or defer doing so, at least partly because of the adverse tax consequences.

Both of these examples involve real losses of utility: permitting taxpayers to choose freely between consumption and investment, and to take reasonable steps to control risk, contribute to welfare as a general matter. It might be thought that such a free choice is also important if capital is to be allocated efficiently among competing demands, but this is less clear. For the most part, it seems that the reduced liquidity caused by relatively high taxes on gains affects the ownership of assets, not their deployment. For example, a business may observe that its use of an asset is suboptimal. Even if the gains tax discourages *sale* of that asset, it may be possible in many cases to *lease* the asset to a user who can make that asset more productive. It is true that not all markets are congenial to leasing, and the movement of some assets from less to more productive uses may thus be impeded by capital gains taxes. Nevertheless, it would appear that the primary effects of relatively high taxes on gains are on the ownership issue rather than the deployment issue.

There is at least one cost of illiquidity, however, that may implicate both the ownership and the deployment of assets. Individual taxpayer liquidity can be seen as a partial antidote to a variety of forms of market failure that have their roots

...permitting taxpayers to choose freely between consumption and investment, and to take reasonable steps to control risk, contribute to welfare as a general matter.

in information costs or other transaction costs problems. A scenario illustrating this would involve the supposition that Farmer A has an opportunity to improve the output of his land, but requires capital to implement his idea. Farmer B knows A to be trustworthy and of sound business judgment. B also has capital to invest in this project; but if that capital is currently invested in appreciated assets, B may be reluctant to expose himself to tax by selling those assets to raise the needed capital. An economist might assume that if A's idea has value, an efficient credit market (yes, we're referring here to the American banking system) will supply the necessary capital. A more realistic account of this situation, however, would recognize that, at least as to relatively small transactions, the value of an idea may be swamped by the various transactions costs of getting financing to implement it, consisting largely of allocations of the salaries of loan officers, credit investigators, bank examiners, deed recording officials, lawyers, and the like.

Excess Burden of the Capital Gains Tax. Public finance economists refer to the cost of distortions induced by taxation, such as those described above, as the "excess burden" of the tax. Minimizing the total excess burden of all taxes is obviously desirable, as long as that is reasonably consistent with other tax policy goals, such as fairness, administrability, and the like. Although excess burden is extremely difficult to measure, there are a few mathematical insights about excess burden worth considering.⁵ Within the parameters of standard public finance models, excess burden is thought to rise proportionally with the tax elasticity, and proportionally with the *square* of the tax rate. With respect to capital gains taxation, the ease with which the tax can be avoided by retaining the asset in question makes it plausible to assume that tax elasticity—and, hence, excess burden—is high. This assumption is supported by substantial—though not uncontroverted—empirical evidence; it is also reflected implicitly in both the Administration's and the Joint Committee's revenue estimates regarding the current capital gains tax reduction proposal.

Those revenue estimates, in fact, provide the best non-technical explanation of the problem with the current capital gains tax rate. Even accepting the Joint Committee's more pessimistic view, cutting the capital gains rates by 30% would reduce total government revenues over the 1990-95 fiscal years by only \$11.4 billion. That sounds like a lot of revenue, but it really isn't: it is only about 3% of the total tax on capital gains that the government would collect absent any change in rates. In other words, Congress is in a position to cut rates in this area by a percentage that is ten times larger than the percentage revenue loss associated with that rate cut—a fact which is a testament to the inefficiency of the high present rates.

To return for a moment to the Laffer curve model, what the revenue estimates suggest is that, as to capital gains, the current rate structure puts the tax either into the prohibitive zone (if the Administration estimates are accepted) or just to the left of the prohibitive zone (if the Joint Committee estimates are accepted.) But it really doesn't matter which is the case. Even if the Joint Committee's estimates are more accurate, capital gains tax rates are nevertheless well into the range within which it is necessary to impose much larger rates to produce relatively small increments of revenue, meanwhile increasing exponentially the excess burden of the tax. It seems almost beyond dispute that Congress can find some other, more efficient corner of the revenue system to make up for any revenue lost.

Long-term versus Short-term Elasticity. It is clear from the foregoing that the case for a lower capital gains rate depends in some part on the tax elasticity of capital gains realizations. One imaginable explanation for at least part of the elasticity of this curve is that taxpayers expect the tax rates on capital gains to fluctuate, within some historical range. In recent years the maximum rate on long-term capital gains has been as high as 35% and as low as 20%. If fluctuation within that range is anticipated, it would surely exacerbate the rate response; that is, it would, during the high-rate part of the cycle, make taxpayers even more reluctant than otherwise to have realization events, and vice versa. This would make the realization rate curve appear to be even flatter (more elastic) than it would be in the face of truly permanent rate changes. This complication has created considerable difficulties for those who seek to measure the revenue effects of capital gains tax rate changes, and probably accounts for much of the current controversy over those effects.

If the present rate structure were thought by taxpayers to be truly permanent, or at least highly durable, it would undoubtedly make the realization rate curve steeper (less elastic), which would in turn reduce the inefficiencies associated with capital gains taxes. The magnitude of the efficiency improvement is of course uncertain, and inherently difficult to estimate. I would argue that it is also irrelevant to the current debate. Unless Congress were to propose (and a sufficient number of states were to ratify) a constitutional amendment on this question—a highly implausible event—no Congress can effectively bind subsequent sessions to a particular course of action, for capital gains taxes or anything else. It is quite routine for Congress to finish a major tax bill, pat itself on the back, and announce to constituents that it has finally fixed the tax system. It is equally routine for Congress to begin considering changes to its recent tax enactments before the loose-leaf sheets memorializing those enactments have been filed in their binders. Those who

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speak of frequent tax rate fluctuations as though that were aberrational have not been paying attention to the pattern of recent tax legislation. Contemporary analyses informed by public choice theory have even argued that frequent tax change is in the best interest of members of Congress, if not the public, and is therefore likely if anything to get worse.⁶ Finally, it is especially heroic of tax reformers to expect that capital gains rate fluctuations can be brought to a halt at a time when those rates are in the upper ranges of recent historical experience. Owners of appreciated assets can at this point be expected, having come so close last year to a lower capital gains rate, to wait for that change patiently.

The only reasonable response to this situation, it seems to me, is to recognize that the rate realization curve is indeed quite flat in the relevant ranges and is likely to stay that way for the foreseeable future. In that case, relatively high capital gains rates will yield little or no additional revenue compared with substantially lower rates, but will nevertheless produce considerable—and wholly avoidable—inefficiencies in the nation's capital markets. I believe that a *prima facie* case for rate reduction has been made.

Objections to Lowering the Capital Gains Tax Rate

The purpose of the first part of this article has been to demonstrate to readers that taxing capital gains at the present relatively high rates is strikingly inefficient, given the other constraints built into the federal income tax. That inefficiency is, of course, not the only concern in developing appropriate policies in this area. Considerations of fairness, simplicity, and administrability, among others, are also implicated by proposals to lower tax rates on capital gains. Arguments about these concerns have been fully articulated elsewhere, and will not be discussed in detail here. I will confine myself in this part to a brief assessment of each of the major arguments against lowering the capital gains rates. For purposes of this discussion, I am assuming that any proposals seriously considered would, like the Administration's proposal, impose only a special capital gains rate cut, not a general tax cut. Thus, implicit in this discussion is the idea

of *different* rates for capital gains *vis-a-vis* ordinary income, thus restoring the importance of a distinction that has been mostly irrelevant since the Tax Reform Act of 1986.

Distributional Effects. The primary argument against reducing the capital gains tax rate is that the benefits of such a tax cut would be enjoyed almost exclusively by wealthy taxpayers. Half-hearted attempts to dispute this can be found in the literature on this subject, but they are wholly unconvincing. They are unconvincing in part because they are overwhelmed by counter-evidence. (In 1986, tax returns showing adjusted gross income of \$100,000 or more accounted for a bit over 1% of all returns filed, but those returns reported about two-thirds of all net long-term capital gains—the only gains for which favorable rates have traditionally been available.)⁷ But they would be unconvincing even in the absence of counter evidence, because of their implausibility. It is almost true by definition that the wealthy will benefit most from a capital gains tax rate cut: being wealthy means having assets, and having assets generally means having gains, at least as long as we have both real economic growth and inflation.

Paradoxically, however, the high correlations between wealth, income, and ownership of appreciated assets, provide poor grounds for opposing a capital gains tax cut. In fact, those correlations present an opportunity rather than an obstacle: because we know so clearly who benefits from a capital gains tax rate cut, we know precisely where to look to make up any revenue lost by such a cut. And, by the analysis presented in the first part, we have reason to believe that the welfare gains enjoyed by the wealthy from a capital gains tax rate cut will be much greater than just the direct tax dollars they save; they will include the regained portions of the excess burden of the present rates. In view of these substantial welfare gains, there would seem to be a good argument for trying to recoup much more ordinary income tax from the wealthy than any revenue that is lost through a cut in the gains rates. An increase in marginal rates on ordinary income above \$200,000 to 33% would seem amply justified.⁸ And it is estimated that such an increase would produce about \$41.9 billion over the next five fiscal years—nearly

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Treating one type of income more favorably than another inevitably puts pressure on the distinctions between the two types. In the context of the capital gains-ordinary income distinction, this is particularly troublesome, because that distinction becomes highly evanescent at the boundaries.

four times the amount that the Joint Committee believes a capital gains tax would lose.

In fact, there is a considerable convenience in knowing precisely who benefits from a tax cut, and knowing as well how that group can be targeted for an offsetting adjustment elsewhere in the tax system, so as to maintain a distributional *status quo*. An example where that is not so will make the point: Many tax analysts agree that a higher gasoline tax would be wise, because of its revenue-generating potency, and its favorable environmental and balance-of-payments effects. It would not be distributionally neutral, however, in geographic terms: taxpayers in the west, and in rural areas everywhere, drive greater distances than other taxpayers, and would bear a disproportionate part of the tax burden. Since it is difficult to design an offsetting adjustment in the tax system to preserve the *status quo* as to burden distribution, higher gasoline taxes have been debated, but not enacted.

Such a fate need not befall capital gains tax cuts. A solution that raises revenue while lowering tax burdens may consist of the simple device of tacking on a new, modestly higher top bracket as an accompaniment to the lower capital gains rates.

Complexity of the Tax System. Even if one is willing to accept some additional inconsistencies in the tax system, it should be recognized that one side effect of doing so is the creation of greater complexity. Treating one type of income more favorably than another inevitably puts pressure on the distinctions between the two types. In the context of the capital gains-ordinary income distinction, this is particularly troublesome, because that distinction becomes highly evanescent at the boundaries. It is common, for example, to define the value of a capital asset in terms of the discounted present value of the income the asset can be expected to produce in the future. More concretely, if you own a machine with a five-year expected life, and you lease it to another for one year, the rent you receive is clearly ordinary income. But what if you "lease" the machine for all five years of its expected life? What if you "sell" the machine, but lease it back, or retain an option to buy it back at some future point?

From issues such as these, substantial complexity pretty much inevitably arises—complexity both in the tax rules themselves, and in the planning for asset transactions.

I regard this problem as the most serious drawback of the idea of a capital gains rate differential. There are a few responses that can be noted, however. First, it should be remembered that most of this complexity is still in the Code anyway, and probably has to be there in some form or another to limit abuses in capital loss deductions. Individuals are still limited, as they were prior to 1986, to a deduction of only \$3000 for *net* capital losses in a single tax year. Since net capital losses are, of course, capital losses minus capital gains, it follows that any taxpayer who has already suffered, say, a \$50,000 capital loss in a tax year, can enjoy a gain of up to \$47,000 tax-free, if that gain can qualify as a capital gain.⁹ Thus, many taxpayers may have a need to know whether or not sale of one of their assets would generate a capital gain even under present law.

Second, to paraphrase the public finance maxim "an old tax is a good tax," we might note that an old complexity is more tolerable than a new complexity. The capital gains-ordinary income distinction has been a part of our modern income tax virtually from its inception. The tax-reform/tax-avoidance dynamic—whereby a "loophole" is closed by a rule that creates new avoidance opportunities (perhaps smaller ones, if the reform is sound) slightly displaced from the old ones—is surely alive and well in the capital gains area. But we should remember that most of the more troublesome questions have been reduced by now to manageable forms.

Third, we should also remember that, in this area as in many others, most of the transactions are garden-variety ones that contribute very little to overall complexity of the tax system. Sales of stock, sales of land, and the like will usually be fairly straight-forward. Further, a lower rate on capital gains may make at least some highly complex non-recognition transactions (corporate reorganizations, like-kind exchanges, etc.) marginally less common, as some taxpayers

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decide they would prefer a simple taxable transaction at lower rates to the more complex avoidance transaction they might otherwise have chosen.

Finally, we should remember that the great bulk of the costs associated with any increase in complexity will be borne by the owners of capital assets themselves. And my strong impression of the situation is that the affected taxpayer group will find these burdens light, and bear them gladly. This is, after all, a group (*i.e.*, upper-middle and upper-bracket taxpayers) that has, as business people, professionals, and wealth-holders, borne in recent years the greatest share of the complexity burden of refined time-value of money rules, at-risk limitations, passive activity loss limitations, alternative minimum taxes, uniform capitalization, "kiddie taxes," generation-skipping transfer taxes, and a long list of others. All these complexity burdens have been imposed in the name of tax reform; this group of taxpayers can be forgiven if they regard with some exasperation the claims of tax-reformers that complexities associated with favorable rates on capital gains make that proposal unacceptable.

Offsetting Inefficiencies. The argument in the first part of this article is based on the substantial inefficiency of having tax rates on capital gains of 28% or 33%. If those rates are lowered, and especially if doing so then requires that some other rate be raised to recover any revenue loss, there is a distinct possibility of introducing some alternative source of inefficiency into the system that may be as damaging as the capital gains inefficiency. More particularly, if the ordinary income rates are raised at the top end to maintain revenue neutrality, those rates may exaggerate the excess burden associated with that part of the tax system.

On the other hand, it would seem that the tax elasticity of ordinary income must be very much lower than the tax elasticity of capital gain income, at least under the present set of rules. The outstanding distinction between the two is that capital gains taxes can be avoided without foregoing wealth accretion, simply by avoiding realization events; the opportunities to avoid the income tax without avoiding income itself are much more limited, and generally more expensive. Although the econometric evidence on this question is hardly conclusive, what evidence exists generally supports the view that significantly less welfare would be lost due to modest increases in the top ordinary income rates than would be gained by a revenue-equivalent reduction in capital gains taxes.

Conclusion

In thinking about taxing gains from capital transactions, one confronts two competing sources of unease. On the one hand, there is great appeal in the idea of taxing all income at the same rate: both simplicity and fairness considerations

militate powerfully in this direction. The tax system should depart from such a structure only with great reluctance.

On the other hand, it must be admitted by even the most ardent opponents of lower capital gains rates that taxes in the 30% range on such gains are miserably inefficient, at least within the contours of the present federal income tax.

My own tentative resolution of these competing concerns is informed mostly by a strong sense that the American public has shown that it regards itself as excessively burdened by federal taxes in recent years. Candidates for office who promise not to raise taxes, no matter what, do better than candidates who campaign on more responsible platforms. Under such circumstances, if tax rules can be found that collect the same revenue (or perhaps even a little more) with less excess burden, we would generally be wise to enact them. Lower rates on capital gains, coupled with modest increases in the top rates on ordinary income, seem to offer precisely such a possibility. With all its many faults, this proposal would, I think, marginally improve the tax system, and I (somewhat uneasily) advocate it.

¹A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, Book V, ch. 2.

²See Lipsey & Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956).

³Of course, if the asset has a value that is lower than its tax basis, the distortion is reversed: taxpayers may dispose of assets sooner than they otherwise would in order to deduct capital losses. The effects of inflation (which tends to push asset values above their unindexed tax bases) and the limitations on the deductibility of capital losses make this premature disposition effect a far less serious source of distortion than the lock-in effect described in the text.

⁴I.R.C. § 121 may permit her to do this tax-free, if she is over 55, has less than \$125,000 of gain, and has not previously used this once-in-a-lifetime relief provision. If any of those conditions fails, she may be inhibited by the threat of a capital gains tax.

⁵A substantially more detailed explanation of the public finance economics underlying this discussion can be found in a more complete and better documented version of this article, to be published shortly in volume 47 or 48 of TAX NOTES.

⁶See, e.g., Doernberg & McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 MINN. L. REV. 913 (1987).

⁷Internal Revenue Service, *Statistics of Income — 1986, Individual Income Tax Returns*, Table 1.4 (Washington, D.C. 1989).

⁸More accurately, my suggestion is to eliminate the 5% surcharge that presently applies to taxpayers having taxable incomes from about \$75,000 to about \$200,000 (assuming a joint return and a four-person family), and replace that with an explicit 33% marginal rate bracket beginning at about \$75,000 of taxable income (for joint returns) and continuing indefinitely. In addition to raising revenue, this change would have the additional salutary effect of reversing the decision reflected in the Tax Reform Act of 1986 to impose a marginal rate on extremely high-income taxpayers that is lower than the one imposed on upper-middle income taxpayers.

⁹Because of capital loss carryovers (I.R.C. § 1212), this capital gain need not be realized in whole, or even in part, in the same year as the loss. However, from the taxpayer's viewpoint, the sooner the effectively exempt gain can be realized, the more valuable the exemption.

About the School

Judicial Clerkships: An Exciting Opportunity

“**W**hy clerk?” That is a question that members of the faculty and administration at Duke Law School have attempted to answer for students this year. The answers are somewhat varied, but it is hoped that the overall effect of the asking and answering of that question will be a heightening of awareness of clerkship possibilities among Duke law students.

Last year, Dean Pamela Gann and members of the Faculty-Student Placement Committee expressed the feeling that fewer students at Duke considered clerkships than might be warranted, and that perhaps clerkships were not presented as a viable choice to enough of the student body. In response, Senior Associate Dean Robert Mosteller, together with Professor Sara Sun Beale and the other faculty members on the Placement Committee, developed a program to heighten student awareness of clerkship opportunities.

Dean Mosteller believes that the Law School needs to enhance student enthusiasm for clerking as an attractive choice for the first year or two after graduation. He notes that “students fall into patterns of expectations, and many students at Duke have not been encouraged to aim high enough and broadly enough in their thoughts about what they want to do after Law School. He feels that the attitude about employment at the Law School is generally too conservative—instead of looking at their lives in terms of different opportunities, students tend to see their first job in the law as their last. Mosteller also sees a “tendency on the part of students to feel that they must get right at their ‘real’

job as lawyers.” Clerkships appear to some to be a delay in that process. But this perspective does not comport with most people’s experiences in the law or with the experience of most judicial clerks.

Many legal employers see a clerkship as a very positive experience. In fact, John M. Harmon ’69, a practicing attorney in Austin, Texas, states that his firm places great value on the clerkship experience and seeks to hire young lawyers who have first clerked with a judge. Also, many lawyers change jobs several times during their legal careers and a clerkship is not only an opportunity to do something for a year or two that is different and enjoyable, but also a professional credential that “travels well.” Although the compensation level for clerks is well below that of associates in major law firms, a clerkship offers experiences that are not available in law firm work.

In addition to broadening the number of Duke law students who consider clerkships, the Law School’s program is also focused on expanding the types of clerkships students consider. Because federal circuit court clerkships are often described as the “prestige clerkship,” students sometimes fail to look beyond these to the many opportunities in federal district courts, in federal specialty courts, and in state courts. Although it is true that circuit court clerkships can offer wonderful experiences, the richness and value of other types of clerkships should not be underrated. Through this new program, the faculty and administration hope to introduce students to the variety of clerkships available and to help them find the type

of clerkship and the type of judge best suited to their interests.

The new clerkship program at Duke has made strides both in encouraging more students to apply for clerkships and in raising the awareness of clerkship opportunities. As Professor Beale and Dean Mosteller emphasize—clerkships are not for everyone; but most Duke law students can find a clerkship somewhere if they decide that it is something they want to do.

The Program

As Professor Beale expresses it, “We asked the question, ‘What do we need to do to improve on this?’, and we came up with several ideas.” The efforts were focused in two ways: first, raising awareness of clerkship opportunities and second, helping students to present themselves as attractive candidates for clerking.

In the fall semester, each second-year law student received a memo from Dean Gann outlining the benefits of clerking for a judge and offering suggestions to the students about how to prepare for the clerkship application process. Dean Gann offered a number of reasons for considering a clerkship: the ongoing value of a clerkship as a professional credential, the distinctive learning experience available through a clerkship, and the fact that most clerkships are very enjoyable and satisfying experiences.

Dean Gann also advised students to think about how to “position themselves” for a clerkship. In her letter she emphasized the importance of developing a working relationship with one or two faculty members, so that those per-

sons could write knowledgeable letters of reference to the judges to whom the student applied. Because so much of Law School instruction is in a large lecture format, Dean Gann emphasized that students must make course decisions first semester with an eye toward clerkship applications during the next term. This means that in course selection, students should attempt to sign up for small seminar courses or arrange for independent study or research work for a faculty member. Work on a more personal seminar or independent study level will insure that at least one or two members of the faculty are familiar with the student's work.

During the fall semester the Placement Committee sponsored two presentations for second-year students to familiarize them with the clerkship process. First, the Committee brought a distinguished panel of judges to the School to talk about the clerkship process. This panel included Justice Gary Stein '56 of the New Jersey Supreme Court, Judge Norma Shapiro of the U.S. District Court in Philadelphia, and Judge Daniel Friedman of the U.S. Court of Appeals for the Federal Circuit. During the meeting, Professor Beale also distributed a comprehensive booklet she prepared about clerkships and the "how to's" of making application. After the meeting, a reception was held for the panel members, students, faculty and other judges from the area who have some affiliation with Duke Law School. In the evening, Professor James Cox hosted a dinner at his home for the judges and for representatives of various student organizations.

A second panel composed of three current third-year students who have secured clerkships and a young alumna who had clerked spoke to second-year students about their application and clerkship experiences.

In January when professional responsibility is taught to first-year students at the Law School, a number of

judges visit to teach sections of the course. These judges meet with interested first-years to familiarize them with clerkship opportunities. This year, Judge James Oakes, Chief Judge of the Second Circuit Court of Appeals, and Judge Abner Mikva of the D.C. Circuit, taught in the professional responsibility course and spoke with first-year students.

In addition, Professor Beale and Dean Mosteller held meetings with student organizations to familiarize students with clerkship options. They spoke with each of the law journal staffs, the Moot Court Board, the Black Law Students Association, and the Deans' Advisory Council. Beale and Mosteller have also spent time talking with individual students and helping them to prepare effective resumes and application packages. They encouraged faculty members to put extra effort into gathering information about students before writing letters of recommendations. As the application season moved on, Professor Beale and Dean Mosteller kept tabs on which students were applying to which judges, and encouraged some students to broaden their application pool.

Why Clerk?: The Alumni Perspective

Kenneth Starr '73, Solicitor General of the United States and former judge on the U.S. Court of Appeals in the D.C. Circuit, describes the clerking experience as "a very special—indeed unique—relationship of high professionalism and deepest confidence. Secrets are shared. Confidences are freely exchanged. A law clerk becomes, in effect, a member of the judge's judicial family. In fact, the relationship, although short-lived in chambers, continues for a lifetime."

Linda Arnsbarger '85, who clerked for Judge Starr during the 1985-86 year, describes clerking as a fabulous experience, and emphasizes that much of the clerking experience depends on

the judge for whom you clerk. She found Judge Starr to be a delightful person, and notes that his chambers were respectful but informal. There was an "open door policy" where the clerks and the judge wandered freely into one another's offices to discuss the cases and to exchange ideas. "There is no other opportunity to have that kind of polishing of judgment. In a law firm you start out as low person on the totem pole. Clerking is very different. The judge relies upon you one hundred percent to keep on track. Judge Starr required a lot of us. He wanted us to be as up on the cases as he was, and he prepared thoroughly. He argued with us about the cases. He was always testing new ideas and rethinking approaches to the legal questions we confronted. In the D.C. Circuit we were often dealing with big policy questions, so it was the perfect place for a 'policy junkie' like me. Intellectually, clerking beats everything you do afterward in the law."

John Harmon '69 clerked for Judge Griffin Bell of the U.S. Court of Appeals and for Justices Warren Burger and Hugo Black of the U.S. Supreme Court. He notes that his law firm highly prizes law students who have had a clerking experience because it gives capacities to a student that are different than the skills developed at law school. "Clerking gives self-confidence to a student. Law clerks learn that they can step out and be exposed to many areas of law and become relative experts in those areas in a very short time. They are able to take the resources in the briefs, talk with their judges and fellow clerks, research and solve problems that other more experienced lawyers have not been able to solve. A clerk is, in effect, the judge's lawyer. It is valuable to come to a law firm with that confidence."

Harmon clerked for Judge Bell on the Fifth Circuit during the years when the court was wrestling with desegregation. He learned many helpful habits from Bell, including organizational abil-

ity and efficiency. "Judge Bell would step out of oral arguments and pass out opinions to be written by each of his clerks and then he would take some of the opinions himself. He believed it was important to keep things moving and to stay on top of the work."

Harmon also learned many lessons in creativity from the judge. "During this time an ingenious concept developed in the Fifth Circuit. It was their way of dealing with segregation by changing the status quo and saying 'enough is enough.' For ten years after the desegregation orders came down towns kept developing desegregation plans which were inadequate and after the plans were overturned by the courts, the towns would simply submit new, but equally inadequate plans. *Alexander vs. Holmes City* was decided by the Supreme Court while I was clerking. After that decision, the Fifth Circuit decided to do more than simply reverse these cases. They wrote out desegregation plans for the towns and told the towns to implement them. In essence, the judges were saying, 'It's over, NOW... you implement these plans not next year, but during Christmas break. The kids are going to come back to new schools.' I had never been to Yazoo City, but there I was in the judge's chambers, redrawing school lines. It was an ingenious plan because it forced the towns to cooperate. Suddenly they were back in court asking for modifications. They took the plans and refined them. They would come into court asking for this or that change, because the judge's plan made kids cross the railroad tracks six times or because a different configuration fit better with the geography of the town. The plans were a way of forcing those towns to actually do something. It was a spine-tingling moment when the judges passed out all of those plans. I will never forget it."

With Justice Black, Harmon learned about thinking through cases and about different ways to approach legal ques-

tions. "Justice Black lived the law. We rode to work and back together and ate breakfast together. We worked in his home. We talked about cases continually. He never had a problem with the forest and the trees. He believed that it was necessary to talk things out in order to really understand them."

Judge Gerald B. Tjoflat '57, Chief Judge of the Eleventh Circuit of the U.S. Court of Appeals, who has had many Duke law students as clerks over the years, provides a view from the other side of the bench. "Through clerking, a student can gain an experience that money simply can't purchase. The experience is the equivalent of a post-graduate degree, as it offers the clerk a unique exposure not only to a wide variety of issues, but to the whole judicial system... A clerk sees a digest of all things in a case. Through examining the record a clerk at the appellate level sees how cases begin, develop, and get to a point where the arguments are clear. Along the way, the clerk may see

both good lawyering and bad lawyering, and can learn how cases that seem to be in a mess could have been avoided."

Kevin Kaplan '89, one of Judge Tjoflat's current law clerks, describes the clerkship as "a good exercise in thinking." In dealing with complicated legal questions, a clerk is forced to learn how to cut to the heart of things and figure out what is really going on. Kaplan emphasizes the importance of selecting a judge carefully. "Judge Tjoflat gives us a lot of responsibility, but he also spends a lot of time working through problems with us and giving us advice on how to improve our work."

State supreme courts and state courts of appeal also offer valuable experiences at the appellate level of the judicial system. Justice Robert Clifford '50 has served on the Supreme Court of New Jersey for seventeen years. He describes a clerkship in his court as an opportunity to gain an interesting perspective on how an appellate court REALLY works. Clerking on a state supreme



Judge Gerald B. Tjoflat '57 confers in chambers with his judicial clerks, Bill Mureiko '89 (left) and Kevin Kaplan '89.

court provides a valuable glimpse of the dynamics of a collegial court where the same group of judges address all of the issues together. Justice Clifford believes that this is an especially exciting time to be involved in an active state supreme court. "It used to be that all of the sexy legal issues were decided in federal court. But now there is a noticeable trend in the other direction. All of the problems of society seem to be making their way to the door of the state courts. State constitutions are playing a larger and larger role in litigation. Because New Jersey is a corridor state we are seeing some of the challenging issues discussed here—educational funding, housing and death penalty issues, to name just a few. The issues we address are fascinating, ever-changing and important. The clerks are intimately involved in the process. I depend heavily on my clerks. I think it is an excellent exposure to an important part of the legal system."

Justice Clifford's clerks appear to be equally enthusiastic about the experience. Peter Verniero '84 clerked for Justice Clifford the year after he graduated from Duke. He believes that a well respected court like the New Jersey Supreme Court and a mentor like Justice Clifford are, "an unbeatable combination. Clerking is a tremendous experience, one you cannot duplicate anywhere else in legal practice. It is an excellent opportunity to extend development after law school. In the right clerkship you have an opportunity to develop a relationship with the judge and to develop good professional habits. The judge becomes a tutor. The clerkship prepared me for private practice. It set me on the right professional track."

Judge Eugene Phillips '47 serves on the North Carolina Court of Appeals. He believes that his clerks develop valuable skills by focusing on and distilling out the importance of the facts in cases that come before the court. His experience is that more often than not the case turns on the presentation of facts.

Therefore he works with his clerks to learn how to pick out and present the facts that are most decisive, quoting Daniel Webster's saying, "[t]he function of a lawyer is to keep things clear." It is an intellectually stimulating experience."

Many students who know they are interested in litigation seek clerkships at the trial court level. Judge Ernest Torres '68, a federal district court judge in Rhode Island, believes that a district court clerkship is a good opportunity to get an inside look at the litigation process and to work closely with a judge to see how the judicial decision-making process works. He hires two clerks each year and relies on his clerks for research, writing and "whatever needs to be done." He works with his clerks to improve their writing and their analytical abilities, describing a clerkship as an excellent opportunity to develop one's writing skills.

Clerking for a federal magistrate can also provide good training for litigation. Though not classified as judges, federal magistrates are authorized to perform many judicial functions including supervising discovery and holding pre-trial conferences, arraignments, and bail and suppression hearings. Magistrates are authorized to try misdemeanor criminal cases and, with the consent of the parties, civil cases.

Alex Denson '66, a federal magistrate in the Eastern District of North Carolina, points out that students interested in clerking for a federal magistrate should determine what types of cases are handled by the magistrate in that particular jurisdiction. Denson, for example, handles a heavy civil trial calendar so his clerks see a lot of trials, which he considers helpful for those interested in a civil trial career. He sees it as an opportunity to view issues impartially as does the judge, rather than approaching matters as advocates as they will when working in a firm. He points out that the variety of duties in a magistrate's office offers additional opportunities;

his clerks also have the experience of reviewing the record for error in social security cases and habeas petitions—"a valuable experience for beginning trial lawyers who need to learn how to make the record for review." ToNola Brown '87, who clerked for Denson for two years, considered the clerkship "a beneficial extension of my legal education." She particularly appreciated the hands on experience she had in drafting opinions and jury instructions.

Trial court clerkships are available in state courts as well. William Daniel '48 is a judge in the Superior Court in Atlanta. Because of his case load, he particularly values clerks who have a background in criminal procedure. His clerks do more research than writing and have the opportunity to hear lots of "splendid... and not so good, lawyering." He describes clerking as "helpful in giving an excellent idea of how lawyers conduct their business."

The clerkship program at the Law School encourages students to consider different types of clerking experiences. For example, Erik Autor '88 is presently clerking for Judge Dominick DiCarlo on the U.S. Court of International Trade, an Article III court with both trial and appellate jurisdiction.

In trade cases involving issues of dumping and countervailing duty or unfair foreign trade practices, the court hears appeals from the Commerce Department and the International Trade Commission. In customs cases, it acts as a trial court to decide issues of class and valuation regarding imports. Autor finds that the court and its clerks therefore "wear two hats," but he considers the clerkship more similar to that in a court of appeals as it involves "more research and writing rather than handling such things as motions and jury charges."

As this is a very specialized field, handling very technical and complicated cases, Autor notes that "many lawyers have never heard of the court. This clerking experience will not trans-

fer well to a general practice, but it is very helpful to me as I plan to stay in the field and work for a firm with a trade practice. I now have a much better appreciation of what judges are looking for when they decide a case—what information they need and what arguments are not worth putting in the briefs.” He therefore recommends a clerkship in such a court for those “who want to go into a specialized field.”

Rebecca Swenson '84 worked first as a court law clerk for the D.C. Circuit (now called staff attorney) and then for Judge Robert Bork of the same circuit. Although she enjoyed working for Judge Bork and is thankful for the opportunity to work in close proximity with someone whom she holds in high regard, Swenson's greatest enthusiasm is for her job as court law clerk. The court law clerk handled dispositive motions and procedural motions. Her job involved researching and presenting the merits of these motions to the judges. “It was the best job I've ever had. I would write memos and then I would have to argue my position on the motions before a three-judge panel every week. I worked a lot. It was exciting and it involved a lot of responsibility. The opportunity to argue before the judges was great preparation for litigation. I could also choose to be the fourth clerk to any judge who needed help. My writing skills and oral skills really developed during that time. The job is also a great source of references and connections. And, it is a job that is available to people even if they don't have perfect grades or a proven track record. I highly recommend the experience. I loved it.”

Bill Blancato '83 clerked for Judge Alex Kozinski when he was a judge on the U.S. Claims Court. (Kozinski now serves on the U.S. Court of Appeals in the Ninth Circuit.) The U.S. Claims Court hears all of the claims against the United States except tort claims. That means that Blancato spent most of his time doing work on contracts issues,



In 1983, Professor Jeff Powell (left) clerked for the Honorable Samuel J. Ervin, III.

Fifth Amendment takings, military compensation disputes and tax questions.

Blancato loved working as a clerk in the U.S. Claims Court. “It is a great experience. You do it early in your career but it is probably the best job you'll have in the law. There was time to analyze problems and turn over every stone; in practice you usually don't have that sort of time. It was also an opportunity to work with a judge who has had experience. Judge Kozinski gave us his thoughts and critiqued our work. Working with the other clerks was fun as well. We didn't actually make decisions; but it is as close as you can get to playing judge without actually being one.”

The Faculty Perspective

“A year of looking over the shoulder of a judge,” is the description Professor John Weistart '68 gives to the clerking experience. Professor Weistart clerked for Justice Walter Schaeffer of the Illinois Supreme Court in 1968-69. He feels that clerking is a valuable experience whether one chooses to practice or to teach. “Law school offers one perspective on the law and practice offers a second perspective; clerking is a distinct and helpful third perspective. It is the perfect transition from law school to

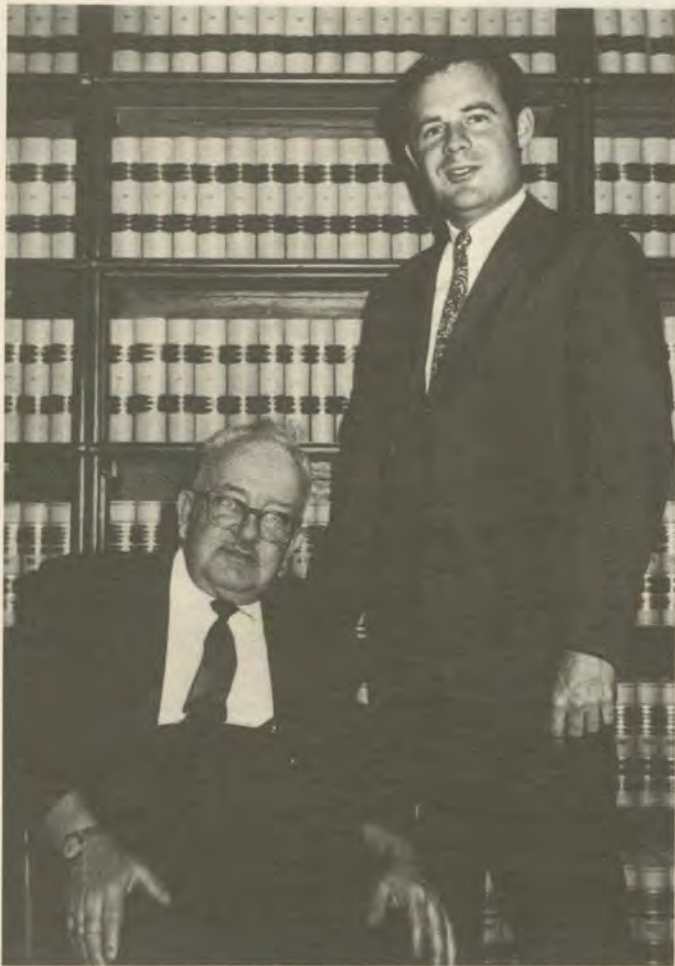
practice. The experience offers tremendous insights into the way ‘the law’ develops.”

Professor Jeff Powell, who clerked for Judge Sam Ervin on the U.S. Court of Appeals in the Fourth Circuit, believes that the decision to clerk should involve careful thought and research. “I do not recommend clerking in the abstract. The relationship between a judge and a clerk is personal as well as professional. When choosing a clerkship it is important to get a sense of what the relationship with the judge will be like on a personal level. Judge Ervin has a laid-back style. That fit in with the way I enjoy living my life. It was the perfect clerkship for me, but for someone with a different temperament it would not work as well. A student shouldn't feel pushed into clerking if it doesn't sound attractive or exciting.”

“BUT,” Powell continues, “if clerking is something that appeals to a student, it is an ideal opportunity to work closely with an experienced senior member of the profession, and to watch how that person ‘lawyers.’ A large part of how we understand who we are as lawyers is through the development of images of how a lawyer professes her calling and of who she understands herself to be. To have a rewarding clerkship is to powerfully develop such an image.”

Professor Sara Sun Beale also emphasizes the close working relationship between a clerk and a judge. She clerked for Judge Wade McCree from 1976-1977 when he was serving on the U.S. Court of Appeals in the Fifth Circuit. In a *Michigan Law Review* issue dedicated to Judge McCree after his death, Professor Beale likens the experience of being a “McCree clerk” to becoming a part of the judge's own family. That sense of extended family continued even after the clerks moved away and started families of their own.

She considers it a stroke of luck to have landed in Judge McCree's chambers. “I clerked for Wade McCree from 1976-77. In retrospect I have often



Professor Bill Reppy (right) with The Honorable Raymond C. Peters during his clerkship in 1966-67.

marvelled at my good luck. When I applied, I knew little more than the fact that the judge's chambers were within commuting distance of Ann Arbor, where I was living while my husband was in graduate school. During and after my clerkship I learned what an exceptional man the judge was, what a warm relationship he established with his clerks, and how much he could and did teach them. He was a wonderful mentor and friend."

Professor Beale's time with Judge McCree left lifetime impressions. She remembers him as a man of profound and deeply held commitments. "As we worked on individual opinions with the judge we also learned about his values. The overriding concerns reflected in his

opinions were the fairness of the process and respect for the dignity and rights of individuals. He once said that the social imperatives of a large country should not encroach upon individual rights and freedoms any more than necessary... [H]e sometimes spoke of the racial discrimination he had suffered. The judge was not bitter, but he was determined that the dignity of every individual should be respected. He applied that standard to every person with whom he came in contact. He was as courteous to the elderly woman who cleaned his chambers as he would

have been to the Chief Judge.... I feel fortunate to have had the opportunity to work for such a warm, brilliant, and highly principled man who taught me so much, both personally and professionally. I loved and respected him, and I will miss him."¹

This sense of warmth and appreciation is often apparent when clerks speak of the judges with whom they have worked. Dean Mosteller, who clerked for Judge Braxton Craven in the Fourth Circuit of the U.S. Court of Appeals, explains, "Judges can't talk to others about the cases they are deciding. They are largely cut off from professional conversations with lawyers by the ethical demands of their job. The clerks become the judge's professional confi-

dantes. Judges also depend on the clerks to get the work done. They desperately need law clerks. It is an important position. It is also an opportunity to help make the law at some level. The mutual dependency between clerks and judges usually creates a wonderful relationship."

Professor Tom Rowe clerked for Justice Potter Stewart on the U.S. Supreme Court during the 1970-71 term. He recalls, "the term began with the Charlotte-Mecklenburg busing arguments and ended with the Pentagon Papers. It was a fascinating experience just seeing the inside of how lots of decisions are made. It really gave me a more realistic sense of how decisions DO get made. They are greatly affected by political questions, by other legal issues and by the judges' druthers. The other clerks are interesting as well. They are worth getting to know because they are bright, fun people and they provide valuable professional contacts after everyone goes his or her own way."

Professor Bill Reppy has written an article about his recollections of clerking with Justice William O. Douglas on the U.S. Supreme Court.² Professor Reppy, who clerked both with Justice Douglas and with Justice Raymond E. Peters of the California Supreme Court, notes "clerking is a great experience, offering a wide variety of exposure to the law. You are involved in scores of cases and are able to study the record and see where the errors were made and where people lost who should have won. It is excellent practical training, really almost clinical. It's fun, it's exciting and the people you work with are bright. There are a group of clerks in most courthouses, and those people spend time together discussing law and ideas. It is really a tremendous intellectual experience."

Professor Tom Metzloff clerked for Judge Robert Ainsworth of the Fifth Circuit Court of Appeals and for Justice Byron White of the U.S. Supreme

Court. He emphasizes the "people" aspects of clerking. "You see that the legal system is composed of people. Seeing how a judge deals with an issue is an excellent experience for anyone, for any kind of lawyer, not just for a litigator. In clerking you realize that who wins and who loses doesn't just turn on the way the case is argued. Judges have their own views of things, and that affects their decision-making process. Clerking made me realize that a good lawyer structures an argument looking for the best possibilities with that particular judge. Knowing the importance of a judge's views takes some of the pressure off, and it also helps in planning an argument."

It is true that today there is a vast difference between a law clerk's salary and the salary of a starting associate at a

large law firm. Though acknowledging those economics, Professor Metzloff emphasizes his belief that clerking is a great choice. "The point is, it's only one year. And after that year you come back to where you would have been anyway if you had started with the firm. Most importantly it is a pleasant year. It's a free year to go somewhere and experience a new community—risk free. I was a northeasterner and my clerkship in New Orleans was an opportunity to experience the South and to live in an interesting and lively city. It's also pleasant because the work is interesting. In practice, two to three cases will often occupy seventy percent of your time. They go on forever without end and it is hard to stay fresh. A clerk gets new cases at least weekly. The longest time I spent on a case in the Court of Appeals

was four weeks on an anti-trust case. In the Supreme Court I spent five weeks on a commerce clause case. It is a chance to grapple with tough legal issues very quickly. It is really a lot of fun."

The "fun" of clerking seems to come up in most everyone's descriptions of the experience. But Dean Mosteller may have described that aspect of clerking most aptly: "So many people seem to spend time worrying about careers. But one can also look at life as an effort to put together pleasant years. Clerking is a very pleasant year."

Denise E. Thorpe '90

¹Beale, *Wade H. McCree, Jr.*, 86 MICH. L. REV. 217, 218-20 (1987).

²Reppy, *Justice Douglas and His Brethren*, 12 N.C. CENT. L.J. 412 (1981).

Law Students Shine in Moot Court Competitions

Spring semester was a busy time for the many Duke law students who participated in moot court competitions, both within and outside the School. Duke teams participated successfully in three national competitions, bringing home several trophies and awards. The intraschool competitions were highlighted by the presence of Supreme Court Justice Sandra Day O'Connor, who judged the final round of the Dean's Cup Competition in February.

Dean's Cup & Hardt Cup. The Dean's Cup featured weeks of competition among fifty-four second- and third-year Duke law students. The final advocates, Melanie Caudill '91 and Ronnie Kann '91, were determined just days preceding the final argument on February 17 before Justice O'Connor and United States Circuit

Judges Jon Newman (Second Circuit) and Richard Cudahy (Seventh Circuit). The case argued, *Delgado v. Smith*, centered on whether an initiative petition circulated by private citizens, whose use in accordance with state election laws results directly in a statewide election on a proposed constitutional amendment, is subject to the language minority requirements of the Voting Rights Act of 1965.

Although Kann was named the winner of the Dean's Cup after a lively round sparked by frequent and pointed questions from the judges, Justice O'Connor noted, "You both showed a lot of poise and a lot of knowledge of the materials. I would welcome you at the Supreme Court."

The final round of the Hardt Cup Competition for first-year students was argued by Glenn Sarno and

Carmela Edmunds in April. Presiding over the final round, which centered on a right-to-die case, was North Carolina Supreme Court Justice Henry E. Frye.

Jessup International Law Moot Court Competition. The Philip C. Jessup International Law Moot Court Competition consists of two levels of oral pleadings. Regionals are held in each country where more than one team wishes to participate in the International Semifinals Competition. The Duke team was the winner over teams from eleven schools in the Southeast Regional held at Washington & Lee Law School in Lexington, Virginia in February. The members of Duke's winning team, all second-year law students, were Ann Billings, Brad Cope, Kari Dohn, Marcella Larsen and Kristen Scheffel. The issue in this



The judges and advocates in the 1990 Dean's Cup Competition were (from left), Judge Jon O. Newman, Melanie S. Caudill '91, Associate Justice Sandra Day O'Connor, Ronnie Kann '91, and Judge Richard D. Cudahy.

year's Jessup Cup concerned international environmental law and Antarctica.

At the regionals, the Duke team came in First in Combined Written Brief/Oral Scores, came in Second for Best Brief, and won two speaking awards (Best Oralist—Kristen Scheffel; Honorable Mention Best Oralist—Ann Billings). Duke's team also won the regionals in the 1989 competition.

Although Duke's team did not proceed to the final round of oral arguments in the World Championships, their brief was awarded the the Alona E. Evans Memorial Prize for Fourth Place in the World Competition. The brief now moves on to the next round of judging.

Frederick Douglass Civil Rights Moot Court Competition. Therence Pickett '91 and Claude Allen '90 represented Duke at the 14th Annual National Frederick Douglass Civil Rights Moot Court Competition in Detroit, Michigan in March. Pickett and Allen won the right to compete in the national competition by taking First Place in the Regional Competition held at the University of Georgia at Athens in mid-February. The team not only took First Place Overall, but also received awards for Best Overall Brief and Best Respondent Brief. In the Na-

tional Competition, featuring 158 teams, Pickett and Allen placed Third Overall behind teams from Georgetown and the University of Georgia. Pickett was named the Best Oralist of the National Competition.

The issue briefed and argued in the regional and national competitions centered around whether a race conscious tenant selection plan implemented by a fictitious city violated the Equal Protection Clause of the Fourteenth Amendment and/or Title VIII of the Civil Rights Act of 1968. Each member of the team was required to argue both sides of his respective issue. Pickett argued the constitutional claim and Allen argued the statutory claim. Allen noted that "it was particularly exciting to compete against students from other national and regional institutions and to come away with such a tremendous suc-

cess—particularly Therence's winning the Best National Oralist out of over 350 advocates!"

National Moot Court Competition on Bioethics and the Law. This national competition was sponsored by and held at Georgetown Law School in March. Over twenty-five teams from around the country competed in the competition which was modeled on an actual right-to-die case. The competition consisted of three preliminary rounds, the semi-finals and the final round. The final round was video-taped and broadcast on C-Span.

The Duke team consisted of Colm Connolly '91 and Stan Gibson '91. They placed Second in the Overall Competition, losing to the team from the University of Little Rock-Arkansas. They also received an Honorable Mention for Best Brief.

Next spring will be an even busier time for students involved in moot court activities, as the Law School will host the initial Rabbi Seymour Siegel Moot Court Competition. This competition, established by a gift from Allen G. Siegel '60, will focus on an ethical issue and will feature teams from sixteen ABA-accredited law schools.



The Honorable Henry E. Frye of the North Carolina Supreme Court (center) judged the final round of the Hardt Cup Moot Court Competition between Carmela Edmunds '92 (left) and Glenn Sarno '92 in April.

The Docket

Duke Law Alumni On the Bench

For some law students, spring semester at Duke Law School is a time to live one of their most secret ambitions—to be a judge. Black-robed second- and third-year Moot Court Board members with responsibility for judging the Hardt Cup and Dean's Cup Moot Court competitions conspicuously occupy the halls, classrooms and courtrooms on any given weekday evening in February and March. For most, it is the only time they will have the opportunity to experience the power, intellectual challenge and leadership that comes with the honor of wearing that distinctive black robe. For others, a combination of hard work during the course of their careers and luck may result in a future opportunity to sit as a judge in one or more of the many courtrooms in the United States.

Indeed, Duke Law School graduates have a good chance of distinguishing themselves in the judiciary—around 100 alumni are currently sitting on a bench. Recently, some of these alumni shared their insights into this area of the legal profession with the *Duke Law Magazine*. In general, the judges specialized in litigation after graduation. For most, the opportunity to become a judge was not so much a part of a particular plan, but more of a fortuitous happenstance. With very few exceptions, our alumni judges find their work rewarding from an intellectual as well as civic perspective. Most agree, however, that judicial salaries are low and the caseload can be overwhelming.

Federal Court Judges

Gerald B. Tjoflat '57 has served as a judge in the U.S. Court of Appeals since 1975 (on the Fifth Circuit from 1975-81, and on the Eleventh Circuit since 1981), having served on the U.S. District Court for the Middle District

of Florida from 1970 to 1975. He was named Chief Judge of the Eleventh Circuit last fall.

Tjoflat was the partner in charge of litigation at a large law firm in Jacksonville, Florida in June, 1968 when colleagues urged him to consider filling an unexpected vacancy on the Fourth Judicial Circuit of Florida. Although four and a half years remained in his predecessor's term, Judge Tjoflat was required to run in the next general election in November of that year. As a Republican candidate in a predominantly Democratic area, he expected that he would be returning to private practice following the election. After running unopposed in both the primary and the general election, however, he decided to stay on the bench. "The idea of sitting on the bench was an intriguing one. Opportunities like that don't come when you want them. And at the time, I could afford to make the financial sacrifice because my children were only seven and ten years old."

Tjoflat was appointed to the U.S. District Court for the Middle District of Florida in 1970, and was elevated to the Court of Appeals by President Ford in 1975. Tjoflat says he has no plans to give up his life tenure in the near future. "This is a very challenging and interesting position because of the variety of legal problems that I face."

Disposing of the massive number of cases is the biggest challenge facing judges today, Tjoflat feels. "The volume of litigation has grown at a geometric rate, putting a lot of pressure on judges to decide many cases. The courts have scarce resources and, in order to face this challenge, society must settle cases through other means and only try necessary matters in the courthouse."

In addition to his judicial activities, Tjoflat has sought to improve the legal system by serving in professional organi-

Duke Law Alumni Judges

This list of currently sitting judges was compiled from records in the Law School Alumni Affairs Office. Please let us know if there are additions or revisions that should be made to our records. The persons interviewed for the accompanying article represent only a cross-section of Duke Law alumni judges. The author appreciates the time these alumni spent talking with her and only regrets that she could not talk with all of Duke's alumni judges.

1941

Eugene A. Gordon

Senior Judge, U.S. District Court
Middle District of North Carolina

1947

Henry A. McKinnon, Jr.

Emergency Judge, 16th Judicial District
North Carolina Superior Court

Jonathan Z. McKown

Judge, 7th Judicial Circuit
South Carolina Circuit Court

Eugene H. Phillips

Associate Judge
North Carolina Court of Appeals

1948

Ray Leonard Brock, Jr.

Retired Chief Justice (serves by assignment)
Supreme Court of Tennessee

Hollie Conley

Judge, 31st Judicial Circuit
Kentucky Circuit Court

William W. Daniel

Judge, Atlanta Judicial Circuit
Superior Court of Georgia

A. William Sweeney

Justice
Ohio Supreme Court

John M. Turner

Judge, 11th Judicial Circuit
Florida Circuit Court

Dan Edward Walton

Senior Judge, 178th Judicial District
Texas District Court

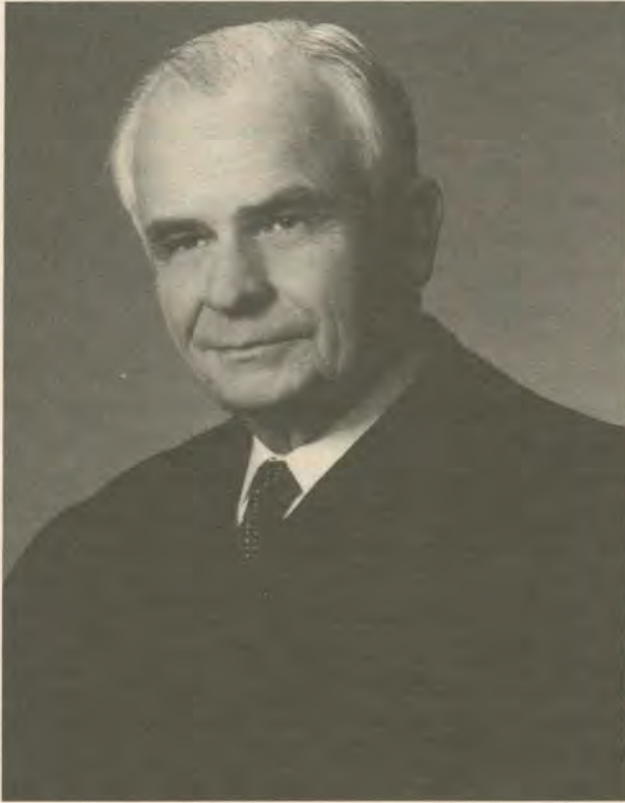
1949

Walter Heter Butz

Municipal Judge
Bellevue, Ohio Municipal Court

Hollis Monroe Owens, Jr.

Resident Judge, 29th Judicial District
North Carolina Superior Court



The Honorable Robert D. Potter '50

zations, including two American Bar Association committees: the Committee on Implementation of Standards of Criminal Justice and the Committee on Discovery, Section of Criminal Justice. He actively nurtures his commitment to civic improvement through his church and the Boy Scouts of America. He also serves the Law School as a life member of its Board of Visitors. In 1987, the Law School honored Tjoflat for his devotion to public service with the Charles S. Murphy Award.

Robert D. Potter '50 serves as Chief Judge of the U.S. District Court in the Western District of North Carolina, after following a fairly unique career path. After graduating from Duke Law School, Potter took his father's advice "not to work for anyone else" and opened his own practice in Charlotte. He recalls feeling "more prepared to argue a constitutional issue before the United States Supreme Court than I was to file a simple lawsuit." With the exception of five years in the 1950s

when he joined with another lawyer, Potter had a successful solo practice in areas such as civil litigation, pension and profit sharing, real estate, securities and tax law. He was appointed to the bench in 1981 by President Reagan.

Potter describes himself as an "even-handed" judge, who strives to ensure that every case receives full consideration and that every decision will be informed and fair. He advises the attorneys who appear before him to take time to conduct careful research and to think about a case before filing a lawsuit. Pointing to the fact that fifty to sixty per-

cent of the cases on the civil docket are settled after calendar, Potter encourages the use of various settlement techniques in his courtroom. When cases are not settled, he views dismissal and summary judgment as viable options in clearing the docket of cases that lack justiciable merit. He firmly believes that the pre-trial resolution of issues is an advantage both to the litigant and to the court.

Despite Potter's efforts to streamline the number of cases in the court's docket, he points out that the caseload continues to increase. He feels this is due to the increasing number of criminal cases, particularly drug offenses, civil and criminal cases under the RICO statute, and the additional time now required under the new federal sentencing guidelines. However, he warns that "no one should take a position like this thinking he or she can retire to an easy life. I've probably worked harder here than when I practiced law."

Potter recognizes that the legal profession is quite different now than when

James B. Stephen
Judge-at-Large
South Carolina Circuit Court

1950
Robert L. Clifford
Associate Justice
New Jersey Supreme Court

Fred Charles Pace
Chief Administrative Judge
Board of Claims, Commonwealth of Pennsylvania

Robert D. Potter
Chief Judge, U.S. District Court
Western District of North Carolina

Luther Perry Shields
Judge
United States Tax Court

James B. Wolfe, Jr.
Chief Judge, U.S. Bankruptcy Court
Middle District of North Carolina

1951
James J. Booker
Judge, 21st Judicial District A
North Carolina Superior Court

George E. Orr
Judge, 11th Judicial Circuit
Florida Circuit Court

Charles E. Villaneuva
Judge, Vicinage Five
New Jersey Superior Court

1952
James S. Byrd
Judge, 9th Judicial Circuit
Florida Circuit Court

Frank J. Montemuro, Jr.
Judge
Superior Court of Pennsylvania

Jay Walter Myers
President Judge, 26th Judicial District
Pennsylvania Court of Common Pleas

Peter B. Scuderi
Magistrate, U.S. District Court
Eastern District of Pennsylvania

Thomas W. Seay, Jr.
Senior Resident Judge, Division Three
North Carolina Superior Court

1953
Calvin Earl Smith
Judge, 23rd Judicial District
Pennsylvania Court of Common Pleas

Richard C. Webster
Municipal Court Judge/Referee
State of Colorado

1954
Paul Game, Jr.
Magistrate, U.S. District Court
Middle District of Florida

he graduated from Duke Law School. For a solo practitioner of the "old school," he considers his current position to be a sanctuary in a time of increasing specialization. He sees the federal bench as an extension of the general practice of law. "I enjoy the independence and variety of legal problems I encounter." He says that "service is probably the chief reason [that] anyone would want this position," and he sincerely believes a person can make a difference sitting on a judicial bench.

Two graduates from the Class of 1968 also sit on United States district courts—Ernest C. Torres in the District of Rhode Island and Garrett E. Brown, Jr. in the District of New Jersey. Torres had five years of prior judicial experience on the Superior Court of Rhode Island (1980-85) before returning to the bench as a federal district judge in 1988. Previously an assistant vice president of staff counsel operations for the Aetna Life and Casualty Insurance Company, Torres does not think that lawyers prepare to become judges, although he believes that many have a vague sense that this is something they would like to do at some time in their careers.

He notes, "I have always had a desire to be in public service. As a judge, I have the opportunity to make a useful and worthwhile contribution. I also enjoy dealing with questions of importance. The intellectual challenge and the independence and opportunity to do what I think is right are some of the most positive aspects of being a judge." When cases come to the U.S. District Court in Rhode Island, they are assigned to a "basket" based on the subject matter of the predominant issue in the case. Then each judge draws his individual docket at random. "Categorizing the cases works well because the system maximizes the chance that each judge will receive his share of antitrust, criminal and constitutional cases, for example."

One of the drawbacks of being a

judge, according to Torres, is the restriction on outside activities by time constraints. Before returning to the bench, Torres enjoyed teaching legal courses to undergraduates and para-legal students at local colleges. Unfortunately, he no longer has time for this, but he manages to serve as a member of the boards of several charitable organizations, and he enjoys speaking to civic and school groups. Torres also has fond memories of attending occasional alumni meetings and participating in Moot Court Board activities at the Law School.

Garrett Brown agrees with his former Law School classmate and fellow U.S. District Court colleague that coming back to Duke to work with the students is a rewarding experience. Brown has enjoyed judging oral arguments in the commercial practice clinical course at the Law School since 1987. He finds that he is always delighted with the preparation and performance of the students in the course. "I am glad to see that the Law School is providing such realistic and challenging courses. This is the kind of practical approach to teaching students about the law that I would expect from a school like Duke."

Brown's experience in several areas of the legal profession make him a reliable source for advice on what preparation is helpful to be a practicing attorney and an active judge. "Any trial lawyer is probably interested in sitting on a bench. The best preparation is the lawyer's total experience." Brown's preparation prior to his appointment to the U.S. District Court included trial and appellate experience in the civil and criminal areas.

After graduating from Duke, Brown was a law clerk in the Supreme Court of New Jersey, and served as an assistant U.S. attorney for the District of New Jersey. While in that office, he was appointed deputy chief of the criminal division and later executive assistant U.S. attorney. Brown spent more than eight years in private practice represent-

ing international corporations. In 1981, Brown became general counsel at the U.S. Government Printing Office where he served for two years before being appointed to serve as chief counsel of the Maritime Administration at the U.S. Department of Transportation. He received his commission to serve on the U.S. District Court in 1985.

According to Brown, one of the most attractive things about his current position is that "you never get into a rut on the federal bench. You could very easily have a patent case one day, a drug case the next day, and a medical malpractice case the day after that."

Federal Magistrates

A number of Duke Law School graduates sit as federal magistrates. Peter Scuderi '52, is U.S. Magistrate for the U.S.D.C. for the Eastern District of Pennsylvania. "The judiciary is the epitome of legal practice. I think that any lawyer, particularly a litigator, aspires someday to serve on a bench," says Scuderi when asked what attracted him to become a magistrate after twenty-two years of private litigation experience.

Scuderi points out that the biggest difference between practicing as a lawyer and sitting as a judge is "the client. You are still very much involved in the law, but as a judge you are representing the interests of the people. A lawyer is an advocate and must look at the client's case from a partisan view. The role of the adjudicator is much different; the judge has to make the final decisions with regard to the rights and contentions of two opposing parties. The greatest challenge for the judge is to never become indifferent to any case. There are small cases, but every case is the most important one to the litigant. Judges have to remind themselves of that constantly."

Donald Dietrich '61 was appointed U.S. Magistrate to the U.S.D.C. in the Middle District of Florida when that position was created in 1970. After ten

years of private practice, he welcomed his appointment as an opportunity to serve the public. One of the most rewarding benefits of his job is that he is able to maintain contact with judges throughout Florida who also graduated from Duke Law School. Dietrich does not have to go too far to maintain such contacts. When he was appointed U.S. Magistrate in 1970, Paul Game '54 was also appointed to the same bench. Game sits in the U.S. Courthouse in Tampa, and will retire this summer. When both men were appointed twenty years ago, Gerald Tjoflat '57 was a U.S. District Court Judge in the Middle District of Florida.

Currently, Dietrich says that he enjoys keeping in touch with Phillip Hubbart '61, Chief Judge of the District Court of Appeals of Florida, and Richard W. Kreidler '61, County Court Judge in Jacksonville. Dietrich's memories of Hubbart and Kreidler go back a long way. While at Duke, Dietrich roomed with Hubbart during their second and third years of Law School when they were both editors of the *Duke Law Journal*. Dietrich and Kreidler were fraternity brothers at SUNY-Buffalo and roommates during their first year of Law School.

"It is a small world, and that is one of the nice things about Duke. It is a good three years of your life to make relationships and friendships that will grow," says Dietrich, whose son, Paul, graduated from the Law School this spring. He feels that "it's not just a coincidence that all of us have become judges in the State of Florida. I think we share a temperament that lends itself well to the judiciary."

Charles Binder '74, U.S. Magistrate in the U.S.D.C. for the Eastern District of Michigan, seems to share this temperament, as he says "I enjoyed practicing as a lawyer, but perhaps I have a predisposition to adjudication rather than litigation." After graduating from Law School, he clerked on the U.S. District Court in the Western District of Michi-

gan for two years before entering private practice. In 1984, he was appointed as a part-time magistrate splitting his time between the court and his own practice for six months until a full-time magistrate position was approved.

Binder was eager to return to the judicial chambers because he "truly enjoyed the opportunity to figure out the 'right' decision, not what the best thing is for a particular client. I had no idea how much I enjoyed that perspective until I sat as a part-time magistrate and applied that process of thought again. I missed the endeavor to come up with the objectively 'right' outcome in my practice." Binder recognizes the challenges that come along with his responsibilities. "This job is not easy. Federal law makes for hard cases. It is not easy to sentence people found guilty after a criminal trial. It isn't supposed to be easy," he says, "and if it ever gets easy, I should think twice when I do it."

'Special' Courts

Luther Perry Shields '50 never thought he would one day serve as a judge on the U.S. Tax Court. With the exception of five years that he spent working for the Internal Revenue Service, Shields dedicated twenty-five years of his career to the successful practice of tax law in Knoxville, Tennessee. However, in 1981, three vacancies opened on the U.S. Tax Court and it seemed that everyone from Washington, DC to Tennessee thought that Shields would be the perfect choice for one of the vacancies.

"I knew the people who would be influential in making the appointment. They knew my qualifications and, well, one thing led to another and I was appointed by President Reagan to the U.S. Tax Court." Shields says that the service and intellectual challenge of this job "provides a satisfactory way to top off a career that has centered on tax law."

Unlike the typical law student, Shields says that tax was one of his fa-

C. Anthony Harris
Judge, 4th Judicial Circuit
South Carolina Circuit Court

Robert L. McFadden
Judge, 16th Judicial Circuit
South Carolina Circuit Court

1956
David H. Allard
Chief Administrative Law Judge
Arizona Department of Health & Human Services

Harold Bernard, Jr.
Administrative Law Judge
National Labor Relations Board

Harley B. Gaston, Jr.
Judge, 27th Judicial District
North Carolina District Court

Vincent T. Hall
Judge, 2nd District
Florida District Court of Appeals

Gary S. Stein
Associate Justice
New Jersey Supreme Court

1957
Gerald Bard Tjoflat
Chief Judge, U.S. Court of Appeals
for the Eleventh Circuit

1958
Richard L. Denison
Administrative Law Judge
National Labor Relations Board
Frederick A. Thayer, III
Chief Judge, 4th Judicial Circuit
Circuit Court of Maryland

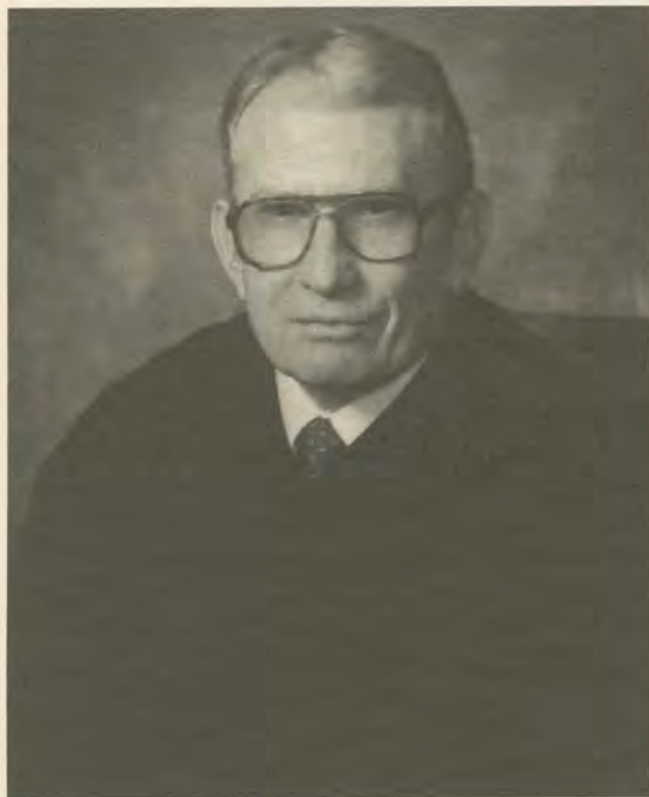
1959
Robinson O. Everett
Chief Judge
U.S. Court of Military Appeals
Charles E. Plunkett
Chancellor, 13th Judicial Circuit
Arkansas Chancery Court

1960
Robert B. Bell
Administrative Law Judge,
Office of Hearings & Appeals
Social Security Administration, Atlanta

Eugene S. Harris
Chancellor, 11th Judicial Circuit West
Arkansas Chancery Court

Maynard F. Swanson, Jr.
Judge, 6th Judicial Circuit
Florida Circuit Court

Newton C. Taylor
President Judge, 20th Judicial District
Pennsylvania Court of Common Pleas



The Honorable Luther Perry Shields '50

vorite subjects. "Charles Lowndes was my tax professor. I remember that he was an enthusiastic teacher of federal tax law. Tax legal work is drudgery for a lot of people. It's not the least bit colorful like criminal or divorce cases. I enjoy tax because in practice and as a judge you have to work out a reasonable solution as soon as possible for business people who want to get back to managing their businesses."

By law, the U.S. Tax Court must try cases in locations that are convenient to the taxpayer, which suits Shields just fine. Like many younger professionals who find themselves balancing careers with long-distance relationships, Judge and Mrs. Shields find themselves in a similar position after almost forty years of marriage! "My wife has a family business and home in Knoxville and I rent an apartment in Alexandria, Virginia. Whenever I travel to the southern part of the country I go through Knoxville and when I travel up north or out west, Mrs. Shields joins me there or travels

with me from Washington, DC."

In December 1988, Rufus W. Reynolds '33, U.S. Bankruptcy Judge for the Middle District of North Carolina, retired after forty-two years on the bench. When he retired, he was the longest-tenured among the nation's 284 bankruptcy judges. During his career he handled over 40,000 cases, the most widely-known being the reorganization of Jim and Tammy Bakker's PTL Ministry.

After graduating from the Law School in 1933, Reynolds set

up a private practice in Greensboro, where he specialized in bankruptcy matters. "It wasn't because I wanted it," he says. "It was because there just wasn't anything else going on." World War II interrupted his practice for a few years and when he returned from "foreign duty" in Texas, Reynolds found a reinvigorated Greensboro. Instead of returning to his own practice, Reynolds took a job as the "bankruptcy referee" in the Middle District Court, and later became North Carolina's first federal bankruptcy judge.

Reynolds admits that the values that he learned in the Depression still carry much weight with him. "After you see so little money and so many problems, you can't forget that overnight." Reynolds believes that preservation, not liquidation, is what good bankruptcy jurists are about. "They hold together institutions whenever possible, they provide fresh starts. And they do this regardless of the sleaziness that created the money mess in the first place."

In his last year on the bench, Reynolds presided over the PTL bankruptcy case in Greensboro. "From a legal standpoint, the PTL case was routine. In terms of public impact, it paled beside large corporate bankruptcies. It was a nightmare," says Reynolds. "I have never heard anything like it before—so emotional, so explosive, so publicized." When Reynolds was assigned the PTL case in June 1987, he had high hopes for the survival of the ministry. By the end of the following year, he was discouraged and cynical. He likes to share the story of the woman who called the bankruptcy court to ask if Reynolds was a Christian. "I said, 'You tell her I was when I started this case, but now I plead the Fifth Amendment.'"

Administrative Law Judges

Two other former Duke Law School classmates share the honor of being federal administrative law judges. David H. Allard '56 is the Chief Judge in the Office of Hearings and Appeals, Social Security Administration under the Department of Health and Human Services in Tucson, Arizona. Harold Bernard '56 is an administrative law judge with the National Labor Relations Board (NLRB) in Washington, D.C.

Allard remembers that he was attracted to the idealism involved in the system of justice when he started to consider the possibility of becoming a judge. When he left the staff of the Interstate Commerce Commission in 1967 to take his first administrative law judge (ALJ) position at ICC, he "approached it romantically." In his twenty-three years of experience as an ALJ, some of his idealism, he says, "has been smashed, but not all of it."

Allard says that he practices "mass justice" in his current position, normally having fifty or sixty cases on his docket each month. According to Allard, "one of the hardest things to do in this office is to transmit the feeling to the parties that their experience in the

courtroom has been fair. There is no time for reflection and sometimes the courtroom is like a play in which everyone knows his lines." He believes that it is critical for judges to "take time to reflect on whether what we are doing fits into the larger scheme. It is important to ask ourselves 'what type of system of justice are we providing and is it the best system or are there changes that we should think about and implement?'" For Allard, one of the biggest challenges of being an ALJ in the "mass justice" system is to "look at the judges' role from the perspective of the person who uses the final product, i.e., the decision that the judge hands down." He believes that judges can make a difference in the larger system if they do their best and recognize that sometimes it is beneficial to change set ways of implementing the law.

In his last year of law school, Harold Bernard took a course with the late Professor Charles H. Livengood, a former solicitor with the Department of Labor, and was "struck with a spark of interest in labor law." Bernard has been a government attorney or ALJ with the NLRB ever since. He began thinking about becoming a judge after serving as an NLRB examiner. As an attorney for the NLRB, he appeared frequently before district court judges and developed

a tremendous respect for the bench "marvelling at the magnificent way they disposed of their heavy case loads."

After about ten years as a trial attorney, "along came the opportunity to apply for an ALJ position when the NLRB let it be known that, as the Marines say, it was 'looking for a few good men.'" Thus, Bernard began the lengthy application process for becoming a federal ALJ. He proudly points out that appointments to federal administrative law judgeships are based solely on merit. If the applicant meets the threshold requirement of "at least two years of 'in-the-pit litigation' experience within a seven-year time frame, recommendations are sought from approximately 100 judges and lawyers with whom the applicant has participated in vigorous litigation." The applicant must then pass both written and oral general examinations, and an examination before the employing agency. This rigorous process carried out by the Office of Personnel Management meets two federal government concerns: finding the most qualified people to serve as ALJs, and keeping the ALJ position beyond reproach.

For Bernard, the reward of being a judge is "the total freedom to approach important issues objectively, thoroughly, and within established legal

1961

Donald Paul Dietrich
*Magistrate, U.S. District Court
Middle District of Florida*

Phillip Arthur Hubbart
*Chief Judge, 3rd District
Florida District Court of Appeals*

Richard W. Kreidler
*Judge
Duval County Court, Florida*

William Yates Manson
*Judge, 14th Judicial District
North Carolina District Court*

James E. Moore
*Judge, 8th Judicial Circuit
South Carolina Circuit Court*

1962

Peter L. Roda
*Judge, 28th Judicial District
North Carolina District Court*

Herbert Alfred Schaffner
*Judge, 12th Judicial District
Pennsylvania Court of Common Pleas*

Leonard Victor Wood
*Judge, 18th Judicial Circuit
Florida Circuit Court*

1963

Gerald T. Wetherington
*Chief Judge, 11th Judicial Circuit
Florida Circuit Court*

1964

Kenneth G. Biehn
*Judge, 7th Judicial District
Pennsylvania Court of Common Pleas*

Ted R. Todd
*Judge, 5th Judicial Circuit
Indiana Circuit Court*

Thomas G. Wilson
*Magistrate, U.S. District Court
Middle District of Florida*

1965

R. Allan Edgar
*Judge, U.S. District Court
Eastern District of Tennessee*

Robert L. Garrenger, Jr.
*Judge, Vincinage Eight
New Jersey Superior Court*

Thomas C. Kleinschmidt
*Judge, Division One
Arizona Court of Appeals*

1966

Alexander B. Denson
*Magistrate, U.S. District Court
Eastern District of North Carolina*



A courtroom at the Law School is decorated with photographs of alumni judges.

guidelines so that law and justice are served. The work-load for the attorneys in the field offices is tremendous. As an ALJ for the NLRB I can enjoy the luxury of savoring the facts of my cases."

One of the case management techniques used quite often by Bernard is the telephone settlement conference. He was one of the first ALJs to successfully use this case management tool. Though he believes that it may be ten or fifteen years before the U.S. government provides the means to conduct hearings by way of video-conferencing, he would be in favor of such a system. In addition to helping him manage the ever-increasing caseload he sees each year, such conveniences provide him with more time to pursue his outside interests such as his family and the 10K road races and marathons that he participates in each year.

At the time that Bernard was graduating from Law School and preparing to join the NLRB as a legal assistant, Richard L. Denison '58 was taking his first labor law class with Professor Livengood at Duke. More than thirty years later, Bernard and Denison are both administrative law judges with the NLRB in Washington, DC. Like Bernard, Denison claims that Professor Livengood inspired him to pursue a career in the labor law area, and he has not been disappointed with his choice.

After presenting cases to some very distinguished judges throughout the United States while he was a field attorney, trial attorney and supervising attorney with the NLRB, Denison started to think about becoming a judge. "This was a natural progression for me. I believed that as a judge I would have the opportunity to put my considerable experience to good use and to make a significant contribution to the NLRB." According to Denison, "it is very enjoyable to be a judge after having had the burden of prepping witnesses as an attorney. As a judge I can walk into the

courtroom without a worry in the world. My attention is focused on the evidence that is presented to me in the course of the hearing. My main responsibilities are to conduct a fair hearing and to make proper rulings. Of course, then I spend a lot of time writing my own decisions."

Denison firmly believes that many cases are better settled than tried, especially in the labor law area, as labor disputes tend to be very emotional and the views held by both parties are deep-seated. He believes that labor and management will work better together in the future if they can reach a mutually agreeable resolution through negotiations. In such situations, the role of the NLRB ALJ is to ensure that the terms of the settlement are within the statutory provisions.

State Court Judges

Christine Meaders Durham '71, an Associate Justice on the Utah Supreme Court, says that she was "probably somewhat unusual in that I had judicial ambitions, although I kept them a secret, even while I was in Law School. When I took trial advocacy at Duke I used to enjoy it most when I got to play the judge and do the evidentiary rulings. I enjoyed Moot Court and, again, always enjoyed more the opportunities when I got to judge rather than to advocate. But this is not the kind of ambition that one discloses in public because the process of becoming a judge is too chancy. There is no well-defined career track that can take you to that end."

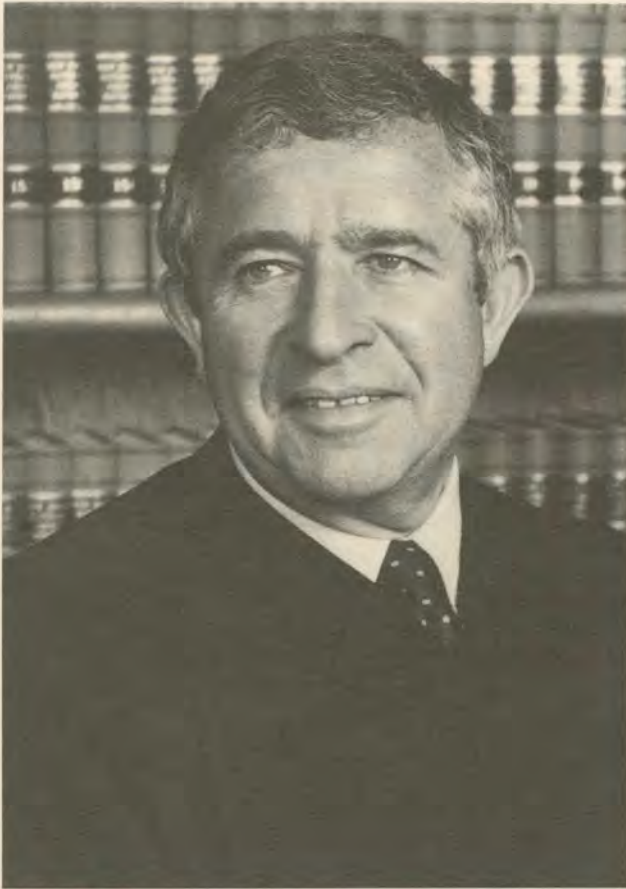
Durham became the first woman appointed to the Utah Supreme Court in 1981. This was perhaps the most prestigious "first" in a career that has witnessed the setting of new standards and opportunities for women in many ways. In 1978, Durham was the first woman appointed to the Utah District Court, and in 1980 she was elected president of the Utah District Judges Association. She served in 1986-87 as

president of the National Association of Women Judges. "It is a particularly interesting circumstance to have come onto this court at a relatively young age when there really is only one court in the country that is higher than a state supreme court. But as Justice Sandra Day O'Connor said about getting appointed, it is like getting struck by lightning, you just can't plan for it!"

Durham stresses the complexity of her lifestyle, its harrowing pace, and its brief moments of relaxation. She admits that it is not for everyone. She works together with her four children and pediatrician husband to make their system work. Durham is concerned with the balance that is critical to her varied responsibilities on the bench, too. She considers "balancing the management and administrative interests and concerns with the actual decision-making process" to be the greatest challenge that she faces on the bench. "This is more unique to judges who sit on courts of last resort because, among other things, our court has responsibility for rule-making and supervising the bar. You can end up spending too much time managing and too little time actually participating in the decision-making process which is, after all, the main reason we exist. Fortunately, there isn't a single aspect of my job that I don't really enjoy a great deal, and it is quite a privilege to be torn between so many engrossing and worthwhile activities."

Gary S. Stein '56 has fond memories of "the old fashioned law school classes" when there were less than fifty Duke Law School graduates each year. However, he doesn't recall having had a particularly strong desire to become a judge when he was a law student. It wasn't until during the twenty-six years that he was in private practice and government service that he began preparing for a judicial appointment.

After graduation, Stein concentrated on antitrust and financial issues as an associate and partner in a Manhattan



The Honorable Gary S. Stein '56

law firm. After nine years in New York, he began a small practice in New Jersey, specializing in representing clients before government agencies. Before his appointment to the New Jersey Supreme Court, he served as municipal attorney for Paramus, counsel to the New Jersey Election Law Revision Commission, attorney for the Teaneck Board of Adjustment, and New Jersey's Director of Policy and Planning. He ascended to the bench in 1981, a job he says "is exceptionally challenging and provides a high level of satisfaction."

Stein has maintained close ties with Duke University over the past decades. One of his colleagues on the New Jersey Supreme Court is another Duke Law School graduate, Robert L. Clifford '50, and in the past five years Stein's son graduated from Duke University and one of his daughters, Terri, graduated from the Law School in 1988. Stein

served on a panel at the Law School this spring to discuss judicial clerkships with interested students.

Thomas C. Kleinschmidt '65 sits on the Arizona Court of Appeals and enjoys his work immensely. After spending more than twenty-five years in the legal community in Arizona he boasts of his respect for the bar because "the Arizona bench doesn't have corruption. The system has a good clean tradition and works the way it should."

Kleinschmidt discovered early in his career that he wanted to become a judge. "I was chomping at the bit about not getting into court often enough and

one of my colleagues suggested that I consider becoming a judge. I left private practice to get more trial experience as an assistant federal public defender and began to prepare for the bench."

According to Kleinschmidt, Arizona follows the merit-based "Missoula Plan" when selecting judges. After completing a lengthy and probing application and filing it with the Supreme Court, a nine-member bipartisan commission nominates three candidates for each position to the governor who finally appoints one individual to the bench. Jokingly, Kleinschmidt suggests that the governor selected him because "I wore him out. I had applied so many times. Persistence is an important part of my make-up." Kleinschmidt sat on the Arizona Superior Court for Maricopa County for seven years. He found trial work "enormously satisfying" and earned a reputation as an excellent trial

1967

H. William Constangy
Judge, 26th Judicial District
North Carolina District Court

Robert G.M. Keating
Administrative Judge
Criminal Court of the City of New York

Malcolm B. Street, Jr.
Presiding Judge, 7th Judicial Circuit
Alabama Circuit Court

Dennis D. Yule
Judge, Benton & Franklin Counties
Washington Superior Court

1968

Garrett E. Brown, Jr.
Judge, U.S. District Court
District of New Jersey

Ernest C. Torres
Judge, U.S. District Court
District of Rhode Island

1969

David E. Foscue
Judge, Grays Harbor County
Washington Superior Court

L. Alan Goldsberry
Judge, Athens County
Ohio Court of Common Pleas

Michael J. Kane
Judge, 7th Judicial District
Pennsylvania Court of Common Pleas

John Dean Moxley, Jr.
Judge, 18th Judicial Circuit
Florida Circuit Court

Dale B. Ramerman
Judge, King County
Washington Superior Court

1970

J. Allen Walker
Judge, 20th Judicial District
Virginia General District Court

1971

Christine M. Durham
Associate Justice
Utah Supreme Court

Douglas B. Morton
Judge
Fulton Circuit Court, Indiana

1972

Robert H. Michelson
Judge
Racine, Wisconsin Municipal Court

1973

John Richard Carney, Jr.
Chief Judge, District 79
Michigan District Court

judge. In 1982, he was appointed to the Arizona Court of Appeals. He finds the thoughtful analysis required by appellate work as rewarding as trial work.

Gerald T. Wetherington '63 has been on the 11th Judicial Circuit Court in Dade County, Florida for more than fifteen years. In 1983 he was elected Chief Judge. One of his most important concerns is the on-going education of the bar and judicial staff. According to Wetherington, "if you don't educate the bar and staff, you'll live in chaos." In order to avoid such a situation, his first act as Chief Judge was to institute a recent-case-law summary program in which his staff prepares manuals and video-tapes on developments in areas such as family, criminal, probate and juvenile law. Wetherington also arranged for the *University of Miami Law Review* to write a digest of legal developments. His theory is that "the court should be on top of the law and minimize its reliance on lawyers who have a particular point of view to present on behalf of their client."

Wetherington's program has received national attention through the National Judicial College and his video-tapes are frequently used at national conferences. The 1988 recipient of the Law School's Murphy Award for dedication to public service, Wetherington is also committed to educating the general citizenry who become involved in court matters. For example, each time the court appoints a guardian of property, the guardian is required to watch a twenty-five minute video and receive a written script of the tape which covers pertinent issues. Wetherington takes his commitment to education seriously at home as well. Maybe that is one reason why when his daughter, Chriss '90, decided to pursue a legal education, she, too, chose Duke!

Maynard F. Swanson '60, who sits on the Sixth Judicial Circuit in Pasco County, Florida, also has a strong commitment to an educated citizenry. Swanson believes it is important to start

the education process quite early and so helped to implement the juvenile jury program in his courthouse to help young people understand the juvenile justice system. The students, ranging in age from fifteen to eighteen, listen to juvenile cases which come before the court and serve in an advisory capacity to Swanson or another presiding judge. They review the applicable laws and make recommendations regarding the adjudication of the case though, of course, the judge has the final word in issuing the court's decision.

When he is not in the courtroom hearing cases, Swanson spends a lot of his time trying to envision a remedy for two of the biggest problems that he sees facing courts today: an increase in crime and a decrease in judicial resources. "I look for the courthouse to become almost entirely electronic," he says. As improved court security and lower legal fees become more important and technological devices become less expensive, Judge Swanson believes that the days of trials with judges, juries, lawyers and contestants together in the same room will be over.

Perhaps the role of the judge will change over the next decade or two. Many of the judges interviewed stressed the increasing importance of computers and audio-visual equipment in their courts and the growing acceptance of alternative dispute resolution procedures by the bar and bench. It is amazing that these developments were barely discussed when the majority of Duke's judicial alumni were attending the Law School only twenty or thirty years ago. Even if the donning of the distinctive black robe becomes an anachronism in the increasingly depersonalized and electronic American courtroom, it is unlikely that this tradition will disappear as rapidly at Duke Law School. Moot Court competition will continue to offer aspiring litigators and judges one of the best opportunities to hone their legal skills.

Debra A. Kelly '90

Larry J. Rosen

*Justice, Criminal Part
Albany, New York City Court*

1974

Brenda Brown Becton

*Administrative Law Judge
North Carolina Office of Administrative Hearings*

Charles Edward Binder

*Magistrate, U.S. District Court
Eastern District of Michigan*

Peter David Webster

*Judge, 4th Judicial Circuit
Florida Circuit Court*

1975

Allyson K. Duncan

*Associate Judge
North Carolina Court of Appeals*

Lola Pearl Maddox

*Associate Judge, 3rd Judicial Circuit
Illinois Circuit Court*

Paul Michael Wright

*Resident Judge, 8th Judicial District B
North Carolina Superior Court*

1977

Samuel Peter Feldstein

*Judge/Surrogate
Hamilton County, New York*

Roberto M. Pineiro

*County Court Judge
Dade County, Florida*

Henry F. Weber

*Judge, 30th Judicial District
Kentucky District Court*

Mary Ellen Williams

*Administrative Judge
General Services Administration
Board of Contract Appeals*

1979

Thomas R. West

*Administrative Law Judge
North Carolina Office of Administrative Hearings*

1980

Shirley L. Fulton

*Resident Judge, 26th Judicial District A
North Carolina Superior Court*

Scotty Peck Krob

*Judge, Grand County
Colorado County Court*

1987

David Thor Bjorgvinsson

*Judge, District Court
Reykjavik, Iceland*

Shaping Awareness of Environmental Issues

Alumnus Profile of John H. Adams '62

He's cheerful. He's amiable. He's soft spoken. But don't even think for a moment that these traits diminish his desire to give the environmental movement legal representation as good "as [that of] Exxon, Ford, or Norfolk Southern."

He is John H. Adams '62, the executive director and co-founder of the Natural Resources Defense Council (NRDC). As the executive director of the NRDC, Adams has helped create "a star in the constellation of environmental organizations," and has been described by fellow environmentalist Douglas P. Wheeler '66 of the Conservation Foundation as "one of the handful of environmental leaders who—since the first Earth Day in 1970—has most helped to shape the nation's awareness of environmental issues, and its responses to them." The father of three children, Adams was recently recognized by *Parents Magazine* for his leadership in the environmental field as one of five recipients of the First Annual "As They Grow" Awards to "recognize Americans who daily make a difference in the lives of children."

Thus, it is not surprising that a mere seven years after it was founded, the NRDC was described in a 1977 Heritage Foundation report as "the nation's leading public interest environmental law firm" and as "one of the more prominent and effective environmentally-oriented organizations... currently active in the United States." And given that start, it is not surprising that nine years later the *Wall Street Journal* called the NRDC the "shadow EPA."



John H. Adams '62

The Birth of the NRDC

Beginning in 1970, John Adams parlayed a one-man organization, with a budget of "the good wishes of friends," into a 168,000 member environmental advocacy group with a budget of \$16 million. After the passage of twenty years, the NRDC now has forty-five attorneys, forty-five scientists, and sixty other employees who work on twenty-four different integrated law and science teams, confronting the public health issues of clean air, clean water, toxic chemicals, pesticides, and food supplies. The teams also work on natural resource issues such as energy, forestry, public lands, coastal zone management/off-shore oil, protection of species, the Arctic wilderness, marine mammals,

and land use. A final group of teams works on international issues such as nuclear arms control, international tropical forestry issues, global warming, and international banking. While the NRDC does spend some time in court, the majority of its time is spent working with regulatory agencies, Congress and other legislative bodies, and resolving conflicts short of litigation.

While creating such a diverse organization, Adams utilized the values instilled in him while growing up on a dairy farm in upstate New York, as well as skills developed at Duke Law School, at the Wall Street law firm of Cadwalader, Wickersham, and Taft, and at the U.S. Attorney's Office for the Southern District of New York. Life on the dairy

farm gave Adams an appreciation for the outdoors, so much so that he and his wife of twenty-six years, Patricia, bought their own farm in the same area. Adams' rural upbringing also instilled a desire to perform "some form of public service law or practicing law in a very rural atmosphere." This desire was reinforced by his Law School experience, which "was extremely valuable to [his] development as a person." At Duke, Adams found a group of people who were very interested in public policy issues, which he feels was "extremely helpful and... a real source of pleasure." Thus Adams did not envision himself doing, "nor do I think I am capable of doing, the traditional practice."

Yet upon graduation, he, like many other Duke third-years past and present, headed towards New York as a young associate. This did not last, for although Adams made a lot of lasting friends, he longed for freedom from the structure of law firm life. "[A]fter the first three years of working at the law firm, which I liked a lot,... [I knew that] it just was not what I was cut out to do and I knew that I was either going to leave the practice of law or find something that I could defend.... I did not want to represent clients' interests that I didn't have an interest in. And a lot of the issues were big corporate financing issues,... issues that I just had absolutely no way to relate to in my own personal life. I just didn't want to do it."

For the moment, freedom was the U.S. Attorney's Office, a fertile litigation training ground and a place where Adams could actually stand up in court and learn how to litigate. At the SDNY office, Adams tried a lot of cases and worked on organized crime and narcotics issues. Yet, as Adams realized, "ultimately [this too] was not going to be a place to stay." Criminal law was not Adams' life-long ambition and, eight years after Law School had ended, Adams knew that he was "going to do

something involving land and conservation and environmental issues." While he did "not have grand ideas about what it would do for the world" (and he still doesn't, he said), Adams did know that he would try to set up an environmental advocacy law firm, not knowing whether his venture would succeed.

But it did. As the Wall Street Journal stated in 1986, "the NRDC has grown to be a kind of shadow EPA. It has influenced laws on air pollution, water pollution, toxics, drinking water, pesticides, nuclear wastes, strip mine reclamation, land use, energy conservation and much more. It's hard to find a major environmental law it hasn't shaped within Congress, the courts and federal agencies. And often, the influence is profound." In creating this "shadow EPA" Adams attracted an initial grant of \$100,000 from the Ford Foundation (as well as several others over the course of next ten years) and began to mull over what "one could do as a lawyer in the environment field." Soon the question became what "seven could do as lawyers in the environment field" as Adams was joined by six Yale Law School graduates, three of whom were former Supreme Court clerks. Thus, the NRDC was born.

Solving "Collective Problems"

The NRDC began by reacting to "one issue at a time: a dam, a road, a highway, a forest." This proved difficult, since "the litigation is difficult and the issues are difficult, and expensive since [the NRDC] neither could nor did charge for [its] services." Now, as a "fully integrated, public policy environmental organization" the NRDC addresses many issues at a time. In keeping with this change, and "to be able to have 150 people and five offices and a representative in Moscow," Adams now essentially acts as the CEO of a major business. "I try to keep up with the business of NRDC and run the business and make sure that we're staying within

our [environmental] goals, raise money,... and do all the little things that keep it going."

This does not mean that Adams is out of touch with the issues confronting the environmental movement. Instead, having grown up with the environmental movement, Adams remains in touch by "track[ing] these issues as they develop." In fact, Adams thinks that "its probably harder for somebody to be dropped into the air, water, toxic, food, pesticides, forestry, [and] land use issues [today] as a young lawyer than it is to start off on day one when they're passing the acts and [to] be there as they are being passed." This involvement is important, said Adams, because the regulatory agencies and Congress have "to be lobbied if you care about your side.... You want to have a chance of having your group given equal weight in our system." While he recognizes that "there is a lot of merit on the other side," the environmental side "is the side I want to be on."

Through the early 1970s the NRDC and other environmental organizations had an "us and them" relationship with the business community/corporate America. But now, in part due to the group's advocacy, problems are seen as "collective problems." This, however, does not mean that the NRDC and corporate America approach problems the same way, said Adams. "There isn't any doubt that depending on what point of view you bring to [the problems], you view them differently. But there is a recognition now that the problems are real, and corporate America and government have a different attitude about these problems—significantly different than they did in 1970 and indeed than they had in 1980." These attitudes changed because environmental issues have become more important to the American public. In turn, the government has been forced to work with environmentalists on developing policies that address the issues. While Adams

admits that this "relationship is not always perfect, it is fair to say that there is not a week that goes by, and really not a day that goes by, that the NRDC is not dealing directly with major corporate officers and major governmental officials."

In addition to guiding the NRDC's advocacy efforts, Adams has helped educate the American public, both as a faculty member at the New York University School of Law and through the NRDC itself. Adams sees education as a vital aspect of the environmental movement, because "you've got to understand the issues. If you don't understand the significance of these issues, how are you going to be part of the solution? You've got to understand what the options are, so you can tell whether or not—when some guy tells you that 'we are doing the best we can'—he is full of bologna." Further, people who are educated about the facts can feel comfortable that they are not dealing with unknowns.

For law students, Adams feels that "the most important thing in developing your feelings about [environmental] issues is what are the facts concerning these issues, not what are the roles" in the environmental movement or what are the exact words of an environmental statute. What is important is not whether you work for a corporate law firm, the EPA, or the NRDC, but "what are the issues that we, the coun-

try, are facing? That the communities are facing? What is the timber policy? Are we protecting our watersheds? Are we protecting our wildlife? And if we are not, then the law students that I am interested in are going to spend time figuring out how to stop that policy."

NRDC's Future

Over the next fifteen years Adams sees the NRDC concentrating on global warming, arms reduction, energy conservation, public health in urban centers and among the disenfranchised and poor, natural resource policy issues, both domestically and internationally, and population issues. This last focus impacts the other four said Adams, because unless we have an understanding of the dimensions of the worldwide population problem, "none of [the other issues] will make a lot of sense." A start for this future activity was Earth Day 1990, which Adams hoped would "develop a whole new generation of environmental players," a development which is "absolutely critical" because the issues that have been identified thus far are not going to be solved quickly. The problems "are too big, and the public and government and corporate America are not ready to solve all these problems." This lack of willingness to solve the problems, said Adams, is reflected in the weak environmental laws that are being passed, the reluctance to spend money on double-hulled tankers

(despite the lessons of the Exxon Valdez), or on waste reduction in factories.

Even with a growing environmental movement in the United States and the world, and even with the better relationship between environmentalists and corporate America, Adams does not think that the NRDC or other environmental advocacy groups are the ultimate answer to the environmental problems which confront the United States or the world. Businesses which control the money used in manufacturing will have "to make the decisions that their policies will be environmental, that environmental goals are equal to profits. If they don't, they will continue to battle on" against nature. Yet, it is economic not to pollute for the economic *and* environmental bottom line is that "whatever you don't do, you don't have to clean up. The price is ten times as expensive to clean up something that you have created than not creating the problem at all."

Jack W. Alden '90

Litigation Specialist and Dynamic Teacher

Alumnus Profile of Charles L. Becton '69

Scholarly judge; hard-working lawyer; dynamic teacher; caring family man; and litigation specialist. Anyone who has met Charles Becton '69 would agree that it is hard to easily characterize this man who has been such a positive force in many arenas. Not only is he a devoted family man (he prepares seventy percent of the family meals), but he is also one of the most dynamic lawyers in North Carolina. Having only recently returned to private practice after nine years on the North Carolina Court of Appeals, other attorneys in the state will now have to reckon with Becton (as he prefers to be called) as he returns to what he considers his greatest love—"lawyering, personally litigating cases."

North Carolina Roots

Born in Morehead City, on the coast of North Carolina, Becton says that he became interested in pursuing a legal career at the early age of nine after watching a program on television about lawyers. "I recall nothing about the program except the feeling I had afterwards that a lawyer could somehow help soothe (and I didn't know how) the pains of being a second class citizen in a racially segregated society. To my knowledge, there were no black lawyers in Eastern North Carolina then. There were no role models. Indeed, I had never met or even seen a lawyer, black or white, at the time." Since then he has been unwavering in his pursuit of quality legal work. He received his undergraduate degree in 1966 from Howard University, a traditionally black institution, where he concentrated in the study of government.



Charles L. Becton '69

Becton notes that when he began considering law schools, he applied to only a handful, and visited only one—Duke. His introduction to Duke evokes a vivid memory: "I had already talked to Clark Havighurst about Duke on what may have been his first recruiting trip to Howard. I had also received a kind 'I-enjoyed-meeting-you' note from Clark with a deserved post script indicating that, contrary to my prediction, Duke had just beaten Carolina in basketball. It was spring break at Howard, and I had heard nothing from Duke. So I drove up to the Law School one day, and asked to be shown around." Once he mentioned to School officials that he had submitted an application, they were "delighted to show me the Law School. Dean Latty was a wonderful host. He offered what I then considered a good financial package right on the spot." Because of his desire to re-

turn to North Carolina, Becton found accepting Dean Latty's offer an easy decision.

In the fall of 1966, Becton enrolled as the only black student in a class of approximately 115 at the Law School. Despite his status as the only black student in his class, he found that he was easily accepted by the other students. Perceiving rather different conditions for the black undergraduate population at Duke, Becton and two others helped organize the Afro-American Society, the predecessor of the Black Student Alliance that exists at Duke today for black undergraduates.

In 1968, Becton participated with Duke undergraduates in a demonstration which involved a sit-in at the Allen Building. Later, in the spring of 1969, just months before he was to receive his J.D., Becton accompanied the black undergraduates in the "occupation" of the Allen Building. Although he was tried and placed on probation by the University for his participation in the Allen Building take-over, formal criminal charges were never pressed, and he was not barred from continuing his legal education at Duke. In fact, many law professors, including then-Dean Ken Pye and Robinson Everett supported him in his efforts to sit for the bar examination after the North Carolina State Bar asked him to "defend" his actions if he wanted to be admitted to the bar.

Choosing a Career

During the summers after his first and second years of law study, Becton decided not to interview with the corporate or big name firms that were in-

interviewing students at Duke. He may be one of the very few Duke Law graduates who never interviewed with a single firm while at Duke. He explains his reasoning: "I did not want to be co-opted or influenced by the big money they were offering; I did not want to take a chance that my principles would be compromised." Although several firms approached him about interviewing with them, he maintained a firm devotion to public service and public interest work. Becton spent the summer before entering the Law School at the Equal Employment Opportunity Commission (EEOC) and spent subsequent summers working for the Department of Housing and Urban Development (HUD). He says these jobs were invaluable and enriching experiences.

In choosing a job after graduation from the Law School, Becton wanted to help black people exercise their legal rights under the law. So rather than choose a job in the corporate law firm environment or as a judicial clerk, Becton went to work for the NAACP Legal Defense and Education Fund, Inc. in New York City, an organization Supreme Court Justice Thurgood Marshall helped nurture to prominence.

In describing how he obtained his position, Becton relates a funny, but now typical, story. "During my last year in Law School, I drove nine or ten hours to New York and walked right into the NAACP offices asking to be interviewed." He states that if nothing else, the lawyers there were impressed by his tenacity and straightforwardness in seeking a job. After his interview in New York, Jack Greenberg, director and general counsel of the Legal Defense and Education Fund, informed him that he could have driven to Charlotte—a much shorter distance from Durham—to be interviewed by Julius Chambers, the most respected Legal Defense Fund cooperating attorney.

Later Becton made the drive from Durham to Charlotte, obtained Cham-

bers' support, and got his first job as a lawyer. During his year with the NAACP, Becton assisted staff attorneys working on "substantial civil rights and civil liberties cases." Within months his name began appearing on briefs he helped to draft which were filed in the United States Supreme Court.

The Lawyer & Judge

After his year in New York, Jack Greenberg and Julius Chambers convinced Becton to return to Charlotte, North Carolina, not eastern North Carolina where he was raised. Becton joined Chambers at his Charlotte law firm which later became Chambers, Stein, Ferguson & Becton (currently Ferguson, Stein, Watt, Wallas, Adkins & Gresham P.A., Chambers having left to become the director and general counsel of the Legal Defense Fund, a position he currently holds). This was an arrangement which Becton found fulfilling in every respect—mentally, philosophically, and personally. In describing the cases the firm handled, Becton finds himself "hard-pressed to remember what we would not defend." The partnership litigated every type of

case imaginable—jay-walking cases, kidnapping, rape, and newsworthy murder cases, domestic cases, personal injury cases, and all types of civil rights and civil liberties cases. As Becton describes it, "we didn't represent corporations; we sued them. We didn't draft contracts; we sued on them."

Becton assisted in representing the Wilmington Ten, the Charlotte Three and Communist Workers' Party members when the Ku Klux Klan shot several members during a march in Greensboro in 1979. He also represented high school students who were expelled because of their involvement in protests against racism, and he helped litigate many employment and school desegregation cases.

The third case he tried to a jury may be his most memorable. Becton convinced a small-town Eastern North Carolina jury to acquit his 19-year-old black client who shot and killed an unarmed white businessman and reputed local Klan leader. Racial tensions were so high that Becton, his client, and the trial judge had to be given State Highway Patrol escorts out of town and through two counties.



The Becton family, (from left), Kevin, Charles, Brenda, Michelle, and Nicole.

After ten years in private practice, at the young age of thirty-six, Becton was offered a judgeship on the North Carolina Court of Appeals. On January 19, 1981, he was sworn in as one of the twelve judges on the court. When asked about the reception he received from fellow attorneys, Becton states that he had state-wide support. After practicing with a firm that made a reputation of defending oftentimes controversial cases in practically every part of the state (Becton himself had appeared in courts in nearly sixty of the 100 counties in the state), many members of the bar were aware of his skills. Becton had also established a reputation among many of the state's judges as always being thoroughly prepared for his cases.

As a judge, Becton was also thoroughly prepared—for the oral arguments, for the exchanges in conference, and for the opinions he authored. "I enjoyed my stint on the bench, and I would like to think that I helped improve the jurisprudence of the state," says Becton. He remained on the bench for nine years until his resignation in February 1990, to return to private practice. In finding a replacement for the vacancy left by Becton, Governor Jim Martin made a landmark decision in appointing another Duke Law School graduate, Allyson K. Duncan '75, the first black woman to serve on an appellate court in North Carolina.

Becton is a partner in a double-lawyer family. His wife, Brenda Brown Becton, also a graduate of Duke Law School, Class of 1975, is now the "judge" of the family. She was recently appointed an administrative law judge in the Office of Administrative Hearings for the State of North Carolina. Before her judicial appointment, she served as an attorney with the Durham City Attorney's Office, Orange-Chatham Legal Services and North Carolina Prisoners' Legal Services. Her legal career also includes four years as a deputy commissioner for the North

Carolina Industrial Commission and two years as an adjunct professor at North Carolina Central University School of Law. The Bectons' busy and active household includes their three children: Nicole, 16; Kevin, 15; and Michelle, 11.

Becton has joined the Raleigh firm of Becton, Slifkin & Fuller. He is enthusiastic about his current practice which is devoted mainly to plaintiff personal injury and medical malpractice cases. The firm has made a commitment to limiting its caseload in an effort to provide the highest quality of legal craftsmanship. Unlike some firms in which one attorney's caseload may number over a hundred, attorneys in the firm Becton joined only represented clients in thirty-four cases last year. This year, due to Becton's arrival, he sees the number increasing by approximately fifteen cases.

Dynamic Teacher

Becton continues to pursue and impart legal knowledge. In 1986 he received his LL.M. degree from the University of Virginia School of Law. Since 1976, Becton has taught trial advocacy at the University of North Carolina, where he is now the John Scott Cansler Adjunct Professor in Trial Advocacy. In addition, he has been a senior lecturer in law at Duke since 1980, where he teaches civil and criminal trial practice.

Becton's section of trial practice at Duke is always one of the most popular among students, causing a waiting list every spring when he teaches. Former trial practice students describe him as "inspirational," "the best teacher I've ever had," "superb," "expert communicator," and "dynamic lecturer." Garrett Epps '91 echos these sentiments: "He was very patient with us. He knew how frightened we all were. We would watch him lecture and wish we could be like him.... He made it seem like trying a case would be fun."

In addition to his teaching duties at Duke and UNC, Becton has been a mainstay of the National Institute of Trial Advocacy (NITA), where he is a highly-rated teaching attorney for the trial advocacy course taught yearly to practicing attorneys around the country. In April 1986, he was chosen as one of ten attorneys to demonstrate trial advocacy skills on an ATLA/ABA/NITA video series titled *Winning at Trial*. In June of 1986, he was one of twelve attorneys selected to demonstrate cross-examination skills on the ABA/NITA video presentation, *Mastering the Art of Cross-Examination*. Also in June of 1986 he was one of thirty-two attorneys selected to demonstrate trial advocacy skills at the Smithsonian Folklife Festival in Washington, D.C. Becton received the William J. Brennan, Jr. Trial Advocacy Award in 1988 for his work in improving the skills of trial lawyers across the country. He is only the second judge to have been honored by such an award.

In further recognition of his superb teaching skills, later this summer Becton will receive the 1990 Jacobsen Award from the Roscoe Pound Foundation to honor excellence in teaching the skills and art of trial advocacy. He was the nominee from the Law Schools at both Duke and Carolina. In recommending his fellow trial practice teacher for the Jacobsen Award, Donald H. Beskind '77 noted, "In a decade of law school and NITA teaching, I have taught with trial advocacy teachers from all over the country. Many are excellent, but none is Becton's equal." The North Carolina Academy of Trial Lawyers has just established the Charles L. Becton Trial Advocacy Award to be presented annually to recognize an outstanding teacher of trial skills in North Carolina. Fittingly, Becton is its first recipient.

Gretchen R. Nelli '91

A Home-Town Judge Returns

Faculty Profile of Judge Robinson O. Everett

After more than ten years on the United States Court of Military Appeals, Chief Judge Robinson O. Everett is retiring from the court and coming home. Judge Everett not only has a permanent home at Duke Law School as one of its senior faculty members, but he was also born and raised in Durham. His knowledge of both the Law School and the city goes deep into the area's history. If you ask Judge Everett about almost anyone in the Durham legal community, he has probably either practiced with, taught, or worked with him or her. If you take a walk with Judge Everett through Durham, he can point out almost every building and tell you its history.

A Son of Durham

Judge Everett was born in 1928 in Durham's Watts Hospital, now the site of the North Carolina School of Math and Science. His parents, Reuben and Kathrine, were both lawyers. His father was one of the first five law students at Duke—then Trinity College. And his mother graduated from the University of North Carolina Law School and began practice in 1920—the same year she won the right to vote.

Judge Everett grew up in Durham and after graduating from high school in 1943, attended Phillips Exeter Academy and the University of North Carolina. He later transferred to Harvard where he became a Wendell Scholar. He graduated from Harvard *magna cum laude* in 1947, then entered the Harvard Law School from which he graduated *magna cum laude* in 1950. In 1959, Judge Everett received an LL.M. degree from Duke. In sports, Judge Everett says he cheers for both Duke and Harvard, but when Duke plays Harvard he roots for "a merciful slaughter."



Judge Robinson O. Everett

At twenty-two years of age, Judge Everett began his first law school teaching job at Duke. He recalls, "I was the youngest person in the class. You can't imagine the discomfort of facing a class of students all much older than you. In addition, I was teaching courses I never had taken in law school and was the faculty advisor as we started the *Duke Law Journal*."

Judge Everett almost breathed a sigh of relief when, after a year's teaching, he was called to active duty in the Air Force during the Korean War. He served in the Judge Advocate General's Department and upon release from active duty became a commissioner of the U.S. Court of Military Appeals. He remained in the Air Force Reserve until 1978, when he retired as a colonel.

In the winter of 1956, Judge Everett was in private practice in Durham and had just completed his text book *Military Justice in the Armed Forces of the United States*. He received a phone call

from then-Dean Joseph McClain with an invitation to rejoin the faculty at Duke Law School and also to become associate editor of *Law & Contemporary Problems*. In the almost thirty-five years that have followed, he has made it a point, regardless of other obligations, to teach at least one class every semester and to get to know his students. He attributes this dedication to the pleasure of having contact with "Duke's extraordinary law faculty and outstanding group of law students."

Today Judge Everett speaks fondly of former students and takes pride in their successes. "My former students are everywhere and I really enjoy it when I run into them. One afternoon while walking a single block from our courthouse, I first ran into a former student who is an assistant prosecutor, then one who is a public defender, and another who is in private practice! How's that for a Duke Law presence?"

The "Supreme Court of the Military"

From 1961 to 1964, Judge Everett served as counsel to the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, and in that capacity he contributed extensively to the preparation of legislation finally enacted as the Military Justice Act of 1968. In 1979, Judge Everett was selected by a nominating commission to serve a one-and-a-half year unexpired term on the U.S. Court of Military Appeals. He was then appointed by President Carter and confirmed by the Senate. On April 16, 1980 he was sworn in and, at the same time, designated Chief Judge. The court now has three judges, with two additional judges to be added in October. The court reviews criminal cases tried under the system of military justice. Often it is referred to as "The

Supreme Court of the Military.”

In his new position, Judge Everett found a “challenge and an opportunity to write judicial opinions on some topics about which I had previously written law review articles.” His first concern, however, was not with opinion writing but with what he calls “problems affecting the health of the court as an institution.” When first ascending to the bench, Judge Everett figured he would have little more than a year to bring the then-troubled court to its full potential. However, in 1980, Congress extended his term by ten years.

When Judge Everett joined the court in 1980, it was reviewing less than 2,000 cases a year; this number later soared to well over 3,000. The caseload has now leveled to around 2,500. The court has world-wide jurisdiction over any criminal case tried by the armed services; its decisions are directly reviewable by the U.S. Supreme Court. Although only two cases have been granted review on writ of certiorari during his service, Judge Everett says that the possibility of review helps provide “excellent quality control.”

Because the court is established under Article I, rather than Article III, of the Constitution and because of its interface with military society, the court has a unique status. This creates an opportunity for the court to blaze trails into some areas where other federal courts may not venture. For example, the Court of Military Appeals regularly deals with rape and child abuse cases, which are seldom seen in other federal courts. These cases have enabled the court to develop extensive precedent on issues concerning confrontation, hearsay exceptions, and the scope of expert testimony. Judge Everett notes that his is one of the very few courts that has allowed trial judges discretion to admit exculpatory polygraph evidence.

The “big issue” that Judge Everett says the court now faces concerns compulsory drug testing. He attributes this to the fact that the armed services were

the first major institution to implement mandatory drug testing and allow use of the evidence obtained for criminal prosecutions. One out of every three cases that now comes before the court involves drugs and many convictions are based heavily on positive drug tests. According to Judge Everett, his court probably was the first to consider in detail the search and seizure issues posed by compulsory urinalysis.

Some of the cases heard by the Court of Military Appeals have considerable drama. In one case that Judge Everett recalled, an attorney was representing his own son, who had received a severe sentence for drug offenses. Another was an espionage case concerning an Air Force officer who had delivered missile secrets to the Soviets. F. Lee Bailey represented the accused officer and Judge Everett recalls that his wife, who had heard the argument, later remarked to him that “Mr. Bailey reminded me of Patrick Henry.” Incidentally, the charges were dismissed because of a government promise of immunity.

Throughout his tenure on the court and his teaching career, Judge Everett has remained active in community affairs and legal reform. He has been president of the Durham Bar; a member of the State Bar Council; chair of the American Bar Association’s Standing Committee on Military Law; a member of the North Carolina IOLTA Board of Trustees; a life member of the National Conference of Commissioners on Uniform State Laws; an American Bar Fellow; a director of the American Judicature Society; and chair of the Durham Redevelopment Commission. He received the Federal Bar Association’s Earl W. Kintner Award for Distinguished Service in 1987.

Over the years Judge Everett has edited numerous symposia for *Law & Contemporary Problems* and has published extensively in leading law journals. As Chief Judge he has addressed audiences across the country and abroad.

Returning to Duke

On September 30, Judge Everett is scheduled to retire and become a Senior Judge of the United States Court of Military Appeals. He points out that this status is different from that of a senior judge on Article III courts and that he will be in a position similar to that of a “reserve officer.” This will enable him to engage in non-judicial endeavors.

After a hiatus of more than a decade, Judge Everett plans to resume full-time teaching at Duke. However, he proudly adds, “my mom, who is in her nineties, is still practicing law and I will be ready to give her a hand if she needs me.” He also looks forward to having more time with his wife Linda and his sons Robinson, Jr., a senior at Harvard; Greg, a freshman at Wake Forest University; and Luke, a high school student.

At the Law School, Judge Everett also has hopes of establishing a Center on Law, Ethics, and National Security. He says “we need to take a close and impartial look at some of the laws and policies that apply to our defense activities and to set out some clearer guidelines as to what conduct is appropriate when national security is involved. For several years, I have been teaching a seminar in this field; and I know that there are many challenging legal and ethical issues to be examined.”

Judge Everett says he is ready to come home! He remembers the days when everyone in the Durham bar and Durham courthouse knew everyone else by name, but he says things have changed. “An uncancelled deed of trust recently surfaced on which I had been named the trustee many years ago. I was asked to go to the courthouse and cancel the document; but when I attempted to do this, the employee in the Register of Deeds Office asked me for an I.D.! I realized then that I had been away from Durham for a long time... It’s nice to be coming back. I’ve got many things planned for my return.”

Jonathon Kaplan '90

Loneliness Filled Noriega's Sanctuary

Enrique Jelenszky '88 and Rolando Domingo

Enrique Jelenszky '88 and Rolando Domingo are Panamanian lawyers. Because Mr. Domingo was familiar with the Vatican Embassy, the papal nuncio sent for him and his friend Mr. Jelenszky to help out when Manuel Antonio Noriega and others took refuge there. Over more than a week the two took notes and later shared their story with David Marcos of the Dallas Morning News. This is a slightly revised version of that story which appeared in a number of newspapers on January 7, 1990.

Are you listening? The gringos will climb over the wall! They're burning up the lot next door!" yelled the ousted general in the bedsheet. "Please go and check!"

Manuel Antonio Noriega was frightened, like a nocturnal animal facing the beam of headlights. His hands were at his neck, clutching the sheet he had ripped from his bed and wrapped around his body. It was the night of December 26, 1989—two days after he had arrived at the Papal Nunciature, which functions as an embassy for the Vatican, looking haggard and suffering back pains from eluding one of the largest manhunts of the twentieth century.

We were in the room next to Mr. Noriega's. Friends of the papal nuncio, we had been called to help out at the embassy during these turbulent days. And now we were also at a turning point, though we did not realize it until later. Having initially ignored, even ridiculed the ousted dictator, we started to see him for what he now was: a scared, lonely man, justifying his past and running out of options. He had vowed never to be taken by the gringos, but eight days later, he would walk into their arms.

It was to be an astonishing week. The windows of the embassy rattled as U.S. Army Black Hawk helicopters swept in from the Bay of Panama. Bulldozers groaned outside as the Americans were clearing and burning a field to



Ousted Panamanian leader Manuel Noriega (left), posed with author Enrique Jelenszky '88 in December at the Vatican Embassy in Panama City.

make a helicopter landing pad. With Armed Forces Radio blasting hard rock or C-130 turboprops buzzing overhead, we talked late into the night with our deposed leader. More accurately, he talked and we listened—to theories about political intrigue, religion, history, and military strategy. He decried communism, even though all of Panama says he was allied with Cuban President Fidel Castro. He defended his declaration of war against the United States, then blamed former national security adviser John M. Poindexter for ruining relations with Panama five years ago by pressuring him to support the contras fighting the Sandinista government in Nicaragua.

We often disagreed with Mr. Noriega, but even when we could not keep our

mouths shut, we kept our minds open. "You are witnessing history," a friend said, and we never doubted that. We scribbled notes from our conversations in between answering the nunciature's incessantly ringing telephones, buying food and translating documents.

Like many Panamanians, we had mixed reactions about the invasion launched by the Americans on December 20. We pride ourselves on being a pacific people, yet our country was crumbling because of the combined squeeze of U.S. economic sanctions and Mr. Noriega's tyranny. Many of our old classmates from Jesuit prep school and law school had moved abroad to start anew.

That first night was terrifying. Red lights from tracer bullets and U.S. helicopters laced the sky. Troops gutted the downtown art-deco-style headquarters of the Panamanian Defense Forces, then swarmed outward. The next day, Mr. Noriega's so-called Dignity Battalions and ordinary citizens were looting and burning everything from barber shops to three-story department stores. Meanwhile, U.S. soldiers blocked off roads around the Cuban and Nicaraguan embassies but did not at first surround the Vatican's Mediterranean-style nunciature.

On December 21, Rolando, a twenty-five-year-old lawyer, was called to help at the nunciature. Several of Mr. Noriega's associates were already there: Lt. Colonel Arnulfo Castrejon, Lt. Colonel Carlos Arosemena King and Caja de Ahorros bank director Jaime Simmons with his two boys and their nanny.

The nunciature was getting full. Captain Gaitan had arrived to ask for refuge. So had four men from the ETA, the Basque separatist group fighting for independence from Spain, as well as the wife of one of the ETA rebels. Lieutenant

Colonel Madrinan bolted over a back fence and almost mowed down Rolando, whom he mistook for a priest because of his dark suit. Juan Carlos Cabrera, a Cuban exile who had picked a bad time to cross through Panama, walked through the front door. Others had come and gone, including several officials from the Defense Forces who left to swear allegiance to the new Public Forces at the nuncio's encouragement.

Last October, when Mr. Endara and other opponents of the military regime took refuge in the embassy, Rolando and his friends joked about the day Mr. Noriega would arrive. Now Mr. Endara had been declared president and 26,000 troops were searching for Mr. Noriega.

On Sunday—Christmas Eve—Rolando had gone to a Mass given for the people left homeless because of the bombing and firefights near Mr. Noriega's headquarters. He returned to the nunciature about 3 p.m. to find an exhausted, hunched newcomer wearing a cap and draped in a flower-patterned blanket—Mr. Noriega. No one had said he was expected; but then no one seemed surprised, either.

Rolando went upstairs to check the room assigned to the ousted ruler—the same room President Guillermo Endara had occupied when seeking refuge from the military a few months before. Rolando disconnected the phone in the room.

Immediately, everyone—aids and even the priests—split up round-the-clock shifts watching the upstairs phone and fax machine. Mr. Noriega rarely left his room, which had an old color television hooked up to cable TV. Mr. Noriega ate all his meals at a simple desk. Rolando steered clear of him.

When Mr. Noriega did appear, he wore a flimsy V-necked undershirt, green shorts, dark socks and sneakers. His only other clothing was a pair of gray trousers. Rolando gave him a used shirt.

When U.S. troops started blaring songs like "I Fought the Law and the Law Won" and bellowing "Good Morning, Panama," Mr. Noriega barely seemed to notice. Papal Nuncio Jose Sebastian Laboa, who was trying to maintain his customary calm, called it "outrageous."

Enrique, a 24-year-old Duke University Law School graduate specializing in international law, arrived Tuesday, December 26—two days after Mr. Noriega. Upstairs, Mr. Noriega's door was slightly ajar. Enrique glanced in to see the gaze of a cornered man. Soon after, the cacophony of bulldozers and helicopters started.

At sunset the next day, we sat together next to his room, questioning our Christian sense of charity. We decided Enrique should approach. Enrique knocked on the door and entered. Avoiding the ousted dictator's glance, Enrique looked at the television. Children were skating at Rockefeller Center. "Have your days been long?" he asked.

Mr. Noriega gestured to the TV set and a Bible and a book by Isabel Allende, daughter of the late Chilean President Salvador Allende. He said, "You know, my life has always been...." His words trailed off as he moved his hands to indicate hectic activity.

Enrique kept the conversation going. "Under the most strenuous circumstances, you can always find the good side. What's the good side of your stay at the nunciature?"

"Well, I've learned that nothing is so important that you can't do without it." He looked back at the television. "Life goes on.... We are just molecules."

Without directly referring to Mr. Noriega's quandary over whether to stay or leave, Enrique remarked, "A man will always be lonely when making the most important decision in his life, even if he is surrounded by his family. Remember, even if your family was here tonight, you would not be alone but

you would still feel lonely when making this crucial decision."

"You have a good philosophy," Mr. Noriega said. The ice had been broken. The next evening Rolando approached the former general. They got around to a subject that made him animated—the United States.

"You were the pampered boy of the Americans," Rolando said, referring to allegations that Mr. Noriega was on the CIA payroll. "What triggered the problems with them?"

"You know, the trigger with the Americans was the 12th of December 1984, with the visit to Panama of Poindexter to obtain support for the contras in Nicaragua."

We can't say if that is true. He had a way of revealing things without really revealing them. He recalled telling Mr. Poindexter, "It is a crazy idea because the contras lack the formation, the training and the capability for combat."

He brimmed with confidence on two points. First, he said the governments of both countries would find a way to break the Panama Canal Treaties before the year 2000. He predicted the wording the Panamanians would propose, "By this agreement, as good friends, we give you this island so you can have a base there." Enrique chuckled at his conviction. "I assure you it will happen that way," Mr. Noriega said.

Second, when the subject of his four-and-a-half days in hiding came up, he boasted that he could have kept going forever. "No one could have found me." When we pressed him, he said he had been warned about the U.S. invasion several hours in advance because of information he received about an unusual level of activity at Fort Bragg, North Carolina. He would not elaborate and we sensed that was just part of the story. His wife and daughters were out giving Christmas food baskets and were informed not long before the attack, he said.

We switched the subject to religion. "I'm Catholic," he replied.

"Practicing?"

"Panamanian-style."

"Does that mean you only go to church for baptisms, funerals and weddings?"

He laughed.

"What about Buddhism?"

"As you know, Buddhism is not a religion unto itself, just a system of philosophical principles and it's not incompatible with Christianity." He said people called him a Buddhist merely because he had received a Buddhist leader. If he had received an African tribal leader, he said, it wouldn't mean he was animist. He said he was impressed by Pope John Paul II's humility, which was so great "that you wanted to lift him up."

He showed his sense of humor.

"This place is so austere. Many people have benefited from sanctuary here and they don't even give anything in return. They never even offered a Betamax [videocassette recorder]."

Some of the talk was just fun. Rolando asked who of the current trio of civilian leaders Mr. Noriega would most enjoy challenging on a televised debate like "Crossfire." Without pausing, he named First Vice President Ricardo Arias Calderon, "because he's the most capable."

We felt emboldened. We asked where he would like to live. "In South America: Argentina. In Europe: France. The rest of the world: Taiwan."

"Instead of being with us tonight who would best understand your position?" He paused and said Francois Mitterrand, the French president.

At midnight, we broke up the conversation. He wrote us notes on the nunciature's stationery. Rolando's card said, "A memory of an analytical chat over geopolitics."

We were helping the nuncio in whatever way we could. Some days, that meant shopping. We went to a different

market each time because we were afraid people would get wind we were shopping for a group that included Mr. Noriega. We bought only the basics: vegetables, eggs, rice and canned meat.

During our visits outside the embassy, friends labeled us traitors. Co-workers said they were abandoning the church because it was flirting with a murderous dictator. Some of our relatives—victims of Mr. Noriega's six-and-one-half-year regime—despaired that we had succumbed to his famous hypnotic stare.

For a few nights, Mr. Noriega ate with Captain Asuncion Eliezer Gaitan, his personal security chief, and Lt. Colonel Nivaldo Madrinan, the burly director of his secret police, then moved downstairs to join a group of Basque separatists whom he had given refuge from Spain, and a few others.

Monsignor Laboa decided we would have a nicer dinner for New Year's Eve, but nothing fancy. We had turkey and pork and traditional Panamanian side dishes. Everyone ate together for the first time. Monsignor Laboa shared special foods he had received from friends at the West German Embassy. At the dinner, Mr. Noriega seemed in good humor until the monsignor went to take a phone call. Mr. Noriega got quiet and moved to a corner. He put out a candle with an upside-down coffee mug.

Finally, on Wednesday, when we had the sense that he was about to depart, that a divisive, bloody chapter was ending, we had the courage to ask a favor. It was hard to guess how someone under so much pressure would react. After all, he was a man facing up to 145 years in prison for drug charges if sent to the United States and convicted, or a lynch mob if he was turned over to his own country. "Would it be dangerous for you if we take a picture?"

"Not at all," he said. "Just let me put on a clean shirt." He strode up to his room, seemingly cheered. He posed

with us, then with other occupants of the house, including Lieutenant Colonel Madrinan and Captain Gaitan, the head of his personal security. A few hours later, he would enter the spartan bedroom for a final time to change into his military uniform with the four stars on the shoulder boards and his Noriega placard pinned over his heart.

That afternoon, the opposition held a large rally outside the nunciature to demand Mr. Noriega's ouster. Enrique stayed home. Rolando went to help at the nunciature, fearing a rush of protesters. "I think Noriega's leaving," someone said at 7:30 p.m. "They brought his uniform and it is on his bed."

The general was not around. Rolando went upstairs and, sure enough, the shined boots and the uniform were laid out. Rolando felt tension and an overwhelming silence. For some reason, at 8:45 p.m., everyone spontaneously gathered inside the double doors. They formed a receiving line as Mr. Noriega came down the stairs. As he went out, he looked serene. Later, when we watched the television pictures of his arrival in Florida, we saw the exact same glower of a cornered man that Enrique had spotted through the open door that first night. Not until he walked into the humid night air to turn himself over to the Americans did we learn that an Uzi machine gun had been found under his bed, a few steps from the site of our nightly chats.

People keep asking us how we would judge Mr. Noriega. We are not evading the question when we say it is not for us to decide. At some point, we had stopped fearing him. Perhaps we pitied him; he had such a chance to do good for this beleaguered country and instead he made it a pawn in his personal chess game with the gringos. To this date, we still see the suffering caused by Mr. Noriega to our country and we foresee that it will not cease in the near future.

Book Review

*Jerry Falwell v. Larry Flynt: The First Amendment on Trial**

by Rodney A. Smolla '78

To say that Jerry Falwell and Larry Flynt didn't like each other would be one of the great understatements of modern times. Falwell, the Baptist minister who founded the Moral Majority, and Flynt, the publisher of *Hustler* magazine, are diametrically opposed not only on every conceivable political and philosophical point of view, but harbor a deep dislike, if not outright hatred, of each other. It was Flynt's open display of this animosity that brought the two of them into a legal battle that ultimately found its way to the United States Supreme Court. In *Jerry Falwell v. Larry Flynt: The First Amendment on Trial*, author Rodney A. Smolla '78, provides a history of that case, as well as biographies of Flynt and Falwell. The depth of his treatment gives us insights into the personalities of both men.

Jerry Falwell was born and raised near Lynchburg, Virginia. His father had become an alcoholic after the loss of a child. During his teens, Falwell was part of a rowdy group of boys, but he never got into any serious trouble. He became a Christian in 1952, and since that time has not drunk *any* alcoholic beverage. This relationship, or lack of one, with alcohol was to figure in Flynt's 1983 attack on Falwell.

Falwell went on to bible college and later began what was to become one of the most-watched television ministries, *The Old Time Gospel Hour*. Subsequently, in order to carry his religious beliefs into the political arena, he founded the conservative group, the



Rodney A. Smolla '78

Rodney A. Smolla is the James Gould Cutler Professor of Constitutional Law and Director of the Institute of Bill of Rights Law at the College of William and Mary, Marshall-Wythe School of Law, in Williamsburg, Virginia. He has published extensively and is a frequent lecturer on constitutional law issues, particularly freedom of speech. He is the author of Law of Defamation, a legal treatise, and Suing the Press: Libel, the Media, and Power, which received an ABA Gavel Award Certificate of Merit in 1987.

Moral Majority. He became a major player in the conservative movement.

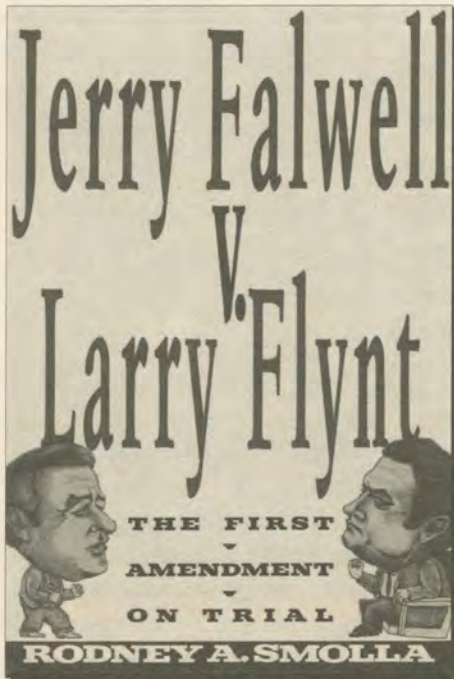
Larry Flynt was raised in Kentucky. He joined the army at fourteen, and by the age of twenty-one he had been mar-

ried twice. He opened a string of "Hustler" strip-joint bars in Ohio, published an internal newsletter and then turned that into a magazine. Within four years its circulation hit over two million and annual profits exceeded \$13 million. Smolla describes *Hustler* as "flamboyant, tell-it-like-it-is smut with no pretense to serious redeeming social value." For a while, Flynt also published straight newspapers, and his company publishes 'softer' pornography.

In 1977 Flynt was converted to Christianity. For a while *Hustler* reflected this as "a screwball mixture of sex and religion..." Later he renounced his con-

version. In 1978, while on trial in Lawrenceville, Georgia for publishing obscenity, Flynt was shot. His spleen and much of his intestine were removed during the ensuing surgery and he was

*St. Martin's Press, 1988



rendered a paraplegic. The following years of treatment with drugs and further surgery left him even more bitter than he had been.

The conflict between Flynt and Falwell erupted in 1983. The Supreme Court decision succinctly summarizes the action Falwell found tremendously offensive:

The inside front cover of the November 1983 issue of *Hustler* magazine featured a “parody” of an advertisement for Campari Liqueur that contained the name and picture of respondent and was entitled “Jerry Falwell talks about his first time.” This parody was modeled after actual Campari ads that included interviews with various celebrities about their “first times.” Although it was apparent by the end of each interview that this meant the first time they sampled Campari, the ads clearly played on the sexual double entendre of the general subject of “first times.” Copying the form and layout of these Campari ads,

Hustler’s editors chose respondent as the featured celebrity and drafted an alleged “interview” with him in which he states that his “first time” was during a drunken incestuous rendezvous with his mother in an outhouse. The *Hustler* parody portrays respondent and his mother as drunk and immoral, and suggests that respondent is a hypocrite who preaches only when he is drunk. In small print at the bottom of the page, the ad contains the disclaimer, “ad parody—not to be taken seriously.” The magazine’s table of contents also lists the ad as “Fiction; Ad and Personality Parody.”¹

Shortly after the publication of the ad, Falwell sued Flynt and *Hustler* on the grounds of libel and intentional infliction of emotional distress. Flynt raised the First Amendment, among other issues, as a defense, and the case became a battleground for the war between the individual rights of public figures and the First Amendment guarantee of a free press. Ultimately, the Supreme Court ruled in favor of Flynt and *Hustler*.

Smolla not only details the title case, and the players in it, but explains the legal concepts involved in a manner likely to hold the interest of both layperson and jaded trial attorney. His extensive discussion of public figure cases such as *New York Times Co. v. Sullivan*² serves as a valuable primer on the subject, and the sources in his footnotes would make a helpful bibliography.

The author goes beyond the legal issues and writes insightfully about the parties and their attorneys. We learn that Falwell’s attorney, Norman Roy Grutman, had frequently represented another “skin” publisher—Bob Guccione, publisher of *Penthouse*. In

fact, Falwell had previously sued *Penthouse* for publishing an interview of him without what Falwell considered proper authorization, and Grutman had successfully defended *Penthouse* in that case. Ironically Flynt’s attorney, Alan Isaacman, had previously represented *Hustler* and Flynt in several lawsuits against *Penthouse* and Guccione.

Jerry Falwell v. Larry Flynt: The First Amendment on Trial is informative and enjoyable, a book that explains the inner workings of the minds of these clients and attorneys. It is comprehensive in its coverage of the celebrities involved and their celebrated case. Its appendixes include the ad which Falwell (and no doubt, many others) found so offensive and the Supreme Court opinion which gave Flynt the final victory. It is a book lawyers and nonlawyers alike should put at the top of their reading lists.

¹*Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).
²375 U.S. 254 (1964).

Reviewed by Kenneth J. Hirsh, Reference Librarian and Instructor in Legal Research.



Alumni Seminar

Law Firm Delivery of Pro Bono Legal Services



(Left to right) Craig A. Hoover '83, Richard "Chip" Palmer '66 and Thomas A. Hale '82 discuss pro bono services. Other alumni participants were Richard M. Allen '66, Barbara R. Arnwine '76 and John J. Coleman, Jr. '50.

Under the sponsorship of the Law Alumni Association, the Law School has started an alumni seminar program which will address timely issues regarding the legal profession through alumni panel discussions. On January 23, 1990, a panel of six alumni and one former visiting faculty member discussed law firm delivery of pro bono service.

In addition to describing the various programs in existence at their firms, the alumni discussed the importance of the commitment to pro bono service by individuals and law firms. Barbara Arnwine '76, Executive Director of the Lawyers Committee for Civil Rights under the Law, stressed the importance of the service of attorneys in private practice in the effort to fully staff pro bono cases.

In answer to questions, the alumni encouraged the student audience to seek information regarding pro bono programs and commitments from the law firms with which they interview and clerk. It was pointed out to the students that not only would this effort allow the students to find the firm in which they would be most interested in working, but would also let the firms know of the interest their law clerks and young associates have in the firm's pro bono efforts.

Alumni seminars on additional topics will be planned for 1990-91. Video tapes of the seminar programs and the spring Career Conference, which invites alumni to talk with the students regarding career choices, will be available in the Law School Placement Office.

Jim Coleman: Pro Bono Representation

Despite the public outrage and widespread contempt for convicted murderer Ted Bundy, executed in Florida's electric chair in 1989, attorney James Coleman of Wilmer, Cutler & Pickering in Washington, D.C., says he has no regrets about the pro bono representation he provided to Bundy from 1988 until his 1989 execution. "Representing Bundy was among the most frustrating and rewarding work I have ever done as an attorney," says Coleman, who taught a seminar on capital punishment litigation at Duke Law School in the fall of 1989.

Bundy was on Florida's death row for nearly ten years and is thought to have been responsible for the murder of about thirty women nationwide. He was executed in Starke, Florida on January 24, 1989 for the murder of a twelve-year-old Florida girl, despite appeals by Coleman to the Florida Supreme Court, a U.S. District Court in Florida and the U.S. Supreme Court to block Bundy's execution by presenting evidence that he was mentally incompetent.

A 1974 graduate of Columbia University School of Law, Coleman says lawyers do not have to be opposed to the death penalty to represent people on death row. "They are people who have constitutional rights that the legal profession has to make sure are protected," says Coleman, who has represented one other death row defendant and has writ-



Jim Coleman (center) at the Alumni Seminar.

ten amicus curiae briefs to the U.S. Supreme Court opposing the imposition of the death penalty in other death penalty cases.

Born and raised in Charlotte, Coleman said he accepted the offer to teach for a semester at Duke because of its reputation as one of the nation's finest law schools and because of its location near Charlotte where his family resides. "I originally intended to take a sabbatical to do research and writing on capital punishment, until I received an invitation from Dean Gann to teach a seminar on capital punishment at Duke," said Coleman, who is a partner at Wilmer, Cutler & Pickering, which funded his pro bono representation of Bundy. "Being at Duke was a tremendous experience—everything that I thought it would be. The students were enthusiastic and well prepared for discussions and the faculty was very supportive."

"By focusing on Ted Bundy's conviction, Professor Coleman's course challenged me to look at what the judicial system does to capital offenders and the attorney's role in that process," said

Claude Allen '90, who was among the fifteen students enrolled in the class. "We looked at capital punishment from both the litigation and theoretical perspective and also discussed pro bono representation of capital offenders. It was a very valuable course and should always be offered among the criminal law courses taught here."

In January, Coleman returned to the Law School as a participant in a seminar on "Law Firm Delivery of Pro Bono Legal Services." Coleman noted, "I define pro bono as any work done in the public interest, although some people define it more narrowly as work done in the public interest on behalf of people who cannot afford a lawyer." Pro bono might be anything from representing garden clubs to indigent criminal defendants on death row, he said, adding that lawyers and law firms generally decide individually what are worthwhile pro bono projects.

Although Coleman does not think that state bar associations and law firms should require lawyers to do pro bono work, he says all practicing attorneys should feel a professional responsibility

to do pro bono. "When a group or an individual has a legitimate legal claim or problem and cannot afford a lawyer, those in the legal profession ought to make sure that they get representation," said Coleman, a former legal services attorney at the Washington, D.C. Legal Services Corporation from 1976 to 1978.

"I am not in favor of mandatory pro bono because it would be like judge-appointed counsel in criminal cases where a lot of lawyers participate against their will and are not doing the best job they can for their clients," he said. "Pro bono is the kind of thing that lawyers ought to do because they are committed to it and it should be done with the same seriousness as work done for paying clients."

Law firms are not doing more pro bono work, he said, because law students and associates are not asking them to do it. "Pro bono is a recruiting factor for law firms and law students should not be afraid to ask employers about their commitment to pro bono," said Coleman, who has recruited for his firm. "If law students asked law firms to do more pro bono and to make pro bono a part of their professional development, they would do it," he said. "Law firms use pro bono to compete with other firms because it helps provide young associates with significant responsibility and experience."

Coleman says that law schools and law students are the key to the future of pro bono work. Law students can have a significant impact on the amount of pro bono work law firms will fund, he said, and law schools have a responsibility to instill in their students the idea that doing pro bono work is part of being a lawyer.

Samuel L. Starks '92

Currie Lecture

The Law School's Annual Brainerd Currie Memorial Lecture was presented on February 16 by Professor Richard Helmholz (far right) of the University of Chicago Law School. He spoke on "European Law and Common Law: Historical Friends or Foes?" to an audience of faculty and students. Also pictured are (from left) Dean Pamela Gann, John H. Lewis '67 and his wife, Harriet, of Miami, Florida, the benefactors of the Currie Lecture. Next year's Currie Lecture will be presented by Professor Lea Brilmayer of Yale Law School.



Distinguished Teacher Award

Claude Allen '90, immediate past president of the Duke Bar Association (far right) presented the 1989-90 Dis-

tinguished Teacher Award to Professors Melvin G. Shimm (far left) and Thomas B. Metzloff (center). The Distin-

guished Teacher Award has been presented annually by the DBA since 1985 to recognize outstanding classroom contributions by a member, or members, of the Law School faculty.

In presenting the award to Professors Shimm and Metzloff, Mr. Allen noted the enthusiasm and respect that both show for teaching and for their students. "This year's distinguished teachers have provided us with excellent examples after which to pattern ourselves. They have impacted our lives for the better because of their unmatched commitment to us and to our education."

Previous recipients of the Distinguished Teacher Award are: Sara Sun Beale, 1988-89; John C. Weistart, 1987-88; James D. Cox, 1986-87; Richard C. Maxwell, 1985-86; and Thomas D. Rowe, Jr., 1984-85.



Special Gifts to the Law School

Building Fund

The Law School is pleased to announce the receipt of three alumni gifts of \$100,000 or more to the Building Fund. These gifts will count toward the School's \$12.5 million component goal of the University's \$400 million Campaign for Duke. James M. Poyner '40 has made a pledge of \$500,000, and John D. Fite '61 and George R. Krouse, Jr. '70 have each pledged \$100,000.

James Poyner is a founding partner, now semi-retired, of the Raleigh-based law firm of Poyner & Spruill, the largest in the Triangle area. He provided leadership and vision in helping to create the Research Triangle Park in the 1960s, and has been active in many civic, bar, and business organizations. (For a profile of Mr. Poyner, see *Duke Law Magazine*, Summer 1988, at 42).

In announcing Mr. Poyner's commitment, Dean Pamela B. Gann said: "We tremendously appreciate the generosity of Mr. Poyner, who is an outstanding graduate of the Law School. Mr. Poyner has been a leader of the practice of law in North Carolina for many years and it is truly fitting that he make this commitment to the Law School at such a critical stage in its development."

John Fite is a partner in the Clearwater, Florida law firm of Richards, Gilkey, Fite, Slaughter, Pratesi & Ward, where he specializes in residential real estate and estate practice and administration. In making his gift, Mr. Fite noted "how sincerely I appreciate Duke University's help thirty-two years ago when I was a Private First Class in the Panama Canal Zone and had no money whatsoever to enter law school.... I feel very fortunate that I am now in a position to be of help to the school that came to my aid when it was desperately needed. In my opinion, there is no finer law school in the United States than

Duke and I am proud that I was able to graduate from such a fine institution."

Dean Gann noted that Mr. Fite's pledge is "a tremendous help in our fund-raising project. His gift will also set an important example to his classmates and to others in Florida, and we are extremely pleased to receive his support."

George Krouse is a partner in the New York law firm of Simpson Thacher & Bartlett, where he practices in the securities and corporate finance areas. Mr. Krouse, a member of the Law School's Board of Visitors, states that "Duke has been very good to me, providing scholarship funds for my entire legal education. I have always felt an obligation to give something back to the Law School, and I am thankful to now be in a position to do so. In addition, my son just completed his freshman year at the University and could not be more pleased with his decision to attend Duke. This has reinforced my already strong feelings towards Duke."

The Law School has received many gifts to the Building Fund during 1989-90. A complete listing will be published in the School's *Annual Report* this fall.

1990 Class Gift

Some members of the Class of 1990 have already made pledges to the Law School which they will pay over a three-year period. Funds from their first-year pledges will pay for the trophy case in the new building renovation. To date, thirty-three percent of the class has pledged \$27,000 over the three years. Matching gifts from employers will bring the three-year total to over \$32,000. Approximately \$9,000 of the pledged amount will be paid during the 1990-91 year.

The Law School is most grateful to our most recent graduates for their support and vote of confidence in the fu-

ture excellence of the Law School. Class members who have not yet made a pledge but wish to participate in the program may call or write the Law School Alumni Office.

Paul, Hastings, Janofsky & Walker Minority Scholarship Program

The law firm of Paul, Hastings, Janofsky & Walker will implement the Paul, Hastings, Janofsky & Walker Minority Scholarship Program at the Law School for a two-year period covering the 1990-91 and 1991-92 academic years. The PHJ&W Scholarship is to be awarded on the basis of financial need and merit to a student starting his or her second year in the fall of 1990. The Scholarship will cover the cost of tuition and books for the recipient's second and third years, and will provide a \$500 per month stipend during the academic year (September-May) to help defray living expenses.

The PHJ&W Scholarship will be awarded to the individual who best fulfills the criteria established by the firm. Strong preference is to be given to minority candidates, including individuals of African-American, Hispanic, Asian and Pacific Island, and Native-American descent. Criteria to be considered include demonstrated financial need; outstanding scholastic achievement; demonstrated commitment to others; leadership ability; and character.

"The Law School has very limited scholarship funds for upperclass students," according to Gwynn T. Swinson, Associate Dean for Admissions. "The Paul, Hastings, Janofsky & Walker Scholarship will ensure continued support for a returning minority student. This Scholarship is a most important initiative by one of the nation's leading law firms. Paul, Hastings has set an example which we hope will be followed by others."

Professional News

'37—**David H. Henderson** has recently retired, but remains counsel to the firm of Helms, Cannon, Hamel & Henderson in Charlotte.

'47—**Matthew S. (Sandy) Rae, Jr.** was named the recipient of the 1990 Shattuck-Price Memorial Award, the highest honor bestowed by the Los Angeles County Bar Association. Rae is a partner in the firm of Darling, Hall and Rae.

'48—**John A. Simpson** has returned to private practice in Ashland, Kentucky after serving as a state district judge.

—**Thomas Emmet Walsh** was recently elected a fellow of the American Bar Foundation. He is a partner in the firm of Gaines & Walsh in Spartanburg, South Carolina.

'49—**Sidney W. Smith, Jr.** has stepped down as chairman of the Executive Committee of the firm of Clark, Klein & Beaumont in Detroit. He will remain with the firm, and will become of counsel at the end of the year.

'51—**James J. Booker**, superior court judge in Winston-Salem, is seeking statewide re-election in November to retain his post, to which he was appointed by Gov. Jim Martin in May of 1989.

'52—**William J. Rokos, Jr.** has retired from the practice of law and resides in Spring Hill, Florida.

'54—**Paul Hardin III**, chancellor of the University of North Carolina, has been named to the Board of Trustees of the Carnegie Foundation for the Advancement of Teaching.



Sidney W. Smith, Jr. '49

'55—**William G. Bell** announces the opening of his law office in Miami.

—**David C. Goodwin** was installed as president of the Miami Chapter of the American Board of Trial Advocates in January. He is a partner in the Miami office of Morgan, Lewis & Bockius.

'59—**Harrison K. Chauncey, Jr.** has joined the firm of Foley & Lardner in West Palm Beach, Florida.

'60—**John Q. Beard** became of counsel to the Raleigh firm of Maupin Taylor Ellis & Adams on March 1, 1990. He is a member of the firm's business and tax practice group, where he specializes in business, tax, and estate planning issues.

—**Joseph M. Parker, Jr.** now serves as president and Triangle regional counsel of Lawyers Title of North Carolina, Inc. in Raleigh.

'61—**C. Richard McQueen** is the co-author of *Federal Tax Aspects of Bank-*

ruptcy recently published by Shepard's McGraw-Hill, Inc. He is the managing partner of the Atlanta firm of Greene, Buckley, DeRieux & Jones.

'62—**John H. Adams** has been named one of the five recipients of the First Annual "As They Grow" Awards presented by *Parents Magazine*, in recognition of Americans who daily make a difference in the lives of children. Adams is the founder and director of the Natural Resources Defense Council in New York City. (See profile on p.49.)

—**James W. McElhaney**, the Joseph C. Hostetler Professor of Trial Practice and Advocacy at Case Western Reserve University, recently received the school's Distinguished Teacher Award.

'64—**Harry J. Haynsworth, IV** has become the dean of the Law School at Southern Illinois University in Carbondale.

'66—**Alexander B. Denson** received the 1989 Human Relations Citizens Award for his volunteer efforts and leadership with the Wake County, North Carolina Coalition for the Homeless. He is a federal magistrate in Raleigh.

—**E.D. Gaskins, Jr.** is now the managing partner of the newly-formed firm of Everett, Gaskins, Hancock & Stevens with offices in Raleigh and Durham.

—**Christopher J. Horsch** is now general counsel to South Shore Bank of Chicago.

'68—**Paul B. Ford, Jr.** has been elected governor of the Foreign Policy Association. He is chair of the International Practice Committee of the firm of Simpson, Thacher & Bartlett in New York City.

—**William G. Hancock** announces the formation of the firm of Everett, Gaskins, Hancock & Stevens with offices in Durham and Raleigh.

'69—**Charles L. Becton** has resigned from the North Carolina Court of Appeals and has joined the Raleigh firm of Becton, Slifkin & Fuller. He was replaced on the bench by **Allyson K. Duncan** '75. In July, Judge Becton received the Jacobson Award from the Roscoe Pound Foundation which recognizes the outstanding law school professor teaching trial advocacy in the United States. (See profile on p. 52.)

—**Richard G. LaPorte** has been appointed a senior vice president of Wells Fargo Bank in San Francisco. He manages the bank's corporate and international legal affairs, and oversees legal services for their loan adjustment, commercial and real estate industries groups.

—**Ronald L. Shumway** is special counsel to Bechtel, Inc. in San Francisco.

'70—**James C. Frenzel** has joined the firm of Smith, Gambrell & Russell in Atlanta.

'72—**John D. Allton** was recently elected to the National Board of the American Diabetes Association for a three-year term. He is a partner in the Norwalk, Ohio office of Hiltz, Wiedemann & Allton.

—**Laura J.G. Long** is a partner in the newly-formed law firm of Porter, Steel, Humphreys & Porter in Durham.

'73—**Nancy Russell Shaw** has been named lecturer at the Law School where she will teach estate & gift tax and trusts & estates during the 1990-91 academic year. She is a partner in the Charlotte office of Moore & Van Allen.

—**William J.A. Sparks** is now senior litigation counsel at W.R. Grace & Co. in New York City. He is also an adjunct professor of law at PACE University

School of Law in White Plains and a member of the Professional Responsibility Committee of the Bar Association of the City of New York.

'74—**Brenda Brown Becton** has been appointed an administrative law judge with the North Carolina Office of Administrative Hearings in Raleigh.

—**Arpad de Kovacs** is president of TCOM Systems, Inc. of Washington, D.C., a mass-mailing service that utilizes electronic transfer technology.

'75—**Thomas P. Davis** has become a partner in the law firm of McDermott, Will & Emery. A trial attorney, he practices in Newport Beach, California.

—**Timothy J. DeBaets** is now with the New York City firm of Cowan, Bodine & Gold.

—**Allyson K. Duncan** was appointed by Gov. Jim Martin in February 1990 to fill an unexpired term on the North Carolina Court of Appeals. She replaces **Charles L. Becton** '69, who resigned from the bench in February. Judge Duncan is the first black female to serve on an appellate court in North Carolina. She has been a law professor at North Carolina Central University in Durham since 1986.

'76—**David B. Post** is now executive director of Turnaround Management Associates in Cary, North Carolina.

'77—**Peter Brian Bothel** announces the opening of his law office in San Francisco.

—**Donald M. Etheridge, Jr.** has been named of counsel to the Durham firm of Newsom, Graham, Hedrick, Bryson & Kennon. He is also director of planned giving for Duke University and a senior lecturer at the Law School.

—**Peter Feldstein** has been elected for a ten-year term as county judge, family court judge and surrogate of Hamilton County, New York.

—**Harold I. Freilich** has been named a



Roberto Pineiro '77

partner in the Washington, D.C. office of Davis, Graham & Stubbs.

—**Brent S. Gorey** is a partner in the Philadelphia firm of Patterson & Weir.

—**D. Ward Kallstrom** has been appointed to the Senior Editorial Board of *Employee Benefits Law*. He is a partner with Lillick & Charles in San Francisco, and a frequent lecturer on employee benefits issues.

—**Roberto Pineiro** has been appointed by Gov. Bob Martinez to a newly-created county court judgeship in Dade County, Florida. Pineiro had previously been a prosecutor in the State Attorney's Office in Miami.

—**Edward J. Rothe** has been named a partner in the Boston office of Coopers & Lybrand, the international accounting and consulting firm. He specializes in partnership taxation.

'78—**Richard A. Horvitz** has been named secretary/treasurer of Moreland Management Company in Beachwood, Ohio.

—**Ann M. "Margie" Humphreys** is now a partner in the newly-formed firm of Porter, Steel, Humphreys & Porter in Durham.

—**Charles C. Hunter** is now a partner with the Washington, D.C. firm of Gardner, Carton & Douglas.

—**Don H. Littleton** has joined the firm of Brill, Moore & Wagoner in West Plains, Missouri. He practices in the areas of corporate law, real estate, probate, estate planning and tax.

—**Jerome C. Scowcroft** has been elected to partnership in the Seattle office of Schwabe Williamson & Wyatt, where he specializes in maritime and international law. He is also an adjunct professor of admiralty law at the University of Washington School of Law.



Jerome C. Scowcroft '78

'79—**Jean Taylor Adams**, who has been a senior lecturer at the Law School since her graduation, has recently moved to Winston-Salem. Although she will not immediately return to teaching, she will continue to edit the "Keeping Current—Probate" column for *Probate & Property*, published by the ABA.

—**D. Rhett Brandon**, a partner with Simpson Thacher & Bartlett, has become resident in the firm's London office.

—**William E. Harlan**, an Army JAG Corps Major, was awarded the Legion of Merit medal for service as the deputy legal advisor to The Inspector General

of the Army. He is stationed for a year at Camp Casey, South Korea.

—**John P. Higgins** announces the opening of the firm of Higgins, Cohrs & McQueen in St. Petersburg, Florida.

—**James D. Palmer** announces the opening of the firm Palmer, Barr in Langehorne, Pennsylvania.

'80—**Margreth Barrett** is now professor of law at the University of California Hastings College of Law in San Francisco.

—**Daniel S. Bowling, III** is a vice-president at Coca-Cola Enterprises in Los Angeles.

—**G. William Brown, Jr.** has joined Goldman, Sachs & Company in New York City as a vice-president. He is involved in sales and new product development relating to currency and commodity hedging and derivative products.

—**Robert A. Carson** has co-authored the "Evidentiary Motions at Trial" chapter for the 1989 supplement to *Illinois Civil Trial Evidence* published by the Illinois Institute for Continuing Legal Education. He is a partner at the Chicago firm of Gould and Ratner.

—**Gale M. Ciceric-Payne** is with the firm of Payne, Pilkey & Associates in Fort Lauderdale, Florida.

—**Michael W. Smith** has been elected partner in the New York City office of Bryan, Cave, McPheeters & McRoberts, where he specializes in private finance, general corporate and international law.

—**Leslie K. Thiele** announces the opening of her law office in Schenectady, New York. She practices in the areas of international & domestic business transactions, immigration & nationality matters, corporate & commercial law, and international investment.

—**William L. Webber** has been named a partner at the Washington, D.C. firm of Howrey & Simon, where he practices antitrust and commercial law, and white collar criminal defense litigation.

—**Richard D. Willstatter** announces the formation of the firm of Green & Willstatter in White Plains, New York.

'81—**Carl R. Gold**, as chairman of the Civil Rights Subcommittee of the Maryland State Bar, has authored *A Basic Guide to Civil Rights and Discrimination Laws*, published in 1989. He is also regional chairman of the Maryland Bar's pro bono efforts.

—**Abigail T. Reardon** was named a member of the firm of Nixon, Hargrave, Devans & Doyle on January 1, 1990. She is resident in the New York City office and concentrates her practice in general corporate and commercial litigation.

—**David J. Wittenstein** has been made a partner in the firm of Dow, Lohnes & Albertson in Washington, D.C.

—**Michael R. Young** was recently named a member of the firm of Willkie Farr & Gallagher, resident in the New York City office.

'82—**J. Bradford Anwyll** has become a member of the firm of Miller & Chevalier in Washington, D.C.

—**J. Phillip Carver** is a litigator with Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel in Miami.

—**David S. Felman** has become a partner in the firm of Glenn, Rasmussen, Fogarty, Merryday & Russo in Tampa, Florida.

—**Thomas A. Hale** has been named a partner in the Chicago office of Skadden, Arps, Slate, Meagher & Flom. He practices in the corporate and investment areas.

—**Richard L. Horwitz** has been named a member of the Wilmington, Delaware firm of Potter Anderson & Corroon.

—**Ronald B. Landau** is now an attorney in the tax department of ARCO in Los Angeles.

—**Hideyuki Sakai** is a partner in the Tokyo law firm of Blakemore & Mitsuki.

—**Ellen R. Stebbins** has joined the Houston office of Jackson & Walker.

'83—**John B. Garver, III** is now a litigation associate at Robinson, Bradshaw & Hinson in Charlotte.

—**M. Timothy Elder** is now an associate at Smith, Gambrell & Russell in Atlanta.

—**David A. Grieme** has become an associate in the business department of the St. Louis office of Lewis, Rice & Fingersh.

—**Scott D. Harrington** is now with the firm of Manatt Phelps Rothenberg & Phillips in Los Angeles.

—**Susan Westeen Novatt** is an associate at Hill Wynne Troop & Meisinger in Los Angeles.

—**Carlos E. Pena** recently joined the law department at Young & Rubicam in New York City as a vice-president.

—**C. Scott Rassler** was recently selected as a member of Mass Mutual Life Insurance Company's "Freshman Five"—an award honoring the top five new agents throughout the country.

—**Kenneth R. Uncapher** has joined the Winter Park, Florida firm of Trisman and Willard.

'84—**Barbara Tobin Dubrow** is now with the firm of Sherr, Joffe & Zuckerman in Philadelphia.

—**Mitchell I. Horowitz** has joined the firm of Fowler, White, Gillen, Boggs, Villareal & Banker in Tampa, Florida.

—**Kyung S. Lee** has become a shareholder in the Houston firm of Sheinfeld, Maley & Kay. He continues to practice in the area of corporate restructurings and reorganizations.

—**Floyd B. McKissick, Jr.** announces the formation of the firm of McKissick & McKissick, with offices in Durham and Oxford, North Carolina.

—**John F. "Sandy" Smith** is a candidate for a position as a Stanford University trustee, his undergraduate alma mater. He is a senior associate at Morris, Manning & Martin in Atlanta.

—**Peter G. Verniero** has become an associate at the firm of Herold and Haines in Liberty Corner, New Jersey.

'85—**J. Porter Durham** is now an attorney at Miller & Martin in Chattanooga, Tennessee.

—**David E. Mills** was appointed assistant United States attorney for the District of Columbia in May of 1989.

—**Jonathan P. Nase** is counsel to the Legislative Budget & Finance Committee in Harrisburg, Pennsylvania.

—**Peter G. Rush** has become an associate with the firm of Bell, Boyd & Lloyd in Chicago, where he practices in the area of civil business litigation.

—**Lynn A. Stansel** is now an attorney at Orrick, Herrington & Sutcliffe in New York City.

—**Sonja Steptoe** has recently become a staff writer for *Sports Illustrated* magazine.

—**Paul R. Van Hook** has joined the firm of Ballard, Spahr, Andrews & Ingersoll in Washington D.C.

'86—**Alexandra Allen** has joined the staff of Greenpeace, USA in Washington, D.C.

—**Martin D. Avallone** is now laboratory counsel for the IBM Corporation in Atlanta.

—**B. Andrew Brown, Jr.** is an associate at Dorsey & Whitney in Minneapolis.

—**Jane Spilman Converse** has joined the firm of Beveridge & Diamond in Washington, D.C. as an associate practicing in the area of corporate transactions.

—**Gordon F. Kingsley, Jr.** has joined the firm of Hill & Barlow in Boston.

—**Karen L. Manos (Tremblay)** has been selected one of ten military attorneys to be detailed to the US Attorney's Office for the District of Columbia to prosecute felony narcotics offenses in D.C. Superior Court.

—**Ellen Fishbein Mills** is an associate at Odin, Feldman & Pittleman in Fairfax, Virginia.

—**Julia Tillman Woessner** has joined the firm of Lashly, Baer & Hamel in St. Louis, where she specializes in tax and estate planning.

'87—**Joel B. Bell** was named director of international events for the World Basketball League. He also continues

his legal practice in Philadelphia at the firm of Kauffman, Heck & Berenbaum.

—**Cheryl M. Feik** is now an associate with the Washington, D.C. firm of Van Ness, Feldman, Sutcliffe & Curtis.

—**Marc I. Israel** is an associate at Olshan Grundman Frome Rosenzweig & Orens in New York City.

—**Ross N. Katchman** is now an attorney at the Hewlett-Packard Company in Palo Alto, California.

—**Paul G. Nofer** is with the firm of Schlossberg & Associates in Berwyn, Pennsylvania.

—**Harlan I. Prater, IV** has been named an associate in the newly-formed Birmingham, Alabama firm of Lightfoot, Franklin, White & Lucas.

—**Junyo Sato** announces the formation of the firm of Ishizawa, Ko & Sato in Tokyo.

—**Sherri White Tatum** is a trial attorney for the National Credit Union Administration in Washington, D.C.

'88—**Liisa L. Anselmi** has relocated to the New York City office of Gibson, Dunn & Crutcher.

—**Emily V. Karr** has become an associate at Stoel Rives Boley Jones & Grey in Portland, Oregon.

—**Mario A. Ponce** is an associate at Simpson Thacher & Bartlett in New York City.

—**David A. Schwarz** is serving as special assistant to Ambassador Morris B. Abram, the U.S. permanent representative to the United Nations and other international organizations in Geneva, Switzerland.

—**T. Scott Wilkinson**, Marine 1st Lieutenant, recently reported for duty with the 2nd Force Service Support Group at Camp Lejeune, North Carolina.

'89—**Kathleen E. Barge** has become an associate in the Washington, D.C. office of Covington & Burling.

Personal Notes

'54—**Eugene C. Brooks, III** was married to Jean Carrie Forrest on March 31, 1989. They reside in Durham, where he practices law.

'61—**Robert F. Baker** was married to Barbara D. Ferguson on March 10, 1990 at Duke University Chapel. He is a partner in the Durham firm of Spears, Barnes, Baker, Wainio, Brown & Whaley.

'63—**David A. Ross** was married to Clare MacIntyre on August 19, 1989. They reside in Arlington, Virginia.

'78—**Christopher G. Sawyer** and his wife are pleased to report the birth of a daughter, named Frances Elizabeth, on May 18, 1990.

'79—**William E. Harlan** and his wife, Betty, proudly announce the birth of their second child and first daughter, named Elizabeth Estelle, on December 6, 1989.

'80—**T. Patrick Jenkins** and his wife, Jan (Duke B.S.N. '79), announce the birth of their third child, a daughter named Kayla Elizabeth, on August 2, 1989.

—**William L. Webber** and his wife, Laurie, are pleased to announce the arrival of their third daughter, named Joan Leah, on January 12, 1990.

'81—**Nancy Holland Kerr** announces the birth of a son, Alexander Holland Kerr, on January 4, 1990.

—**James E. Schwartz** was married to Dr. Susan Lea Cohen on November 18, 1989 in White Plains, New York. James is an associate at the New York City firm of Carb Luria Glassner Cook & Kufeld.

'82—**J. Phillip Carver** was married to Clara Boza on October 6, 1989 in

North Carolina Firms Merge

On March 1, 1990 the North Carolina law firms of Adams, McCullough & Beard and Parker, Poe, Thompson, Bernstein, Gage & Preston merged to form the firm of Parker, Poe, Adams & Bernstein with offices in Charlotte, Raleigh and the Research Triangle Park. Twelve Duke Law School alumni work for the new firm:

'77—**Heloise Catherine Merrill** (Partner/Charlotte)

'78—**Renee J. Montgomery** (Partner/Raleigh)

'80—**Stephen D. Lowry** (Partner/Raleigh)

'81—**Cynthia Leigh Wittmer** (Partner/Raleigh)

'83—**Linda Markus Daniels** (Partner/RTP)

'84—**Pope "Mac" McCorkle III** (Associate/Raleigh)

'85—**Alan G. Dexter** (Associate/Charlotte)

—**Kip Allen Frey** (Associate/RTP)

'87—**J. Parker Mason** (Associate/Charlotte)

'88—**Philip B. Belcher** (Associate/Charlotte)

—**Jonathan M. Crotty** (Associate/Charlotte)

—**Josiah C. T. Lucas** (Associate/Charlotte)

Asheville, North Carolina. They reside in Miami.

'83—**Ronald G. Hock** and his wife, Tassie, announce the birth of their first child, Duncan Van Gorden Hock, on February 23, 1990.

—**Carlos E. Pena** and his wife, Susan, are the proud parents of their second son, Raymond Alonso, born April 10, 1990.

—**Bruce J. Ruzinsky** was married to Linda Gracia on January 14, 1989. They reside in Houston, where Bruce is with the firm of Jackson & Walker.

'84—**Barbara R. Tobin** was married to Kenneth M. Dubrow on March 25, 1990. They reside in Philadelphia.

—**Peter G. Verniero** was married to Lisa Ellen Gaede in Newport Beach, California on November 25, 1989. They reside in Morristown, New Jersey.

—**C. Geoffrey Weirich** and his wife, Kelly, are happy to announce the birth of their second child, Chelsea Rae, on October 21, 1989.

'85—**Brenda D. Hofman** was married to Lance Feis on January 20, 1990. They reside in Chicago, where Brenda is a labor lawyer with Seyfarth, Shaw, Fairweather & Geraldson.

—**James P. Lidon** and his wife, **Jean Sih Lidon**, Class of 1986, announce the birth of their first child, David Jake, born on January 27, 1990.

—**Elizabeth A. York** was married to James A. Schiff on June 24, 1989 in

High Point, North Carolina. Elizabeth is an associate at Simpson, Thacher & Bartlett in New York City.

'86—**Jean Sih Lidon**, and her husband, **James P. Lidon**, Class of 1985, announce the birth of a son, David Jake, their first child, born on January 27, 1990.

—**Lisa Long** and **Kermit B. Kennedy**, both Class of 1986, were married on November 11, 1989. Lisa works for Fried, Frank, Harris, Shriver & Jacobson in Washington, D.C., and Kermit is with Hunton & Williams in Fairfax, Virginia.

—**Julia Tillman Woessner** and her husband, Jeff, announce the birth of their daughter, Mary Nina, May 16, 1989.

'87—**Helene Bertaud** was married to Jocelyn Pinoteau on June 9, 1990. They reside in Paris.

—**Laura L. Britton** was married to Michael Josephs on May 27, 1989. Laura is an associate at Dechert Price & Rhoads in Washington, D.C.

'88—**Eric E. Boody** and his wife, Ann Catherine, are pleased to announce the birth of their first son, Hunter Eric, born October 18, 1989.

—**Josiah C.T. Lucas** and his wife, Sally, are the proud parents of their first child, a son named Josiah C.T. "Trent" Lucas, Jr., born on April 24, 1990.

Obituaries

Class of 1939—Robert E. Kay, a former state senator in New Jersey, died on January 24, 1990. He attended the Law School after graduating from Duke University in 1937, and graduated from the South Jersey Law School, now Rutgers University School of Law in Camden. Senator Kay, a senior partner in the Wildwood, New Jersey firm of Kay & Kay, was first elected to the New Jersey General Assembly in 1954, and served there for several years. He served in the State Senate from 1968-72.

Surviving are his wife, Ella; two sons, Glenn of Wildwood and Stewart of Wildwood Crest; a daughter, Patricia Lenza of Linwood; a stepson, Laurence Morier of Medford Lakes; two stepdaughters, Amy Morier of Cambridge, Massachusetts and Sara Hurley of Gaithersburg, Maryland; and ten grandchildren.

Class of 1940—Robert S. Puckett died on March 9, 1988 of cancer. He attended the Law School during the year 1939-40, leaving to join the Army Air Corps. He retired from the Army in 1969 as a colonel, having received many commendations. He received his master's and doctorate degrees in international relations from Georgetown University.

Mr. Puckett is survived by two sons, Robert, Jr. of Des Moines, Iowa and Ramsay of Arkansas; two daughters, Evelyn of Jacksonville, Florida and Cary of Oklahoma City; and five grandchildren.

Class of 1942—C.H. Richardson, Jr. died February 12, 1990 in Louisville, Kentucky. He was a self-employed attorney in Louisville and taught at the University of Louisville—Division of Adult Education. He served in the Navy during World War II and was director emeritus of Blue Cross-Blue Shield, general counsel for Baptist Hos-

pitals, Inc., and a member of the American Academy of Hospital Attorneys.

Mr. Richardson is survived by his wife, Margaret Wentzel Richardson; three sons, Lee, Mark and Scott; a brother, Robert, of San Francisco; and two grandchildren.

Class of 1947—Harry W. Fogle of Seminole, Florida died in March of 1988. For fifteen years he was a circuit judge for Pinellas-Pasco Counties, twice serving as chief judge. He had previously served on municipal courts in St. Petersburg, Pinellas Park, Gulfport and South Pasadena and practiced law in St. Petersburg for twenty-five years. Judge Fogle served as vice chairman of the Florida Sentencing Study Commission and of the Florida Commission on Criminal Justice Task Force. He was a member of the advisory council for the State Department of Corrections.

Judge Fogle served for twelve years as a Little League district administrator, and was a former president and director of the Police Athletic League of St. Petersburg. He is survived by his wife, Barbara; a son, Henry, Jr. of Seminole; two daughters, Jennifer of Jacksonville and Dee Dee Laughlin of Memphis, Tennessee; his mother, Elsie Fogle of Marietta, Ohio; a sister, Eileen Gavin, also of Marietta; and six grandchildren.

Class of 1955—Raymon J. Hahn died on November 10, 1989 of an apparent heart attack. He was a practicing partner in the firm of Bell, Hahn, Schuster, Wheeler & Williams in Pensacola, Florida. He is survived by his wife, Virginia Harris Hahn; his mother; and a son.

Class of 1974—Phil Sloan, of Clinton Heights, New York, died on April 18, 1990. He was counsel to the town's Zoning Board of Appeals, a senior attorney with the state Division of Hous-

ing and Community Renewal and a commissioner on the state Board of Equalization and Assessment. Mr. Sloan was a past president of the East Greenbush (NY) Republican Club and was a Rensselaer County Republican committeeman. He was also quite active in other civic organizations and was a member of the Albany Police Pipe and Drum Band.

Mr. Sloan is survived by his father, Jack Sloan of Flushing, and a sister, Joyce Sloan Rogero of Washingtonville, New York.

Class of 1980—Rick D. Horton died on April 23, 1990. An artist, painter and photographer, he was also a partner in the law firm of Horton and Lloyd in New York City. A fellowship recipient of The National Endowment for the Arts in 1976, the Ingram Merrill Foundation in 1985, and the Pollack Krasner Foundation in 1986, Mr. Horton frequently exhibited his work in one person exhibitions in New York City, Charlotte, Baltimore and Minneapolis. His work is included in many public, corporate and private collections including the Museum of Modern Art in New York City, the North Carolina Museum of Art, and Centre Georges Pompidou in Paris.

Mr. Horton is survived by his parents, Vance and Verla Horton of Concord, North Carolina; a brother, Vance, Jr.; and two sisters, Mary Delamura of Charleston, South Carolina and Pat Williams of Rockville, Maryland.

UPCOMING EVENTS

American Bar Association Reception	Monday, August 6, 1990
Law Alumni Weekend '90	November 2-3, 1990
Conference on Career Choices	February 22, 1991
Barristers Weekend	March 22-23, 1991
Board of Visitors Meeting	April 5-6, 1991

The following classes will celebrate their reunions in 1990:

Classes of 1944, 1945 and 1946 (joint reunion)	45th reunion
Class of 1950	40th reunion
Class of 1955	35th reunion
Class of 1960	30th reunion
Class of 1965	25th reunion
Class of 1970	20th reunion
Class of 1975	15th reunion
Class of 1980	10th reunion
Class of 1985	5th reunion

The Law Class of 1940 celebrated a joint 50-year reunion with the Classes of 1938 and 1939 in September, 1989.

For more information on upcoming events, call the Law Alumni Office at (919) 489-5089.

Alumni Directory Planned

The Law Alumni Council has voted to sponsor an annual alumni directory. The Council took this action because of the number of positive comments from alumni regarding the usefulness of the last (1987) directory and because of the rapid changeover in address information. The annual directory will be produced from information currently on file in the Law School Alumni Office database. All alumni are therefore encouraged to keep their address information updated in the Alumni Office.

Complimentary copies of the directory will be sent to all alumni who have paid dues to the Law Alumni Association and/or made a gift to the Law School for 1989-90. To help defray the cost of the annual directory and other alumni programs such as the alumni seminars and the Career Conference, the Council voted to increase the annual alumni dues for the Law Alumni Association to \$25 per year.



Dan Crawford

Alumni enjoy renewing friendships during Barristers Weekend, 1990.

CHANGE OF ADDRESS

(Return to Law School Alumni Office)

Name _____ Class of _____
Firm/Position _____
Business address _____
Business phone _____
Home address _____
Home phone _____

PLACEMENT OFFICE

(Return to the Law School Placement Office)

Anticipated opening for: third, second, and/or first year law students, or experienced attorney.
Date position(s) available _____
Employer's name and address _____

Person to contact _____
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 I would be willing to serve as a resource or contact person in my area for Law School students.
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ALUMNI NEWS

(Return to Law School Alumni Office)

The *Duke Law Magazine* invites alumni to write to the Alumni Office with news of interest such as a change of status within a firm, a change of association, or selection to a position of leadership in the community or in a professional organization. Please also use this form for news for the Personal Notes section.

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