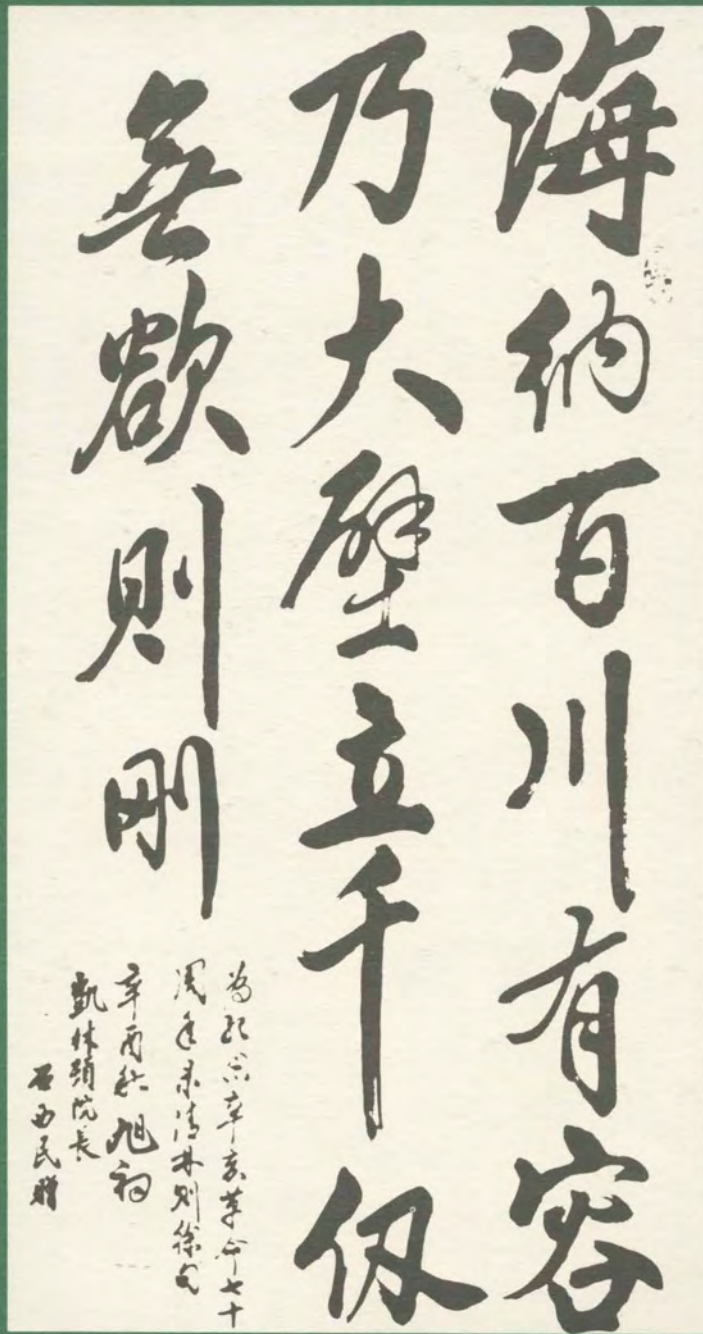


# Duke Law Magazine

WINTER 1982



*The ocean is open for hundreds of rivers,  
It is magnanimous, thus becomes vast and magnificent.  
The lofty peak is thousands of feet high,  
It is natural and unadorned, thus it makes the majesty.*

# *Duke Law Magazine*

## **Contents**

- 2 *Editor's Remarks / On The Cover*
- 3 *Law, Norms and Authority: An Event in Jurisprudence /  
Book Note*
- 
- 4 **Law of the Sea**
- 5 *School of Law Hosts International Law of the Sea  
Symposium / A Conference Report*
- 10 *A Requiem for the Three-Mile Limit,  
Horace B. Robertson*
- 
- 12 **Law & Health**
- 13 *Deregulating the Health Care Industry / Book Note*
- 14 *Mental Health Legislation and Litigation in Britain /  
Alumnus Profile*
- 16 *Health and Safety in the Chemical Industry /  
A Conference Report*
- 
- 21 *Judicial Clerkships / A Report on the School*
- 23 *American Lawyer for the People's Republic of China /  
Student Profile*

**DEAN**  
Paul D. Carrington

**EDITORS**  
Ronald Allen  
Joyce Rutledge

**STUDENT REPORTERS**  
Don Fitzgerald  
Kim Gagné  
Rebecca Prince



- 24** *The Law Cabins, W. Frank Malone*
- 28** *Dean's Dedication Speech*
- 33** *The Future of the Equal Rights Amendment,  
Walter Dellinger*
- 35** *Life and Law in Utah / Alumna Profile*
- 38** *American Inns of Court: An Approach to Elevate  
the Level of Legal Competency*
- 39** *Legal Malpractice in Estate Planning / Article Note*
- 
- 40** ***The Docket***
- 41** *Specially Noted*
- 43** *Faculty Activities*
- 47** *Alumni News*

---

*Duke Law Magazine* is published each winter and spring under the auspices of the Office of the Dean, Duke University, School of Law, Durham, North Carolina 27706  
© Duke University 1982

---

**DESIGN**

Anistatia Vassilopoulos

**TYPOGRAPHY/PRODUCTION**

Carolinatype

**CONSULTANT**

Rachel Bornstein

**PHOTOGRAPHY**

Kyung Lee  
Thad Sparks

## Editor's Remarks

With this issue of the *Duke Law Magazine*, the Law School inaugurates a new format for reporting on the intellectual life of the school and the professional activities of its graduates. While the *Magazine* follows in the path of the *Duke Docket*, it departs from its predecessor in ways more significant than the obvious cosmetic overhaul. In its pages readers will find more comprehensive coverage of campus lectures, often in the form of in-depth treatment of major confer-

ences, features concerning faculty research, publications, and off-campus activities, and portraits of alumni and alumnae in public and professional life.

In subsequent issues the *DLM* will present contributions from members of the faculty reflecting their various academic interests. From time to time we will print excerpts from papers prepared by current students for academic credit in seminars or as independent study projects. At least once each year

there will be reports from the Admissions and Placement Offices. Each spring we will publish a docket of professional and personal achievements of Duke law graduates by class.

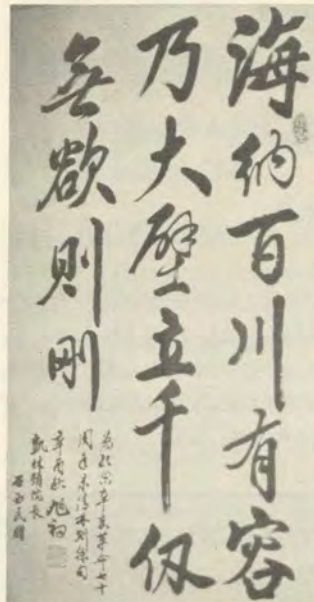
I hope you find pleasure and edification in this fledgling venture. Comments and criticism are welcome any time and may be directed to me or Ron Allen, who joins the Duke faculty in 1983.

Joyce Rutledge

## On The Cover

The calligraphy on the cover was done by Chang Xu, the Chief Justice of the Supreme People's Court in Peking (Beijing), China, on the occasion of the 70th anniversary of the "Xin-hai Revolution," the 1911 revolution led by Dr. Sun Yat-sen which overthrew the Ching (Qing) Dynasty.

The calligraphy contains two verses from Lin Zhe-xu, an ancient Chinese national hero, and it was sent to Dean Carrington with Mr. Chang's compliments and presented to the Dean by Shi Xi-minh in May, 1982.



*Book Note*

# Law, Norms and Authority: An Event in Jurisprudence

*Law, Norms and Authority* was published earlier this year in London. In this work Professor George C. Christie examines and attacks some chief concepts used by contemporary legal philosophers. Professor Christie observes that the philosophy of law and the activity of law diverge from each other, that a normative view of the law creates false expectations about certainty and authority, and that these false expectations can foster public cynicism that "distract[s] attention from the very important contributions that law does make to the organisation of social effort."

Professor Christie criticizes the concepts of "norm," "consistency," and "legitimacy" as incomplete descriptions of what the law is and does.

The theory of norms presupposes a degree of unity, of completeness, of purposiveness and central direction to law that is incompatible with the complexity of society and its legal system. Our law, rather, has largely grown haphazardly and by accretion.

He points out that those who depend on a normative theory are caught in a dilemma. A norm is to be judged as valid or invalid, usually on the basis of its consistency or inconsistency with a relatively complete system of norms, which is in turn judged to be efficacious or inefficacious. Without some standards by which to judge the rationality of these norms, they lose a great deal of their prescriptive character. The task of extracting any consistent explication of legal norms has daunted all who have tried. In fact, the difficulty of this task has led to a normative approach which is predictive rather than prescriptive, which



speaks of what *will* happen rather than what *ought* to happen.

As Professor Christie points out, the need for consistent explication of norms shows the most normative thing about legal method, its demand for consistency. Professor Christie points out that "it is the availability of a more sophisticated machinery for achieving consistency rather than the fact that law supposedly consists of norms" that explains the logic of the law. This logic in the law contributes to the continued acceptance of the authority of the law.

Professor Christie provides a model for the process of achieving consistency in judicial decisions.

---

*"Our law, rather, has largely grown haphazardly and by accretion."*

---

This model is meant to be both descriptive and prescriptive, explaining the most useful aspects of what is done with the law by judges. Professor Christie starts with the cases and statutes that are the materials of the law. He emphasizes that it is not what the cases "mean" but the actual marks on the paper that act as the raw material of the legal process; what the cases "mean" depends on the results of the legal process. In that process, various parties supply cases that they feel act paradigmatically in the situation at bar. It is the hallmark of the judicial process that a decision depends on the acceptance of one paradigm and the rejection of all others because of "significant differences" in the factual context. What counts as significant in turn is somewhat predetermined by other paradigm cases. Professor Christie believes this model, when fully developed, can explain the consistency and therefore the rational power of the law, which helps explain the sense of "oughtness" found in the law better than vague talk of norms.

Christie's work exposes throughout the gap between theorizing about the law and the actual operation of the law.

To organise our experiences we obviously engage in a process of abstraction and organise our experiences in the form of simplified propositions or so-called "rules of law." But the intellectual tools we use to organise our experiences are not the equivalent of the real world with its inordinate complexity and mass of particulars. Thinking about law is one thing — it can be organised and rationalised and reorganised — the law as a concrete phenomenon is another thing.

---

# LAW OF THE SEA

*A Conference Report*

# School of Law Hosts International Law of the Sea Symposium

*We are at one of those rare moments when mankind has come together to devise means of preventing future conflict and shaping its destiny, rather than to solve a crisis that has occurred or to deal with the aftermath of war. It is a test of vision and will, and of statesmanship.*

*Henry Kissinger*

Over sixty diplomats and legal scholars gathered at Duke on October 29th and 30th for the International Law of the Sea Symposium. The symposium was sponsored by the School of Law and was organized by Professors Horace B. Robertson and Richard Maxwell. The purpose of the symposium was to provide a forum for debate on the difficult issues arising out of the Third United Nations Law of the Sea Convention. These issues took on greater significance with the announcement by President Reagan in July that the United States will not sign the Convention.

The Duke symposium, entitled "The Law of the Sea—Where Now?" was organized around six topical sessions designed to stimulate discussion on current issues. While there was a wide divergence of opinion on the various topics, all of the presentations reflected the difficult policy decisions remaining to be made before the Third United Nations Convention on the Law of the Sea (UNCLOS III) comes into force.

The symposium's first topic was "The Third United Nations Conference on the Law of the Sea in Perspective: What was Accomplished?" The speaker was the President of the Conference on the Law of the Sea, Ambassador Tommy T.B. Koh, permanent representative of Singapore to the United Nations. Ambassador Koh detailed what in his view were the outstanding accomplishments of the Conference. These accomplishments include: provisions on the limits of the Exclusive Economic Zone, Outer Continental Shelf and Contiguous Zone; regimes of passage for ships and aircraft; rights and obligations of coastal states and other nations; provisions for protection of the marine environment; contributions to marine and scientific research; mandatory provisions on the settlement of disputes; joining of nations for cooperation on conservation provisions for management and study of marine mammals; and the controversial provisions regarding mining of the international area of the deep seabed.

Following the comments and discussion of Ambassador Koh's presentation, Ambassador James L. Malone, Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs and the current Chairman of the United States Delegation to UNCLOS III, explained the Reagan administration's reasons for not signing the treaty and the role of the United States "outside" the treaty. The major objection to the treaty, according to Ambassador Malone, is that the treaty would place costly and unnecessary political, legal and economic restraints on the mining of minerals of the deep seabed.

The third session addressed the critical issue of the future exploration of the resources of the deep seabed and subsoil. The speaker was the Honorable John Bailey, Deputy High Commissioner of Australia to Canada, Special Representative of Australia to UNCLOS III and Rapporteur of the First Committee, UNCLOS III.

The status of the principle of freedom of navigation was the topic of the fourth session of the symposium. Professor Thomas A. Clingan, Jr., of the University of Miami School of Law and Vice Chairman of the United States delegation to UNCLOS III, spoke on the impact of the Convention on the concepts in international law of the territorial sea, the exclusive economic zone, international straits, and archipelagic sealane passage. The majority of Professor Clingan's remarks were reserved for an enlightening discussion of the rights of navigation extended to nations that are not signatories of the Convention.

The fifth session on protection of the marine environment and scientific research in the oceans combined presentations by Norman Wulf, the former Director of the Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State, and Professor Donald Walsh of the University of Southern California's Institute of Marine and Coastal Studies. Mr. Wulf's analysis of the results, should the Convention not receive sufficient ratification to enter into force, was most provocative. Professor Walsh related his views of the problems in conducting marine scientific research in the absence of relevant Convention provisions.

The final session of the symposium centered on the question of whether the UNCLOS III treaty points the way toward peaceful settlement of disputes in ocean conflicts. Professor Louis B. Shon of the University of Georgia School of Law, and Deputy Representative of the United States to UNCLOS III, set out the course of

development of the code for the settlement of disputes that may arise in the future with respect to the interpretation and application of the Law of the Sea Convention.

### THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA

For hundreds of years the law of the sea was largely customary law. In 1958 the law of the sea was codified by the International Law Commission. This codification resulted in the convening of the United Nations Conference on the Law of the Sea in 1958 (UNCLOS I). The 1958 conference succeeded in adopting four conventions: the High Seas Convention; Convention on Fishing and Conservation of the Living Resources of the High Seas; the Convention on Territorial Sea and the Contiguous Zone; and the Convention on the Continental Shelf. A second Law of the Sea Conference was assembled in 1960 to determine the width of the territorial sea but was not successful (UNCLOS II).

Since 1958 substantial changes in everything from fishing practices employing electronic detection equipment to deep seabed mining technology, as well as the emergence of new countries, led to a new attempt to develop a codification of the law of the sea. The first initiatives on the questions of rights to the resources of the deep seabed beyond national jurisdiction led to the Third United Nations Law of the Sea Conference, which began in 1973 (UNCLOS III). This Conference resulted in the Convention adopted on April 30th of this year. The Conference produced more than 300 draft articles on a great variety of issues.

The Conference was the first comprehensive attempt to deal with utilization of the resources of the sea. The major achievements of the Conference include: delimitation of the 12-mile territorial sea and the 24-mile contiguous zone; establishment of a regime of passage through straits used for international navigation; establishment of Archipelagic States and rules governing their jurisdiction; creation of exclusive economic zones in the area beyond and adjacent to the territorial seas, not to exceed 200 miles; development of a regime for governing the rights to the continental shelf; provisions for maintaining customary rules of international law in regard to the high seas, including management and conservation of the living resources; establishment of the right of access of land-locked states to and from the sea and freedom of transit; development of the standards and practices for extraction of the resources of the deep seabed beyond the territorial sea; provisions for protection and preservation of the marine environment; establishment of principles for the conduct of marine scientific research; guidelines for development and transfer of marine technology; and a provision for compulsory adjudication of disputes.

Obviously any treaty with a variety of provisions, many of which create new international legal precedents, is a result of compromise among the nations of the world. The United States played a major role in the



development of many of the parts of the treaty. The refusal of the United States to sign the U.N. Law of the Sea Convention announced by President Reagan in July was based on the conviction that the deep seabed mining regime contained in the treaty was beset with major problems.

### THE UNITED STATES AND THE LAW OF THE SEA AFTER THE CONVENTION

The position of the United States was set out by Ambassador Malone during the first day of the symposium. The United States is currently developing a national oceans policy, a portion of which will emphasize the objective of promoting deep seabed mining. According to Ambassador Malone, "We will move forward with a deep seabed regime that will encourage investment in marine mining, development of the requisite technology, exploration and production and pricing of the mineral resources guided by market forces. This regime will provide access to and production of seabed minerals without costly and unnecessary political, legal and economic restraints."

Not all of the participants at the symposium believed that the United States could proceed with its own regime for mining of the deep seabed "outside" the provisions of the Convention. The system established by the Conference for allocating rights to mine the deep seabed was the subject of a long protracted negotiation between developed countries and developing nations. Originally the developed nations desired an international authority to act in the limited role of licensing agent to provide authentication of the claims of national entities (normally domestic



mining corporations) or international consortia. In addition, these producing nations, including the United States, wanted control of the international licensing council.

The developing countries (sometimes referred to as the Group of 77) envisioned the deep seabed mining regime differently. These nations preferred that the overseeing International Seabed Authority be vested with exclusive authority to exploit the resources of the deep seabed. The developing nations proposed that the Authority create an operating arm known as the Enterprise to develop, market and mine the resources. This would be the only recognized entity authorized to mine the seabed. Finally the developing countries at the Conference desired that the decisions be made by the council, where each member nation would have one vote. This would effectively vest control of the Authority in the hands of the more numerous developing countries.

The apparent deadlock on this point was broken by Henry Kissinger's proposal in 1976 for the development of a parallel system for exploitation of the resources of the deep seabed. The parallel system would allot one half of the areas proposed for deep seabed mining to the national companies or international consortia and would reserve the other half for

---

*... the provisions on deep seabed mining were contrary to free market principles, did not provide assured access to future seabed miners and presented the danger of creation of a monopoly by the developing nations...*

---

development by the Enterprise for the benefit of the other members of the Convention. Another provision of the Kissinger proposal was the creation of a Review Conference to be convened for the purpose of revising any of the provisions of the Convention regarding the system of exploration or exploitation of the resources of the deep seabed.

The Kissinger proposal was accepted as a basis for negotiation and the conference eventually developed a draft Convention which contained a parallel system of deep seabed mining with special provisions protecting the interests of "pioneer investors."

Upon coming into office, the Reagan administration suspended negotiations at the Conference and initiated a review of the current state of the provisions of the draft Convention. After a year-long review, the United States delegation returned to the Conference with the position that all of the provisions of the draft Convention were acceptable except the provisions relating to deep seabed mining. The administration

felt that the provisions on deep seabed mining were contrary to free market principles, did not provide assured access to future seabed miners and presented the danger of creation of a monopoly by the developing nations in the Review Conference.

The administration's response was to develop a series of new proposals on the deep seabed mining issue and present them to the Conference. These proposed revisions to the deep seabed mining provisions of the draft Convention (known as the Green Book) essentially reverted back to the position of the developed nations prior to the parallel system proposal. The developing countries refused to accept the Green Book even as a basis for negotiations.

Believing that the majority of the provisions of the Convention, except for the deep seabed mining provisions, had become customary international law and consequently would benefit the United States if we remained outside the Convention, the administration directed a vote against adoption of the Convention and announced the United States' withdrawal from further active participation in the Conference. On July 9, 1982, President Reagan announced that the United States would not sign the Convention and would not participate in the rule-making exercises (the Preparatory Commission).

The entire responsibility for the failure of the United States to become a party to the Convention should not be placed on the Reagan administration. The Senate, which would have to ratify the treaty by a two-thirds majority, would not likely approve the present draft treaty even given the opportunity, according to Frederick S. Tipson, Chief Counsel for the Committee on Foreign Relations of the United States Senate. In Tipson's personal view, a change in the administration in Washington would probably not reverse the position of the Senate. The view of the majority of the Senate is that the cumulative effect of the deep seabed mining provisions "run counter to the original conception of the seabeds as the common heritage of mankind." In addition, the binding effect of the amendments passed by the Review Conference "would be enough," in Tipson's view, "in and of itself to lead to Senate rejection, since the reservations would not be allowed on a single issue."

#### **THE FUTURE OF DEEP SEABED MINING AFTER UNCLOS III**

Given the decision of the United States not to sign and adopt the Convention, an important issue becomes the nature of the United States' obligations and rights under the treaty. The most controversial topic at the symposium was whether the United States could exploit the resources of the deep seabed outside the Convention (i.e. as a non-party). The United States certainly would not be obligated to participate in an international organization such as the Authority. However, in the words of Professor Jonathan T. Charney of the Vanderbilt University School of Law, "An obligation not to exploit the deep seabed resources

outside the general international agreement might form the basis of international law on the subject."

The Reagan administration's position is that the exploration and exploitation of the resources of the deep seabed can be accomplished outside the treaty but within the constraints of our prior adoption of

---

*...there seems to be considerable legal uncertainty and strong political objection to mining of the deep seabed outside the Convention.*

---

the principle that the resources are "the common heritage of mankind." Ambassador Malone contends that, "Despite a few duplicate and conflicting applications (for mine sites) filed with other countries, we are in a most favorable position. With conflict resolution procedures agreed to by five of the six consortia, it is difficult to credit allegations that seabed mining activities will only take place under foreign flags and within the compass of the Law of the Sea treaty." Ambassador Malone points to the agreement signed on September 2, 1982, by the United States, Great Britain, West Germany and France to encourage resolution of overlaps among license applications, and requiring consultation among the signatories before licenses are issued, as an example of the ability of the U.S. to establish reciprocal recognition of mine sites outside the Convention.

Despite these cooperative agreements regarding the recognition of claims, there seems to be considerable legal uncertainty and strong political objections to mining of the deep seabed outside the Convention. The right to exploit deep seabed resources could be found to be a part of customary international law in a manner similar to the principle of freedom of the high seas. No clear precedents exist to indicate that this is the case. Numerous scenarios come to mind in which different combinations of domestic corporations, international consortia and the Enterprise established under the Convention would be disputing the claims to mine very attractive sites of the international deep seabed. As Professor Stefan A. Riesenfeld of the University of California (Berkeley) School of Law, and Consultant to the United States Delegation to UNCLOS III, pointed out, "Neither party in such a dispute should be too sure" of the rights outside the treaty. He described the international law on the subject as a "fluid situation."

The lack of certainty in the outcome of a dispute over the rights to mine a particular deep seabed site subjects the substantial investment required to develop and mine a site to unacceptable risks. If mining were to take place outside the treaty under

the regime of the law of the high seas, little security would be provided for the investment. Professor Charney contends that, "There would be no guarantee that an exploiter would be able to work its mine site without the risk of claim jumpers and the presence of other impediments to its work." If the United States wants to encourage deep seabed mining outside the treaty, Professor Charney believes that it will be required to provide economic support to improve the financial prospects of the industry and to insure against risks inherent in the high seas regime.

A different view of the dilemma was presented by Marne A. Dubs of the Kennecott Copper Corporation, Advisor to the United States Delegation to UNCLOS III. Dubs contends that the risks outside the Convention are less than those incurred by the mining companies and the United States under the Convention. While admitting that the risks are great under either regime, Dubs prefers to wait and see what actions the Preparatory Commission takes with regard to the mining regulations.

The Preparatory Commission of UNCLOS III will convene in mid-1983 to draft the regulations for international deep seabed mining and establish the basis for the International Seabed Authority. A potential exists for substantially reducing the ambiguities in the regulatory scheme established in the Convention. If the Preparatory Commission adopted mining rules favorable to the mining industries of the developed nations, the risks of operating a mining venture would be reduced. Debate is currently continuing on the issue of whether the United States should participate in the Preparatory Commission.

A strong objection to the administration's position that mining can occur outside the Convention was put forth by Ambassador Koh, President of the Third United Nations Conference on the Law of the Sea. In the view of Ambassador Koh, "Private mining of the seabed outside of the Convention is probably illegal." This view is founded upon the fact that the United States has been party to previous agreements which establish that deep seabed mining outside of the 200-mile exclusive economic zone exploits resources that are recognized as the common heritage of mankind. Ambassador Koh does not believe that the international community can accept an approach in which private interests extract resources from the deep seabed outside the treaty and the other interests follow the provisions of the Convention.

#### **THE ROLE OF THE UNITED STATES OUTSIDE UNCLOS III**

Whatever the eventual outcome of the controversy over the deep seabed resources provisions of the Convention, a major question remaining is what would be the impact on the United States' interests, other than deep seabed mining, as a non-party to the Convention. The view of the administration is that the

crucial interests of the U.S. will be protected as a non-party to the Convention. Outside the Convention, the U.S. will continue to have the navigational rights and freedoms recognized under customary international law. This is because, as stated by Ambassador Malone, "The Convention cannot deprive non-parties of their existing rights, either commercial or military."

The U.S. will recognize a benefit from being a non-party to the Convention as it will not be obligated to make payments to the International Seabed Authority of a percentage of revenues derived from exploitation of resources of the continental shelf outside the 200-mile territory. Obviously no such requirement exists in customary international law. Other provisions of the Convention are felt by the administration either to be unnecessary or to exist already under the theory of customary international law.

The provisions of the Convention on conduct of marine scientific research establish technical rules designed to maximize the probability that consent for research would be granted by coastal states. Under the Convention if a nation fails to give a response to a request to conduct research off the coast, the consent is implied. Professor Charney emphasized that these arrangements were not codification of a norm or existing international law custom and therefore the "United States' scientific research interest will be worse off if the United States stays outside the new Convention."

The administration does not see this as a major problem in being a non-party to the Convention. Ambassador Malone pointed out that "bilateral and regional arrangements are possible wherever appropriate and other less formal approaches to facilitating marine scientific research are under study."

There is also considerable debate over the ability to protect the United States' interest in controlling marine pollution outside the treaty. The administration feels that the Convention is unnecessary because the existing international conventions provide adequate standards restricting the discharge of pollutants. In addition, present agreements are effective, in the view of the administration, in regulating design, construction, manning and equipping of ships, as well as in allowing the United States to enforce international standards as a condition of entering our ports. Even opponents of the administration's decision to decline to sign the treaty acknowledge that the environment would not suffer substantially without the United States' participation in the treaty. However, one should be aware that the provisions in the Convention for protection of the environment from activities in the international area of the deep seabed give exclusive jurisdiction of regulation of the pollution from deep seabed mining activities to the International Seabed Authority.

Considerable debate on the rights of non-parties to the Convention was created by the presentation by Professor Clingan. Professor Clingan is convinced that eminent authorities on international law recognize that the non-seabed provisions of the Convention are either customary international law or at least "a pattern of understanding reflecting the foundation upon which customary law will undoubtedly develop." He pointed out that the history of international law shows that the provisions of the 1958 Convention on

---

*"It is a fallacy to assume that we can pick and choose among the clauses and provisions of the Convention."*

---

navigation were "uniformly and universally applied to all States, signatory and otherwise, and I see no reason why this beneficial practice should not be expected to continue." Although the provisions of the navigation convention are too complex to explore in this context, it appears that the majority of the rights and privileges of the navigation provisions will eventually become customary international law.

The alternative of asserting the rights of the U.S. on the basis of customary international law while rejecting the creation of the International Seabed Authority under the Convention is characterized by some parties to the Convention as "picking and choosing" among the provisions. According to comments by the Honorable Carlyle Maw, former Under Secretary of State and present Chairman of Citizens for Ocean Law, "It is a fallacy to assume that we can pick and choose among the clauses and provisions of the Convention, adopting those we like under the rubric of 'customary international law' and rejecting those we do not choose to accept."

Not all of the provisions that the United States would like to see become international law can be realized outside the treaty. Maw pointed out that the provisions in the Convention on navigation, scientific research, conservation of marine mammals, environmental protection of the oceans and others were negotiated concessions in a "package deal" and could possibly be lost without U.S. participation in the Convention. This is the risk the U.S. takes in the near future. It will be a long time before we will be certain that our actions have been successful in preventing future conflict and promoting peaceful uses of the world's seas.

# A Requiem for the Three-Mile Limit

*Horace B. Robertson, Jr.*

In 1793, Secretary of State Thomas Jefferson proclaimed that the United States "for the present" restrained its territorial claim to the seas "to the distance of one sea league or three geographical miles from the seashore." The 3-mile limit of territorial waters has remained the consistent position of the United States ever since. This narrow breadth of territorial waters is an essential element of the freedom of the seas which has been fundamental to U.S. foreign policy since the birth of the nation. We have insisted also that the 3-mile limit, as a rule of international law, was binding on other nations as well. Today, the 3-mile limit, as a norm of international law, is about to disappear. It has served us well, and it is fitting to mark its passing.

The origins of the 3-mile limit are obscure. The popular myth is that it grew out of the range of an eighteenth-century cannon, hence the sometimes used title, "the cannon-shot rule." Modern scholarship suggests, however, that it sprang more directly from pacific and economic roots. Whatever its origin, however, the narrow territorial sea of 3 miles or one marine league is all that remains of sovereign claims to broad expanses of the oceans in an earlier era.

The idea of the freedom of the seas probably originated with Athens, which welcomed commercial relationships with other states. The idea was carried forward into Roman law. The Digest of Justinian stated that the sea and its coasts were common to all men. Since, however, international law as we know it today was unknown at that time, the reference to "all men" probably meant "all Romans." Nevertheless,



since Rome embraced so much of the known world, the distinction was not too important.

With the decay of the central power of Rome in the Middle Ages, dominion over the seas passed to the principalities and city states of the Mediterranean, Atlantic, and Baltic, each of which claimed tribute for fishing, trading and navigation in nearby seas. Although one might attribute such claims to greed, they also served a beneficial purpose, since the suppression of piracy was regarded as an adjunct of a claim to tribute. And following the breakup of the Roman empire, pirates swarmed along every coast.

Territorial claims in the oceans reached their apogee at the end of the Fifteenth Century when Portugal and Spain divided the oceans between them in a series of treaties which were given Papal blessing. It took nearly three centuries of naval warfare involving at various

times the Navies of nearly every European power before these claims were finally put to rest and the principle of the freedom of the high seas for all was established. As an adjunct to the freedom of the high seas it became generally accepted that every coastal nation could claim exclusive dominion over a narrow belt of the sea adjacent to its coast, the breadth of which was usually expressed as 3 nautical miles or one marine league.

The United States, coming into existence at about the time these doctrines were established, became heir to the benefits of them. Its commerce prospered in an era when freedom of navigation, trade and fishing were accepted norms of international law and practice. Except for relatively minor incidents, the period from the beginning of the Nineteenth Century until the end of World War II was one of stability and respect for the freedom of the seas and the 3-mile limit.

The end of World War II brought an end to that period, however. Ironically, it was an action by the United States which shattered that tranquility. In 1945, President Truman laid claim to the resources of the continental shelf off our coasts. Although his proclamation limited the claim to the seabed and subsoil and made no claim to the water or airspace above them, his proclamation set off a chain reaction. Led by a group of Latin American states, many nations extended their territorial sea claims seaward—to 12, 25, even 200 miles. These broad—and in the United States' view unlawful—claims touched off a series of international incidents—the tuna "war" between the United States and several Central and West Coast

*The broad claims of these new nations... threatened to gobble up the high seas....*

South American states, the cod "war" between Great Britain and Iceland, the shrimp "war" between the United States and Mexico and Brazil, as well as periodic flare-ups between wide-ranging Japanese fishermen and Korea, the U.S.S.R. and the United States.

At the first U.N. Conference on the Law of the Sea in 1958, the United States joined other maritime nations in an attempt to preserve the 3-mile limit. That attempt ended in failure because of the demands of many coastal states for exclusive control of fisheries beyond 3 miles. In 1960, at a second U.N. Conference on the Law of the Sea, the United States and Canada jointly offered to compromise for a 6-mile territorial sea tied to an additional 6-mile band in which the coastal state would have exclusive control of fisheries, but this failed of adoption by one vote.

In the 1960's the "creep" of territorial jurisdiction seaward became a gallop as dozens of new nations, not willing to accept traditional international law as "received" law and having a perception that the freedom of the seas was a device for their subjugation and exploitation, joined the family of nations. The broad claims of these new nations, together with the preexisting ones of many Latin American states, threatened to gobble up the high seas, rendering them a series of disconnected lakes, joined only by territorial seas of one nation or another. The threat to the traditional freedom of international navigation and commerce was obvious.

The principal motivating force for convening a Third U.N. Conference on the Law of the Sea in 1973, however, was not the desire to resolve fishing or navigation issues but rather to settle the newly

emerging issue of who was going to control the hard mineral resources of the deep seabed and to keep the seabed from becoming a source of international friction and competing national claims. Nevertheless, the U.S.'s decision to support the convening of the Conference was substantially based on a desire to stem the rush of national territorial claims seaward. To accomplish this goal the United States, with the support of most maritime states, proposed a territorial sea breadth of 12 nautical miles. This time the maritime states were joined by a new recruit—the U.S.S.R.—which in the period since 1960 had recognized its own self-interest in freedom of the seas in light of its growing international commerce, its enormous high-seas fishing fleet, and its emerging "blue water" navy.

The draft Convention approved by the Third United Nations Conference on the Law of the Sea in 1982 adopted a 12-mile territorial sea. The draft Convention also provides for an additional 12-mile "contiguous zone" in which the coastal state will have national jurisdiction over customs, fiscal, immigration and sanitary matters. And extending beyond that—to an outer limit of 200 miles from the coast—the coastal state may establish an "exclusive economic zone" in which it exercises sovereign rights over fishing as well as the other natural resources of the seabed, subsoil and waters. In those cases where the continental shelf is more than 200 miles wide, the coastal state's jurisdiction over

*And extending beyond that—to an outer limit of 200 miles from the coast—the coastal state may establish an "exclusive economic zone"...*

the subsoil can go even further—to 350 miles or beyond. Although the United States has indicated an intention not to become a party to the Law of the Sea Convention, it is generally agreed that the 12-mile territorial sea will soon become a customary norm of international law if it has not already done so. The concepts of the contiguous zone, exclusive economic zone and continental shelf have also gained acceptance as customary international law.

The simplicity of the old system with a 3-mile territorial sea and all the oceans beyond that limit being free for the use of all has disappeared, replaced by a complex of overlapping coastal state jurisdictions. The consequences of these regimes for mankind's common use of the seas are as yet only dimly understood. While one can acknowledge that, "The King is dead," it is difficult to muster much enthusiasm for "Long Live the King."

*... an additional 12-mile "contiguous zone" in which the coastal state will have national jurisdiction over customs, fiscal, immigration and sanitary matters.*

*Note: An earlier version of this essay was published in the Duke University Letters series on April 15, 1981.*

---

# LAW & HEALTH

*Book Note*

# Deregulating the Health Care Industry

Clark C. Havighurst, long a prominent advocate of procompetitive policies and antitrust enforcement in the health care sector, has recently set forth the case for reform of the medical market in *Deregulating the Health Care Industry* (Ballinger Publishing Co., Cambridge, Mass.; 520 pp., \$37.50).

Professor Havighurst, lauded as "the country's foremost student of healthcare regulation" in *Modern Healthcare* magazine, teaches courses in antitrust law, economic regulation, and legal issues in health care at the Duke University School of Law. His book comes at a critical time as the federal government seeks to cure problems caused by the explosive rise in the nation's medical bill.

In *Deregulating the Health Care Industry*, Havighurst examines national policies which in the past have emphasized strengthening government regulation to control health care costs, and concludes that such "command and control" strategies have largely been failures. Havighurst then lays out the case for permitting the marketplace forces of supply and demand to emerge in health care financing and delivery, and, finally, defines the elements of a responsible procompetition strategy which he believes will accomplish the move from regulation to deregulation in an orderly and realistic way.

The book's early chapters compare the strengths and weaknesses of regulation and competition, indicating, ultimately, that only in the private sector can effective, sensitive cost containment be achieved. Havighurst posits that proper rationing of services is probably beyond the power of government but not



of the competitive market, in which consumers' economizing choices can legitimize the sacrifice of benefits that might be gained from added spending but are not obviously worth their cost.

The book examines those defects of the market for health services that are frequently alleged to invalidate competition as a strategy, concluding that the market has ways of correcting or compensating for consumer ignorance and the distortions of demand brought about by third-party payment. The causes of the market's failure to contain costs in the past are explained in terms that suggest the nature of the needed remedies, including antitrust enforcement, reform of tax subsidies, deregulation, and the introduction of cost-conscious consumer choice in public financing programs.

Havighurst ultimately provides a blueprint for legislative action to reform the health care marketplace. His proposal is at once both restrictive and sensitive, striking a balance between a sharply reduced role

for government, and the necessity for government to supply funds to offset the predictable adverse side effects of price competition on medical education and research and on the system's capacity for indigent care.

At the core of the market-reform strategy advocated by Havighurst are amendments to the nation's certificate-of-need laws which presently require regulators to act affirmatively in aid of deregulating the health care industry on a market-by-market, service-by-service basis as demand-side market forces become capable of disciplining the supply side. Havighurst, whose work with congressional committees in 1979 largely inspired those amendments, would now have them strengthened through a requirement that health care regulators evaluate demand-side factors—the economic incentives at work and the way services are paid for—in making judgments about the need for entry controls on the supply side.

Determining the appropriate role for government in the health care system is a formidable task, and asking the government to remove itself as the dominant decisionmaker in the health care marketplace is an ambitious undertaking. Havighurst's explication of the progress that might be made toward reform through a renewed and strengthened emphasis on the procompetitive forces of existing law is hopeful, however, and may well provide the basis for the emergence of competition as a reliable allocator of health care resources. Havighurst's analysis represents a thoughtful approach that may serve the nation well as the government grapples with the difficult problem of burgeoning medical expenses.

*Alumnus Profile*

# Mental Health Legislation and Litigation in Britain

Britain's Mental Health Act 1959 overthrew late Victorian attitudes which attached moral stigma to mental deficiency and often resulted in punitive, non-therapeutic handling of the mentally ill. But in imposing additional safeguards against unjustifiable involuntary detention and retention in hospital facilities, the Act also largely transferred the role of magistrates and lawyers in compulsory commitment proceedings to the medical profession, except for review of commitment orders by administrative tribunals chaired by a legal officer. In little more than a decade the Act had raised concerns over patient neglect and skepticism about its one-sided reliance on the judgments of medical professionals.

Re-evaluation in the 1970's of this already antiquated system was sparked by observations and reform proposals published by Larry O. Gostin, who, following his graduation from Duke Law School in 1974, spent the next year on a Fulbright fellowship in psychiatry and law at Balliol College, Oxford University, and the Social Research Unit, University of London. Since the mid-1970's Gostin has been a key figure in bringing to public attention—in the popular press, specialist journals and books prepared expressly for the British Government's review of mental health legislation (*The Mental Health Act 1959: Is It Fair?* 1978)—the crucial legal, medical and social issues implicated in revising Britain's mental health laws.

Two-thirds of the policy proposals in Gostin's two-volume analysis of the Mental Health Act entitled *A Human Condition* (Vol. 1, 1975, on the civil law; Vol. 2, 1977, on the law relating to criminal offend-

ers) were adopted in the Mental Health (Amendment) Act 1982. The refurbished Act seeks to strike a more equitable balance between the legal and medical professions in the protection and treatment of the mentally ill in England and Wales. Gostin's concern for the elimination of exclusively medical discretion in matters better left to lay resolution and Gostin's stress on the involvement of mental patients in decisions impacting on their autonomy and welfare grew out of his experiences and study before and during his law school years, and out of a comparison of these perspectives with the system he found to be operating in Britain under the 1959 Act. Gostin's programs should also have future impact, since he now serves on an international Committee of Experts responsible for drafting U.N. Principles for the Protection of Persons Suffering from Mental Disorder and for the International Regulation of Human Experimentation.

After receiving his B.A. degree in psychology from the State University of New York at Brockport, Gostin came to Duke in 1971, worked in 1972 as a patient advocate through Duke's Child Advocacy Center and the Center on Law and Poverty, and

functioned as a consultant from 1972–74 for the N.C. Department of Mental Hygiene. With funding from H.E.W. Gostin was admitted as a pseudo-patient to Cherry Hospital for the criminally insane in Goldsboro. As a result of that field project he drafted a Mental Health Act and a bill of rights for psychiatric and mentally retarded patients, now substantially adopted as the law of North Carolina (*Patients' Rights in North Carolina's Mental Health Institutions*, 1973). Both in North Carolina and in Britain he has been instrumental in training mental health and legal professionals in patient advocacy.

The Legal and Welfare Rights Service, a wing of MIND (British National Association for Mental Health) for which Gostin has been Legal Director since 1975, is a multidisciplinary group consisting of lawyers, psychiatrists and social workers. The staff advises governmental offices, professionals, and patients and relatives on matters such as treatment opportunities, patients' rights and legislative reform. The lawyers' group, represented by barristers and solicitors who work pro bono, has defended patients and ex-patients in cases concerning housing, employment, community care, enfranchisement, access to the courts, education, compulsory admissions, and consent to treatment.

One strong focus in Gostin's dozens of smaller publications has been on jurisprudential, ethical and personal aspects of the administration of hazardous, unestablished or irreversible treatments in psychiatry. For treatments such as sterilization, electroconvulsive therapy, psychosurgery, and the forcible administration of psychotropic drugs, Gostin

---

*Both in North Carolina and in Britain he has been instrumental in training mental health and legal professionals in patient advocacy.*

---



has examined the vexing questions of consent, a patient's competency to *withhold* consent, and the determination of *who* decides where the patient's "best medical, social and personal interests lie"<sup>1</sup> in the area of compulsory treatment. Gostin understands the need for balancing valid medical goals against a mentally ill patient's right to make choices about his own health. He therefore argues for a requirement that risky, unorthodox, irreversible, or resisted treatment procedures be defended in individual instances to an independent authority outside the immediate medical community. He likewise argues for greater respect for a patient's own wishes,

---

*By no stretch of the imagination... has the American legal profession "solved" problems of compulsory treatment.*

---

where those views are not a product of mental illness.

Gostin's case for legal intervention in the regulation of drastic or controversial treatments is rooted chiefly in insights derived from American practice, where the government and the legal profession have, in some fields at least, taken a more activist position.<sup>2</sup> By no stretch of the imagination, of course, has the American legal profession "solved" problems of compulsory treatment. But Gostin presents a powerful rationale to the British professional for allowing law to place reasonable boundaries on the exercise of treatment discretion:

It is, of course, fundamental to the therapeutic relationship that the patient who enters the hospital for treatment has trust in the doctor and does not refuse all forms of treatment. The law, moreover, should not normally interfere in a doctor/patient relationship if it is based upon trust and consensual agreement. However, once that

trust breaks down, a psychiatric patient, unlike physically ill patients, will find it difficult or impossible to choose another doctor or simply to leave the hospital. It would be wrong in these circumstances if he were compelled in law to accept any treatment proposed and where, if he disagreed for whatever reason, his only recourse was to the same doctor who originally recommended the treatment.<sup>3</sup>

This is one of three cornerstones in the new "legal approach" to the provision of mental health services: setting limits on the authority delegated by society and its laws to the providers of psychiatric services, limits based in part on a renewed focus on consent and, where compulsion is involved, on explanation and justification from the medical professional to a non-expert evaluator of diagnoses, behavior predictions and proposed treatment regimens.

Gostin perceives two further cornerstone strategies in this new "ideology of entitlement" which declares that the mentally ill are endowed with enforceable rights to a certain social status and to a certain quality of life.<sup>4</sup> A basic premise of the ideology is its insistence that health and social services must be accessible by right and not as a function of charitable or professional discretion. In this respect Gostin observes an important difference between contemporary American and British approaches.

Conspicuously absent from American policy is a comprehensive legislative and political assessment of the needs of people suffering from mental distress and long-term programmes designed to meet those needs. (Compare the fragmented approach of the United States illustrated by judicial intervention on a case-by-case basis, with the integrated approach in national health and social service legislation and in the White Papers on service provision in Great Britain [DHSS, 1971 and 1975].)<sup>5</sup>

The final broad strategy of the legal approach is the elimination of social or political burdens based

---

*... the mentally ill are endowed with enforceable rights to a certain social status and to a certain quality of life.*

---

on psychiatric status. All too often invalid professional or social attitudes about the conduct or capacities of the mentally ill have produced mental health laws which remove liberties and civil rights granted to the non-mentally ill.

Basic societal rights or privileges such as enfranchisement, jury service, access to the courts, control of one's own possessions and finance, licences to drive or engage in a profession, immigration, unimpeded communication or association, are withdrawn without ever asking the question—is the individual capable of exercising the right or privilege at issue?<sup>6</sup>

Gostin's own writings and associated activities are playing a vital role in correcting that discrimination.

<sup>1</sup> Gostin, *Observations on Consent to Treatment and Review of Clinical Judgment in Psychiatry: A Discussion Paper*, 74 J. of the Royal Society of Medicine 742, 746 (1981).

<sup>2</sup> Gostin, *Psychosurgery: A Hazardous and Unestablished Treatment? A Case for the Importation of American Legal Safeguards to Great Britain*, 1982 J. of Social Welfare Law 83, 90.

<sup>3</sup> Gostin, *supra* note 1, at 751.

<sup>4</sup> Gostin, "The Ideology of Entitlement: The Application of Contemporary Legal Approaches to Psychiatry," in: P. Bean (ed.), *Mental Illness: Changes and Trends* (1983).

<sup>5</sup> Gostin, *supra* note 4, at 35–36.

<sup>6</sup> *Id.*, at 46.

*A Conference Report*

# Health and Safety in the Chemical Industry

A distinguished group of participants gathered at Duke on September 2nd and 3rd for a Conference on Health and Safety Regulation of the Chemical Industry. The conference, sponsored by the Duke University School of Law, was designed to bring together representatives of industry, government and academia to consider the effect of the major environmental laws of the past decade on the chemical industry. The Conference on Health and Safety Regulation of the Chemical Industry was the first in a series of activities at Duke this year designed to explore policy questions in current lawmaking.

The Law School has undertaken a series of interrelated activities during the 1982-1983 academic year designed "to explore some of the critical issues of legal theory, administrative law and policy, environmental health and safety, and public policy that are raised by health and safety regulation of the chemical industry," according to Associate Professor of Law Chris Schroeder, the conference host. In addition to the September conference, there are currently eight upperclass students engaged in a research tutorial directed by Professor Schroeder on Health and Safety Regulation of the Chemical Industry, in which the students research and produce a paper on some aspect of the topic. An upcoming issue of *Law and Contemporary Problems* will be dedicated to exploring in depth the legal and policy issues involved in regulation of the chemical industry. The highlight of this year's activities will be a conference sponsored by the School of Law in May of 1983 which will bring together a group of 50 to 60 participants representing the chemical industry, the environmental community, academia and the regulating agencies. According to Professor Schroeder, the purpose of the May conference will be to "... expose to serious review and criticism the difficulties and successes in current regulatory or legal practice that the existing legislative and judicial responses have brought to light, and identify ways to build on strengths and improve on weaknesses in the public and private law frameworks that have been evolving to address the chemical industry-related health and safety problem."

The September conference brought together experts with diverse views of the effects of safety and environmental regulations on the chemical industry. Few American industries have felt the impact of the past decade's flood of health and environmental laws as

severely as the chemical industry. Since 1970 Congress has passed sixteen federal legislative acts addressing safety, health or the environment in some way. Each of these acts and related judicial determinations of responsibility has created a legal framework for determining the course of chemical industry efforts in health and safety for the rest of the century. The major point of contention among the participants at the conference was not the impact of these regulations in the past decade but the proper path that regulation of the industry should take in the future. The debate on this important issue was partially a result of the underlying disagreement on the direction the chemical industry has taken in response to the statutes and regulations currently in effect. Obviously it is most difficult to agree on where to go if we cannot agree on where we are or how we got here.

The formal sessions of the conference were organized around topics which explored areas of the regulatory process involving the chemical industry. Dr. Fred Hoerger and James Hansen of the Dow Chemical Company presented the first paper entitled "The Cumulative Impact of Recent Health and Safety Regulation on The Industry." Following this presentation, J. Clarence Davies, a Senior Fellow at the Conservation Foundation, discussed "The Effect of Regulation on Industry Innovation," a paper which attempted to identify the impacts of industry regulation on innovation in the chemical industry. The first day's most controversial discussions followed Dr. Nicholas Ashford's energetic report on his research concerning "The Effect of Health and Environmental Regulation on Technological Change in the Chemical Industry." Professor Frank E. Grad of the Columbia University School of Law discussed his participation in the "Superfund § 301(e) Study Group" which was established under § 301(e) of the Comprehensive Environmental Response, Compensation and Liability Act of 1983 (P.L. 96-510, December 11, 1980). The study was prepared for presentation to the Subcommittee on Investigations and Oversight Committee on Science and Technology of the U.S. House of Representatives and dealt with recommended methods of improving legal remedies for injuries and damages from hazardous wastes.

Two papers suggesting the direction of future regulation of the chemical industry were presented on the second day. Dr. Susan Hadden of the L.B.J. School of

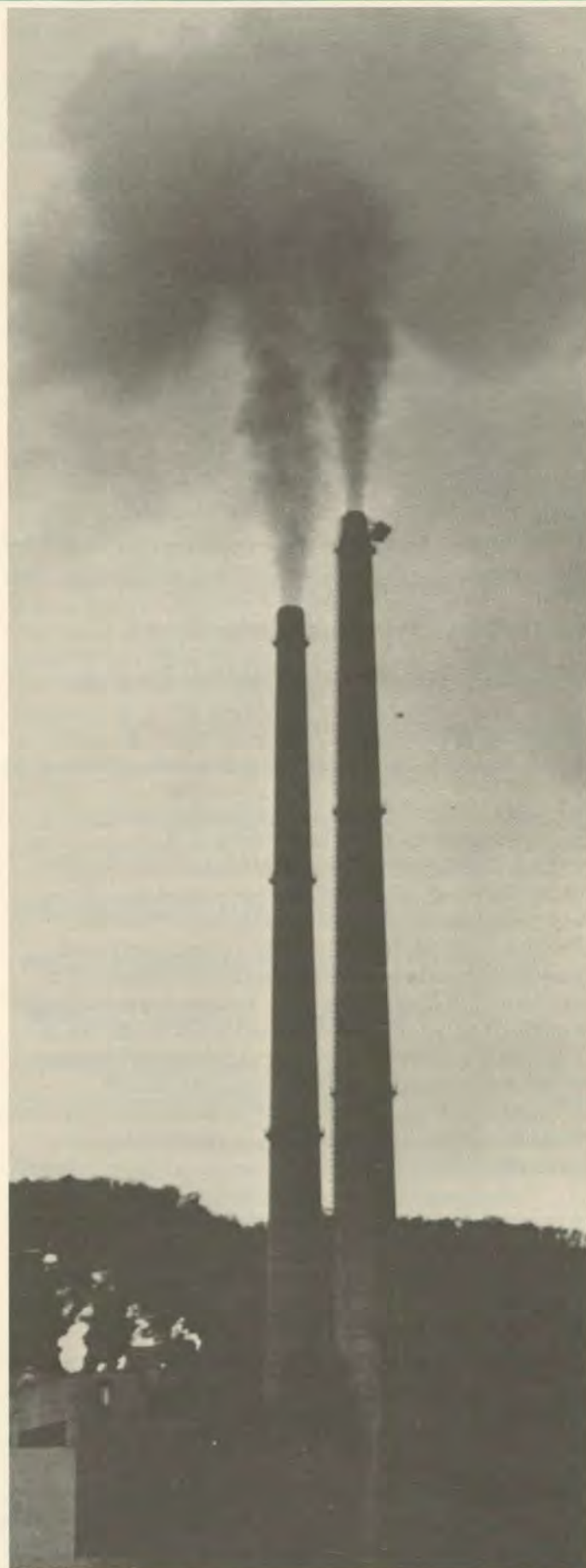
Public Affairs at the University of Texas delivered her report on "Labelling as a Regulatory Strategy for Chemicals," in which she proposed that standardized labelling of chemicals that improved consumer recognition of risks in their use could increase the health protection of the users and consumers of the chemicals. The final paper presented at the conference was "Media Quality, Technology and the Utilitarian Ideal: Alternative Strategies for Health and Environmental Regulation of the Chemical Industry" by Professor Thomas O. McGarity of the University of Texas School of Law. Professor McGarity's thesis is that the evolution of safety and environmental regulations points out the recognition by Congress that a purely utilitarian approach to regulation of the industry is not politically acceptable. He recommends a strategy to improve the efficiency of regulation of the chemical industry.

The most controversial issue at the conference, which cuts across many of the areas of health and environmental regulations, was the question of which combination of regulatory structures and legal remedies will best achieve the ultimate goal of pollution control. This question is not easily resolved but given the probability that we have most likely seen the last of the major legislative initiatives in the area for some time, the development of a well-defined policy for implementation of these laws is needed. A description of the present underlying regulatory structure of the chemical industry, background for this controversy, follows.

#### **PRESENT REGULATORY STRUCTURE**

The health and environmental statutes of the 1970's generally approach the goal of environmental protection in two ways by establishing media-quality limits and technology requirements. The "media-quality based" approach is founded upon the theory that the quality of the receiving media—for example, water—is best protected by establishing the minimum acceptable quality for each medium that is considered "clean" or "safe." The "media-quality based" approach is exemplified by statutes that direct the responsible administrative agency to promulgate regulations that insure that the medium will maintain this "safe" or "clean" state. Congress sets out some overall goal for the quality of the receiving medium which in theory reflects society's interest. This goal may be specified in terms such as "no more than 200 cases of human cancer per year" or "no more than 100 fish killed per year." Often this limit is set in some more socially recognizable goal such as "fishable—swimmable water."

Whichever terms are adopted, the regulatory agency then determines which level of a pollutant in the receiving medium will satisfy this goal. The regulatory body takes this stated goal and converts it, by estimating the effects of the pollutant at various concentrations, into minimum pollutant concentrations that will meet the goal. A model that calculates



pollutant loads can then be employed to allocated allowable discharges (for locations meeting the standard) or necessary reductions in pollutant discharges (for locations not meeting the standard). The general allocations are then matched to individual facilities' discharges to the water. The regulatory agency must then allocate the allowable load among the existing sources that discharge into the stream. This allocation formula is of major concern to the pollutant sources as it determines the level of treatment the discharger is required to achieve.

The technology-based standard is determined by Congress in terms such as "best available technology" or "lowest achievable emission rate" which articulates the degree of pollution control technology that the regulated industries are to employ. This requires the legislature to distinguish between new and old sources, types of production processes, ages of the facilities, costs of the pollution control techniques and other

---

*Few American industries have felt the impact of the past decade's flood of health and environmental laws as severely as the chemical industry.*

---

relevant engineering factors. The regulatory agency is required to survey pollution control technologies currently in use in the industry as well as technologies in developmental stages. The agency must identify the technology that best satisfies the statutory criteria. The cost of the technology is one of the criteria and therefore economic feasibility must be considered as well as technological feasibility. The agency must finally establish the degree of the pollutant discharge that is achievable by employment of the chosen technology within each category and then must specify the acceptable amount of the pollutant allowed, as expressed in units of pollution per unit of production, input, or discharge.

This approach allows the individual pollution source the freedom to choose the technology it prefers as long as the statutory goals are satisfied. The important distinction is that the technology-based approach is followed without regard to the existing quality of the receiving media.

Some environmental statutes adopted by Congress have employed a combination of both approaches. The Clean Water Act stands as a good example of this "mixed approach." The efforts of the EPA under the Act concentrate primarily on establishing technology-based standards for new and existing sources of "conventional" pollutants. The Act also provides for water quality-based standards and effluent standards. The Clean Air Act, the Occupational Safety and Health Act and

the Safe Drinking Water Act are further examples of the combined approach.

Both of these approaches have their limitations. Briefly stated, limitations of the media-quality based approach lie in its failure to link with ease the quality of the media and a particular source of pollution. In the area of health protection as well as environmental protection the approach is severely limited by the inability of the scientific community to accurately predict the health effects of exposure to small doses of chemicals. This leads to frequent rejection by the courts of media-quality based standards as a basis for enforcement actions.

The technology-based approach simplifies enforcement efforts and gives the regulatory agencies more discretion in targeting enforcement actions. However, the assumptions concerning future industrial growth and technological development inherent in this type of regulatory scheme are more easily challenged and rejected by courts. EPA's poor record of justifying technology-based standards in the courts illustrates the difficulty in justifying the underlying assumptions.

Professor McGarity discussed the utilitarian ideal that the unimpeded market best achieves society's goals and that regulatory schemes should be designed to have minimum interference on the marketplace. In the attempt to make an economic determination of the value of lost lives or poor health in the process of making a cost-benefit decision, McGarity claims that the valuation of lost lives and poor health is a political function and not a purely economic one. Economics is not eliminated from McGarity's analysis but the value that society places on a life is seen as more a political decision than an economic one. This is the basis for Congress' rejection of the utilitarian ideal and the strict cost-benefit approach to health and environmental protection.

The political decision to emphasize environmental protection to the detriment of economic efficiency reflects "society's nonutilitarian moral judgments," according to Professor McGarity. Society is willing to pay for protection of health and the environment, McGarity hypothesizes, due to a "wish to reaffirm ourselves that pollution is not merely inefficient—it is wrong." The tendency of Congress to combine approaches for regulation of pollution discharges by utilizing both the media-quality based approach and the technology-based approach is founded on the political goals of cleaning up dirty areas and maintaining pristine areas at "whatever the cost" while attempting to minimize the economic impacts of the regulations.

#### **FUTURE DIRECTION OF REGULATORY POLICY**

Given the present regulatory structure for protection of health and the environment and the political realities of our current social policy, what direction should regulation of the chemical industry take?

Professor McGarity proposes a modification of the

present system based on establishing technology-based standards for new sources and a stringent media-quality based system of pollution charges. A charge system, according to McGarity, would be based on a media-quality goal of zero exposure. A charge would be assessed for every unit of pollution. Such a system in theory would eliminate the need for the regulatory agencies to undertake the task of making the value judgments necessary to set "acceptable" levels of pollution.

McGarity proposes that the charge system be combined with implementation of a new system of technology-based standards for new sources. Chemical companies would then be able to be satisfied with the installation of new technology only if they were willing to pay for any pollution which remains after installation. McGarity claims that this approach would eliminate the current tendency for technology-based standards to push industries to the brink of the newest technology and freeze them there. Instead, the charge system would encourage these industries to continue to improve treatment as new technologies become feasible.

Such a combination system, as McGarity sees it, could eliminate the limitations of the media-quality based approach while maintaining the nonutilitarian goals set in the early 1970's for protection of safety and health.

It was far from universally accepted by conference participants that such a strategy would result in a reduction in pollution levels. It is possible that a battery of new technology-based standards would be a disincentive to innovation in new plants. It was suggested that chemical companies might choose to retrofit old plants rather than subject themselves to the technology-based standards applied only to new facilities. One participant insisted that under McGarity's proposals, a company would be better off to retrofit an existing plant and reduce the pollution charge to a level where the money paid out in charges was less than the cost of the capital for constructing the new facility.

The considerable debate on the use of technology-based standards reflects a basic disagreement among experts in the field on the impact of chemical industry regulation on innovation and the development of technologies. Certainly the most vocal debate of the conference followed Dr. Nicholas Ashford's presentation of his research on the effects of environmental regulations on technology change in the chemical industry.

Dr. Ashford, an associate professor of technology and policy, is the assistant director of the Center for Policy Alternatives at the Massachusetts Institute of Technology. The presentation by Dr. Ashford at the conference was condensed from a report on his research with George Heaton of the Center for Policy Alternatives on the effect of health and environmental regulations on technology change in the chemical industry. Ashford and Heaton developed a model

to investigate the effects of the legislation, regulations and other related actions which are designed to control environmental pollution. The impact of these mechanisms on technological change in the chemical industry was the main focus of the study.

Ashford distinguishes technological change from innovation by defining technological change as broad-based changes which include non-innovative changes such as the adoption of existing technology. Innovation, on the other hand, represents the process whereby a new product or process is brought into its initial commercial use.

The model employed by Ashford and Heaton was designed to identify the technological changes which resulted from an individual firm's compliance with regulations. The emphasis was on each company's response to the particular regulation. After briefly reporting the results of the study, Ashford initiated the most rousing round of debate during the conference with the suggestion that regulatory agencies can and should promulgate regulations with the design to "force" innovation or creation of new technologies. The blind use of technology requirements by agencies is not productive unless the agencies can relate the standard to the desired technological change. Ashford contends that "the important thing is not whether the standards are performance-based or technology-based but whether they are stringent enough to force new technology to be developed."

---

*The political decision to emphasize environmental protection to the detriment of economic efficiency reflects "society's nonutilitarian moral judgments"...*

---

Ashford offers as an example the asbestos industry, which was able to comply with the OSHA standard for asbestos before it was implemented because it required "off the shelf" technology that was available in all companies that manufactured asbestos. Such a standard is not a technology-forcing standard requiring the development of new control technology. In some ways standards can be technology-forcing if they impose such an expensive control technology on the industries that they are forced to seek a less costly solution.

Ashford emphasized the importance of choosing an appropriate regulatory strategy to achieve the desired response. For example, Ashford pointed out the regulation of benzene. A product safety regulation controlling the permissible concentration of benzene in industrial solvents may be more likely to change the nature and

production technology of these solvents than regulation of workplace exposure. One of the major impediments to development of technology-forcing regulations is that the regulatory agencies have been forced to rely on the regulated industry for most of their information about the possible technology change. This means that the vast majority of compliance actions by the industry amounts to application of off the shelf technology and, according to Ashford, that has resulted in less protection of health and the environment than might have been accomplished with another strategy. Ashford encouraged the regulatory agencies to increase their awareness of the fact that it is possible to develop regulations that are designed to stimulate development of new technologies resulting in greater protection of the environment and health.

There was considerable resistance to the idea that the regulatory agencies had the capability to design regulations that would effectively force technology, given the difficulty that the agencies had in developing less controversial regulations such as the effluent guidelines under the Clean Water Act. Ashford feels that such reservations are merely a recognition of problems in the government of keeping personnel specializing in designing such regulatory schemes. If the agencies had the people with the expertise to assess the current engineering potential in an industry for the development of technologies, there would be no problem. Even with such expertise in the agencies, some of the conference participants felt that it would be very difficult to get courts to uphold such strict requirements as would be necessary to force technology in a particular industry. The notion of a group of government engineers trying to convince a court that their "black box" model was the ultimate solution to implement congressional statutes for health or environmental protection troubled several conference participants.

The representatives of the chemical industry felt that establishing overly strict technology-based standards lost sight of the benefits that can be achieved in the marketplace. Dr. Fred Hoerger of Dow Chemical Company expressed this sentiment best when he pointed out that the chemical industry was supportive of technological change as long as there was a health or environmental benefit but that "change for innovation's sake will not help." Ashford insisted that his intention was forcing of technology for improvement of the environment, not just for the sake of innovation.

The ultimate issues revolve around the questions of social policy touched upon by Professor McGarity. Just how safe should we make the world? Our system seems to require us to prioritize our efforts to achieve the greatest gain in health and environmental protection. The question then becomes: given our limited resources, where do we target our efforts of forcing technological change or innovation to achieve the greatest benefit? The manner of prioritizing technology-forcing standards is a highly debated issue.

As was pointed out by a representative from the EPA, not everyone agrees on the method by which substances should be prioritized for regulation under one statute. Dioxin is one example. According to toxicity ratings, Dioxin is the third most dangerous chemical, but the quantities of it currently in the U.S. are relatively small. Should Dioxin be a priority for regulation or perhaps some less toxic but more common chemical?

The answer appears to be that Congress, the agencies and the courts will have to work out a consensus over time to regulate those substances that are a danger to our health and environment. The policy choices facing the nation will have a great impact on the level of pollution control realized as well as the economic health of the chemical industry. It is the intention of the faculty and students at Duke that this year's activities, focusing on these critical issues, will assist in the formulation of a national policy that is beneficial both to the chemical industry and to society at large.

---

*... regulatory agencies have been forced to rely on the regulated industry for most of their information about possible technology change.*

---

*A Report on the School*

# Judicial Clerkships

As befits a school of its stature, Duke has traditionally placed a number of its graduates in the clerkship ranks of federal and state courts around the country. Serving for periods of one or two years as research assistants, writers, advisors, and confidants to judges, these graduates have both enhanced their professional skills and broadened the visibility of the school through their service in the judicial system.

The present third-year class appears likely to garner a high number of clerkships, as interest in such service is increasingly strong among the students, and early hiring results show a high percentage of successful applications. Dean Paul Carrington, who aids students in their clerkship quests, anticipates that about twenty members of the class will ultimately serve as clerks, including some ten on the prestigious federal Courts of Appeals.

Carrington says that he does not give a hard sell on clerkships to Duke students, but does see to it that those who wish to serve as clerks have the opportunity to do so. Accordingly, he annually consults with students about making applications, and makes contact with judges to further the students' chances. The same is true of members of the Duke faculty—many of whom served as clerks before entering teaching—who are helpful to students both in offering advice, and in offering recommendations to judges.

Duke graduates have clerked in every federal circuit over the past several years, with the greatest number going on to the Fifth and Eleventh Circuits. In addition, a number of students have gone on to federal district courts and to state appellate courts.

Carrington lists three reasons why students should consider clerking. First, he notes, "a year in the courthouse assisting in the exercise of judicial authority can afford insights to illumine decades of law practice; it is the kind of experience that enhances judgment." Second, he says, working under the close supervision of an experienced judge affords a unique opportunity for professional training. And, finally, he believes clerking to be a useful credential in the search for future employment.

The Honorable Gerald B. Tjoflat, a 1957 graduate of Duke who now serves on the United States Court of Appeals for the Eleventh Circuit, agrees with Carrington's assessment of the value of a clerkship.

"Through clerking, a student can gain an experience that money simply can't purchase," Tjoflat says. "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."

Tjoflat likens the perspective clerks gain through their experience to that of a person "looking down from a mountaintop" at the judicial system in operation.



"A clerk sees a digest of all things in a case," he says. "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.

"By the time he finishes his clerkship," Tjoflat adds, "the clerk ought to have a thorough idea of how the system works." And, he notes, the clerk may also have "unlimited opportunities for future employment."

It is Carrington's belief that almost any Duke graduate would be competitive for clerkships at some level in the judicial system. While noting that some judges will only consider students with outstanding academic credentials, he points out that many judges focus more on a mix of intellectual and personal traits in selecting their clerks.

Judge Tjoflat says that in selecting his clerks he looks for the student that has a "very bright, agile, inquisitive mind—a mind that is open and full of questions." His

---

*"... 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."*

---

clerks, he says, "must have the analytical ability to explore a problem, get to its bare essentials, and reason it out." Finally, he notes, his clerks must have even dispositions, must communicate well, and must "want to learn a lot."

Tjoflat, who has employed some twenty-two Duke graduates as clerks in his twelve years on the federal bench, professes confidence in the intellectual training offered at his alma mater. "The quality of a class runs extremely deep at Duke," he says, "and it has been both my personal experience and the consensus in the Circuit that Duke clerks have acquitted themselves equally with clerks from other top schools."

In the ranks of judicial clerkships, just as in the levels of the court system itself, there is a hierarchy in which service at the United States Supreme Court stands at the top. Law clerks from appellate courts across the country strive annually to be selected for a one-year tenure as assistant to one of the nine Supreme Court Justices.

Alan Madans '81 was recently accorded the distinction of being selected to spend the present term clerking for Justice Harry A. Blackmun. Madans, a former Editor-in-Chief of the *Duke Law Journal* and Clerk to Judge James C. Oakes of the United States Court of Appeals for the Second Circuit, began work in early August helping Justice Blackmun shape the decisions of the highest court in the land.

---

*... the talk ranges from the work being done to the current baseball standings.*

---

Madans has thus far found the experience to be not only challenging and rigorous, but enjoyable.

"Clerking at the Supreme Court is demanding, but it's also fun," he says. "It's exciting to be at the center of the body that decides what the law is."

According to Madans, the bulk of his time is spent preparing memos for Justice Blackmun on cases that are scheduled to be argued before the Court. Justice Blackmun's four clerks divide the cases among themselves, and prepare twenty to fifty page memos on each one. The memos contain summaries of facts and of proceedings from the courts below, and present the contentions of the parties. The drafting clerk also writes a discussion of the legal issues involved, and recommends a disposition of the case.

It is generally through such memos that Madans prepares Justice Blackmun for consideration of a case. "Justice Blackmun might come to the clerks if he has something to discuss," Madans says, "but most of our thoughts are fully developed in the extensive memos."

Madans says that Justice Blackmun keeps his clerks aware of the status of cases, informing them of the Court's leanings once the arguments have been heard and the Justices have met to consider them. The clerks become further involved in the adjudication of those cases in which Justice Blackmun decides to publish his thoughts, as they play a substantial role in the drafting and editing of opinions.

Beyond the formal level of contact at the Court, Madans has found his informal contacts with the Justices and the other clerks to be rewarding. Justice Blackmun has breakfast with his clerks each morning, and the talk ranges from the work being done to the current baseball standings. Madans has contact with clerks from other chambers throughout the day, particularly at lunch time when they meet in groups. Often, clerks working on the same case for different Justices will discuss the progress of their work.

Madans has found his colleagues in the clerkship ranks to be "an interesting bunch," noting that they "all are very capable, and many are brilliant and insightful." He also says that they are a hard-working group, pointing out that Justice Blackmun's clerks make it a practice to work nights and weekends, "not because the Justice is a slave-driver, but because the time is needed to get all the work done."

After his clerkship has ended, Madans intends to enter private practice, and he entertains notions that he may someday teach law. Regardless of his path, it is certain that his experiences with the Supreme Court will serve him well.



*Student Profile*

# American Lawyer for the People's Republic of China

This year the Law School's first-year class includes Shi Xi-minh, a 32-year old Special Student and Richard M. Nixon scholar from Beijing, China, who is visiting the United States because he feels that China needs a code of laws which can reflect and protect the interests of its people in full-scale economic reconstruction. Shi Xi-minh recognizes that his country is once again at an historical turning point, after ten years of disorder which followed the initial failed attempt at modernization. Shi traces the failure of the 1958 "Great Leap Forward" to the extinction of political democracy. Without political democracy, he says, there can be no economic modernization and without an effective legal system there can be no political democracy. In his determination to improve the Chinese legal system Shi plans to acquaint himself at Duke with general American legal theory and practice, then assimilate whatever might be usefully transferred to the Chinese context.

In China Shi worked for four years (1974-78) as business negotiator in a state-run foreign trade corporation for the import and export of machinery, where he also drafted long-term contracts. In 1978 he was selected as a graduate student at the Beijing Institute of Foreign Trade, where he studied world trade and economics. He acquired his exemplary command of English at the Beijing Foreign Language School, where he studied from 1963 to 1968. That school was one of the first such schools in China and it maintains an extraordinary selectivity, accepting each year only 180 out of about 35,000 applicants.

During the Cultural Revolution Shi was elected director of the general office of the Beijing Con-



gress of Red Guards; later he was arrested and imprisoned as a "political offender" against Maoist authority. Between 1968 and 1974 Shi served in the Chinese Air Force. He was, however, sent to a kind of labor camp for "re-education" after the politically-motivated persecution and imprisonment of his father. Shi was released from the camp following Lin Piao's fall from power and spent 1971 as army representative to the Public Security Bureau in a city in the Henan province. The next year he spent at a military academy.

Shi Xi-minh worried about his first trip outside China and to America. His American friends in Peking had prepared him for a "cultural shock" and were concerned for him. Accordingly, Shi had "nervous expectations that he would be unable to find the familiar signs and symbols in his social intercourses." He feared that this cultural shock would "disconnect him from his past."

Despite this trepidation, Shi has been pleasantly surprised by his American experiences. He has not been shocked, he says, by our American society. Many aspects of daily life he has found familiar,

and he says that his present and past are still closely connected as he wishes them to be. He remembers that his nervousness quickly disappeared when he found that the Americans that he encountered were very friendly. Durham's relaxed loose atmosphere and friendliness reminds him of a small town in China.

Shi Xi-minh did not expect law school in America to concentrate so heavily on the practical aspects of law in contrast to jurisprudence. (Shi is following the full first-year curriculum this year.) He notes that American law school is more of an "attorney's school." Because of this perspective, he has found it necessary to teach himself a different way of studying—learning how to read and then to recite rather than just reading and thinking to which he had been accustomed.

Shi believes students at Duke study extremely hard and was surprised to discover this, considering our affluent society. In China, he says, he has never encountered the type of pressure that he feels American students encounter. Despite this concentration and pressure with which American students are faced, Shi has been most impressed by the American student's constant habit of free thinking.

Shi Xi-minh had one comment about American society in general in contrast to Chinese society. He reflectively noticed that "Americans waste everything but time; in China, everything is saved except for time." He feels that he has now learned to save time also, and names this "saving" as a way to increase China's efficiency.

# The Law Cabins

W. Frank Malone

*Mrs. Carrington received this informative letter after chatting with Frank Malone at the 1942 class reunion this fall. Both he and his wife Margaret (Nursing '39) lived in Duke's legendary cabins, about which he writes:*

On a recent visit to Duke I had a lively dinner conversation about the legendary Duke law cabins and the nearby Duke nurses' cabins. It was said that the School needs more documentation on this than it has, and I undertook to send whatever I had. The results are enclosed. I also spent time in vain searches for material I know I have but cannot find. As my first employer in Baltimore used to storm through the office saying, "We don't need filing clerks around here; we need *finding* clerks."

Candor compels the admission that it was the medical school, and not the law school, that first built cabins north of the hospital in what was then still part of the Duke Forest. They built three of them in the mid-1930's, in a line off the southwest corner of Trent Drive and Erwin Road, i.e., where Hanes House now squarely sits, having wiped out the cabins. They were intended for use by interns, but after they had used them for some time it was found impractical. It was a good 5-minute walk from the cabins to a given ward of the hospital, and at all hours of the day and night that was too much. And so in September 1938, just as the law cabins were opened, graduate nurses working at the hospital were moved into the medical cabins.

I have no idea what caused Dean Claude Horack to build the law cabins, or select the particular site, or how they were built. They were in place and ready to go when I got there in September 1938 and I, with many of my classmates, was assigned to live there. If only members of the incoming 1941 class had been put there it could have been said that we had no choice. But there was a substantial group of second- and third-year students (1939 and 1940). They were already at the school, and went to the cabins because they wanted to go.

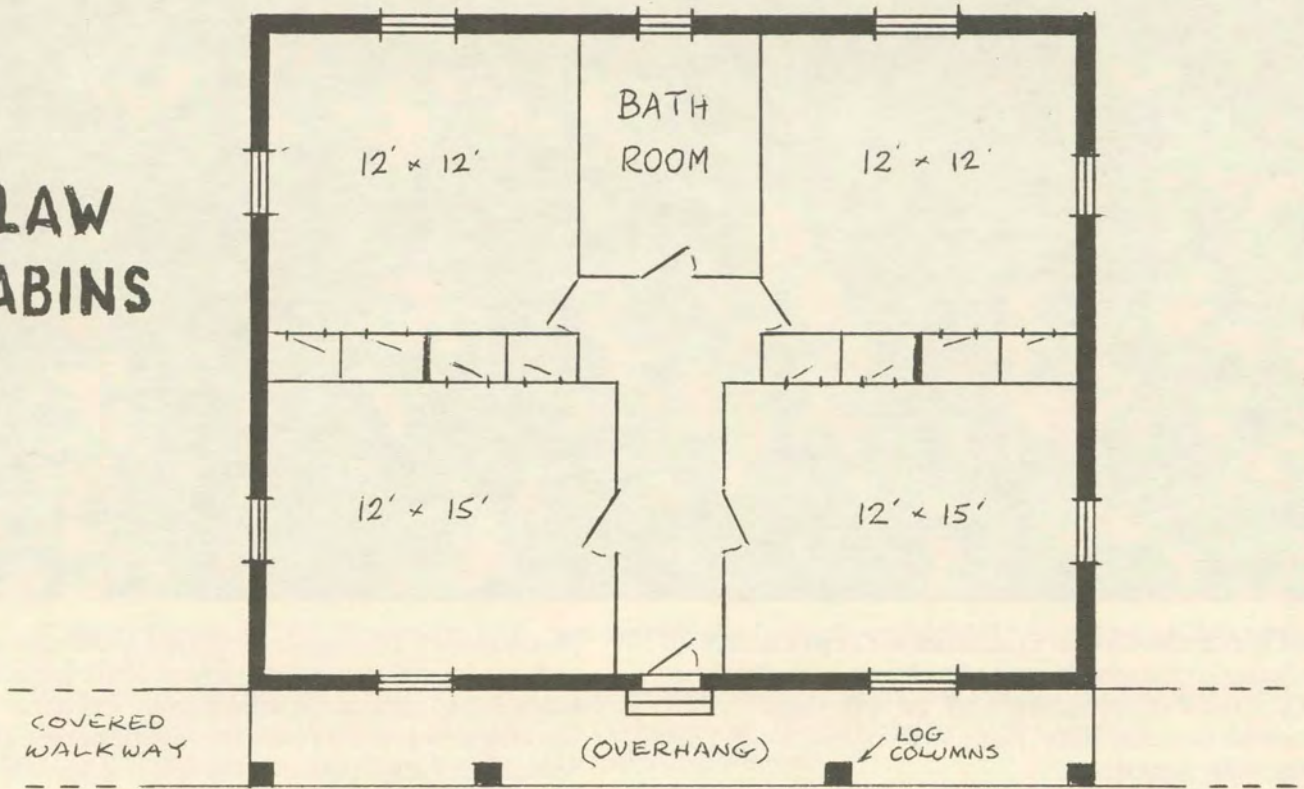
The cabins were built in fairly close proximity to the power plant, which is now larger than then, and about a quarter of a mile from the nurses' cabins. There were five of them: four residential cabins, each holding eight students for a total of thirty-two, and a central recreation hall. The latter is the only one of which I have pictures. The others were built two to each side of it, and angled slightly to form a sort of crescent. All were connected by a covered flagstone walkway. We got to the law school, the old one on the quadrangle next to the library, by walking up a wooded path past the power plant, around the north end of the hospital, and into the rear entrance of the law school by its parking lot. It can't be done today, but except in very wet weather it was pleasant enough then.

The exterior photograph of the recreation hall gives a good idea of its scale and how the covered walk connected to the others. All the cabins had a log exterior, well-notched and mortared. Dean Horack was said to have intended this to show that we embryonic lawyers were following in the Abraham Lincoln log cabin tradition. That may have been, but Lincolnque the cabins were not. The rooms in the residence cabins, while not very large, were paneled in completely clear pine, stained a light brown, a sort of paneling that can hardly be found today. You can see from the interior photograph of the recreation hall that it had a mixture of log and stone interior walls and a very large stone fireplace. It had small rest rooms at one end, and a small kitchen and utility room at the other; otherwise, it was a big open room with three french doors to the outside. It had an array of sofas, chairs, tables and lamps that could be grouped in the center or shoved over against the walls for a party or dance. There were no rugs and no one wanted any, although Bill Womble, '39, had a fine Indian rug that he hung over the fireplace during his year there.

But while the cabins were hardly primitive, that did not keep the sorrier wits from pinning various tags on them. The Dean's full name was Hugo Claude Horack



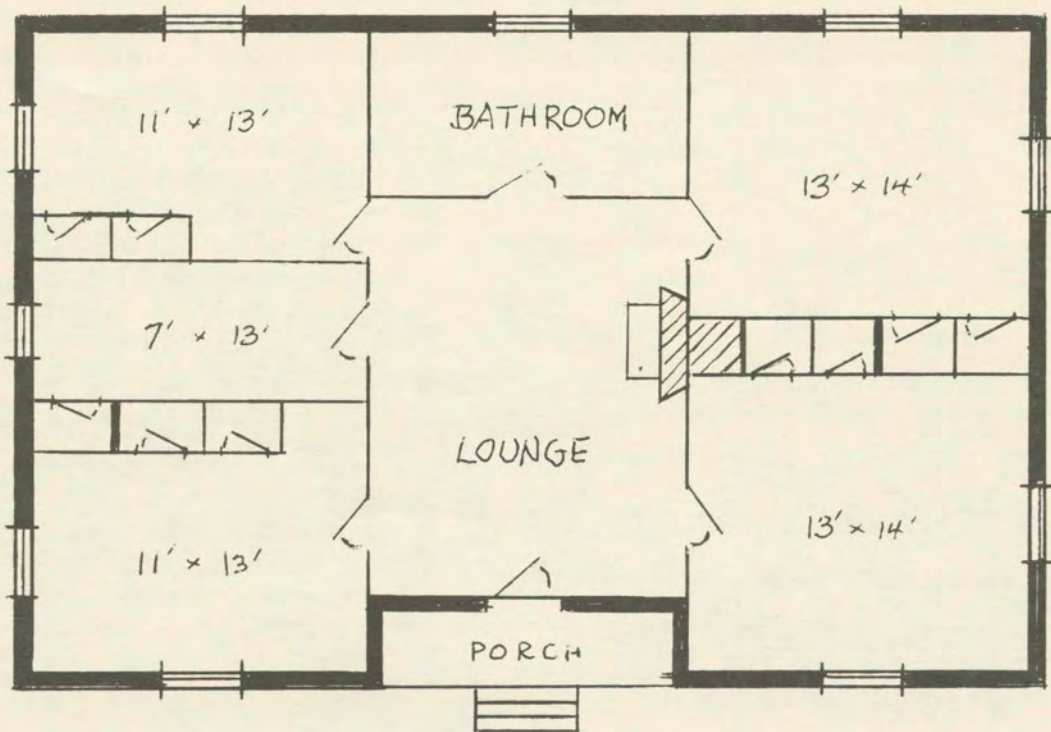
# LAW CABINS



DIAGRAMMATIC ONLY.

Dimensions and details are approximations, and NOT drawn to scale.

# NURSES CABINS





and Roosevelt's Civilian Conservation Corps was still in being, so somebody immediately came up with "the CCC: Claude's Cozy Cabins" and "the 4-H: Hugo Horack's Horrible Huts." There were others, which I have mercifully forgotten.

Once the 1938 charter inhabitants (inmates?) had settled in, Dean Horack organized a reception. Not only was it attended by faculty and students; he had issued a group invitation to the nurses at the nurses' cabins, and had said that any who wished to come would have escorts from the law cabins. In the picture, first, there are four identifiable faculty members: (1) the man slightly to the left center in a light gray suit is Charles Lowndes; (2) the man to the upper left center under the hanging lamp is Lon Fuller; (3) the shorter man he is talking with is Arthur Cathcart, a visiting professor that year from Stanford; and (4) at the far left is David Cavers. Otherwise, everyone in the picture, a small part of the total, is a law student or a graduate nurse. I am in the right center (about 55 pounds ago) talking with the blond wavy-haired nurse (glass raised) whom I brought. It has to be said that as the months wore on there were a few times when something stronger and in greater quantity was consumed than the stuff in those

---

*It is hard to realize today how big and important Fox Movietone News and its competitors were in the pre-television era...so when Fox came to Duke to do a short feature on those Abraham Lincoln cabins it was a big event.*

---

punch glasses. This usually occurred in the afternoon and evening following the morning of the last semester exam. But in general we were a sober and hard-working group, and so were the nearby nurses. There were a lot of good parties at the hall, but never to my knowledge a very wild one.

Once the cabins had gotten underway they attracted a great deal of attention, including an appearance in the fall of 1938 on Fox Movietone News. It is hard to realize today how big and important Fox Movietone News and its competitors were in the pre-television era. Every movie show opened with them, so when Fox came to Duke to do a short feature on those Abraham Lincoln cabins it was a big event. The filming took place inside the recreation hall after they had taken a few exterior shots, and we sat in rows facing Dean Horack, who stood with his back to the fireplace facing us. As per the script he would start off saying, "I have selected you men to live in these cabins..." at which point the film crew would break it off and change something. This went on so many times that by the time of the final take we were so damned weary of being selected that the Dean was getting hoarse and the rest of us were practically asleep. But when Fox released it, everybody flocked to the movies at Page Auditorium to see it. It lasted about three minutes, and the Dean could hardly be heard on the screen because of shouts all over the theater of "Hey there's so-and-so" and "Hey there I am"—movie stars all. As for me, the shot of the back of my head was superb. I have often wondered whether 20th Century Fox or anyone else has a library of these films and whether the school could get a clip of it.

I have tried to show the general floor plans of both sets of cabins. First I must say that while my father was an architect, and one of my brothers still is, none of that has rubbed off on me. I can scarcely draw a straight line and the draftsmanship is totally imper-

fect. But I hope it gives some idea of how they were laid out. The nurses' cabins, while not made of logs, resembled the others in having a rustic exterior and comfortable interior. They did not have a central hall, but each had a lounge in the center of the building with easy chairs and a fireplace. These were so inviting that the law school, along with the medical school, spent a lot of time there. Some would go there without a date, simply to get-up a card game with whoever was around. Three marriages grew out of this in 1940 and early 1941 and at least two, including ours, have lasted over forty years. (I should add that when Margaret graduated in 1939 she stayed on as a teaching assistant and was assigned to the cabins. We first met there.)

I do not of course know how the cabins fared in the

war and post-war years. I hope they were enjoyed as much as our group did. But on a brief visit in July 1961 it became painfully evident that the VA hospital had doomed them. The residences were already gone and the central hall was rapidly going. Even giving a large discount for nostalgia, it was and is a depressing sight.

This has been long and rambling; but lawyers, even non-practicing ones, do that. I hope it will stimulate more and better input from those who lived there. I would particularly like to see some from my classmates, all of whom—then and now—have better memories than I.

*W. Frank Malone received his J.D. at Duke in 1941. He is a Retired Colonel in the U.S. Army.*

#### CHARTER RESIDENTS OF LAW CABINS—September 1938

Seated, L to R: Jack Moran (41); Bill Ault (41, later 42); Ross Arnold (40); Numa Smith (41); Ken Harris (40); and Hugh Gracey (40).

Kneeling, L to R: Maury Weinstein (40); Norton Arst (41); next can't identify\*; Virg Coopridner (41); Gus Margraf (39); next can't identify\*; and Jim Mattocks (41).

Standing, L to R (by heads): Bill Watson (41); Walt Lenox (41); Charlie Fischer (41); Elwood Barkman (41); Bill Womble (39); next can't identify\*; George Burwell (39); Aute Carr (41); next can't identify\*; Ed Reid (39); Gene Desvernine (39); Elmer Rouzer (40); Frank Malone (41); and Norm Wherrett (41).

\*Am sorry about the four I couldn't identify; they probably couldn't identify me either. There were five others not in the picture. The only one of those I am certain of is Ben Raub (40).



# Dean's Dedication Speech

*On September 19, 1982, Dean Carrington delivered the dedication speech on the occasion of the relocation of the Salmon P. Chase Law School from Cincinnati to the University of Northern Kentucky. His remarks on the transition of Salmon Chase to a university law school are slightly abbreviated for publication here.*

As a university law school, it is now the duty of Chase not merely to provide training in the law, but also to perceive and to reveal the law's truths. A law school which draws its succor from a university, if it is the true child of a true parent, must maintain a harbor for reflection, and for detached criticism, of the law, its institutions, and even its practitioners. Over the longer arc of time, a university law school earns and justifies its status by performing the useful errand of social and political criticism, of law reform. This work may sometimes try the patience and test the temper of university administrators, trustees, legislators, members of the profession, and even citizens at large. In some circumstances, however, the irritations may serve as the best proof of the value of the service performed.

If I am right that law reform is an important function of a *university* law school, Salmon Portland Chase would certainly have approved this additional emphasis. Perhaps we might pause today to recall that in his early days in Cincinnati, in the spring of 1830, Salmon Chase participated in the organization of the Cincinnati Lyceum. He presented one of its first lectures on the subject of the Life and Character of Henry Brougham. Lord Brougham, it may be recalled, was perhaps the greatest of nineteenth-century English law reformers. He was particularly noted for one enormously powerful speech delivered in 1828; I quote Salmon Chase's lecture on Brougham's address to Parliament:

It is perhaps saying not too much of this speech to affirm that there is not one, ancient or modern, that contains a larger amount of information, all bearing with admirable adaptedness and resistless effect, upon the very question under consideration. In this speech, he brought before the House the whole condition of the common law. No nook of the immense field had escaped his observation. He went into every dark corner and hidden recess, as into familiar and frequented haunts. And to this great knowledge of what the law was, he added a clear and sound understanding of what the law ought to be. While he pointed to the evil, he did not omit to indicate the remedy. There is a spirit now awake upon the subject that will not slumber again, until, instead of the present cumbrous and unintelligible system of law and courts, like that far-famed labyrinth, into which if a man entered he never found his way out again, England shall have a simple and intelligible code of laws, and a cheap and prompt administration of justice.

I share with Salmon Chase a strong admiration for Henry Brougham. I hope to induce you to share in this feeling by reading a Brougham peroration. I ask you to note how contemporary the thrust of Brougham's remarks may be; indeed, his passion for equal justice before the law will always be timely. Brougham said:

It was the boast of Augustus that he found Rome of brick and left it of marble. But how much nobler will be the sovereign's boast when he shall have it to say that he found law dear, and left it cheap; found it a sealed book, left it a living letter; found it the patrimony of the rich, left it the inheritance of the poor; found it the two-edged sword of craft and oppression, left it the staff of honesty and the shield of innocence.

That Salmon Chase shared this specific sentiment of Brougham is not in doubt. In his same lecture, after himself recounting some of the shortcomings of the substantive law, he observed:

The administration of the law is more wretchedly defective than the law itself. Justice is sold at an enormous price. The witty saying of Horne Tooke is too true. To one who said, the courts are open, he replied



"Aye, like the London tavern, to all who can pay the bill." So high are these bills, so great is the expense of legal proceedings, that it is frequently better to pocket an injury quietly and say nothing about it, than to attempt redress at law.

The author of these acerbic words about the law would certainly have approved the transition in his institution which is marked by this day's event.

In urging that the role of critic is a central function of the university law school, I do not mean to suggest that the role cannot be performed in the context of a free-standing professional school. Plainly the contrary is true. But for the independent law school which functions primarily to satisfy the immediate needs of the students who are its consumers, the role is not central, as it is for a university law school which owes a strong allegiance to its discipline and to the ideal of truth.

Nor do I mean to claim that all university law schools at all times effectively serve the law and its reform. Like other institutions and individuals, we often fall short in the performance of our obligations. There are many obstacles to be overcome within a university law school; many of them we place before ourselves. Among the obstacles to effective service are intellectual sloth, pedantry, the quest for popularity with critical student audiences, timidity, parochialism, the desire to ease the stress of anxiety by affirming false verities. And there are such external distractions as bar examination results and the like. So we celebrate today not a new achievement of this institution, but rather a new ideal, an enlarged purpose.

This enlargement of purpose should be tangibly seen in operation, if it exists, but only in the subtle undertones of this school's curriculum. More frequently than in the past the faculty of this school should feel obliged to ask, and the students should feel obliged to consider, questions as to what the law ought to be. It is our professional duty, nay even our sacred duty, to examine the law as fully and deeply as we are able, and to reveal all its blemishes as we know them, whether or not the knowledge of these flaws will shortly enhance the services or the earnings of our students.

Let me illustrate with three examples. I will reveal three unwelcome and uncomfortable truths about the law. To be completely candid, I must acknowledge that I have less confidence in my assertions than I am about to manifest. I here adopt an oracular style in order to bring more clearly into relief the irritating and troublesome nature of the enterprise on which we have here embarked. And to spare you the words necessary to express all the appropriate qualifications.

### MARIJUANA LEGALIZATION

First, I assert that the study of criminal law in a university law school should include a serious examination of the effects of our pathetic laws controlling the use of marijuana. One need not diminish

one's disapproval of the use of marijuana in order to recognize that the time for legalization is long past. The law has been sent on an impossible task and is causing incalculable harm in its vain effort to control the substance. One cost is that many honest folk are being made criminals. Thus, last week in my state, a farmer was arrested for growing three acres of marijuana. He was substantially in debt, and was apparently hoping to save his small farm with a supplementary cash crop. This seems like a melancholy tale until I tell you that the value of his three-acre crop was seven million dollars. Given the high likelihood that such a farmer will escape detection, what kind of sanction is needed in order effectively to deter his conduct? Marijuana is now the second largest cash crop in North Carolina; it would not be surprising to learn that it is the largest

---

*... there is a limit to the amount of temptation that they can all reasonably be expected to resist.*

---

in Kentucky. If we cannot prevent production in the face of such incentives, the result is prohibition to turn small farmers of your state and mine into adversaries of the law.

A similar effect is the corruption of our law enforcement system. We have had surprisingly few scandals so far. But there can be little doubt that bribery and illicit influence are present with growing frequency. We are blessed with many fine law enforcement officers and judges, but there is a limit to the amount of temptation that they can all reasonably be expected to resist. And we are surely exceeding that limit.

The third enormous cost is the powerful stimulus we are providing to organized crime. Smuggling is now a major industry. And piracy on the sea and even in the air is a minor one. Consider that a short while ago over 90% of the one hundred dollar bills in currency in the United States were located in Dade County, Florida. The marijuana distribution system is not only enormous and highly profitable, but it may well be the central nervous system of organized criminality which spreads its tentacles into so many aspects of our economy. The wrong people have and continue to receive plenty of money for all their purposes, legal and illegal.

A fourth cost of prohibiting all use of marijuana is that it disables us from using the law to impose any lesser restraints on use of the offending substance, where lesser restraints might actually be effective. Restraints on sale to minors, for example, might be more effectively maintained if those restraints were imposed on vendors engaged in an otherwise legal business.

A fifth cost is the foregone public revenue that could be derived from taxing the use of marijuana. This is a point that may have special force to us North Carolinians,

suffering as we are under the lash of increased federal taxation of tobacco products. But surely in these times it is perverse not to consider the tens of billions of dollars of public revenue that are not received as a result of our vain efforts to prevent consumption of the offending substance. These funds are in large measure the same monies that we now divert to the underworld which collects the high profits of illegality.

I will not pause to qualify or enlarge on this argument, for it is not now my purpose fully to convince you of its ultimate merit. My point is that it is an appropriate, perhaps even an obligatory, item on the agenda of this university law school.

### PROGRESSIVE INCOME TAX

For a second illustrative uncomfortable truth, I assert that the progressive income tax is not progressive, but is a system of rewards for chicanery. Like the laws regulating the distribution of marijuana, the progressive income tax has become a substantial source of lawless conduct by otherwise loyal and worthy citizens.

The absence of progressivity in the federal income tax is perhaps not easily demonstrated, particularly to taxpayers of moderate income who feel the heavy burdens imposed upon them. The fact is, however, that the tax system is now so encumbered with incentive provisions designed to subsidize activities which have been deemed worthy of subsidy that the tax can fairly be said to be designed to be avoided by those with adequate resources to engage in effective tax planning. No one was surprised to learn that our President, despite his large income as a private citizen, was paying a modest rate of tax at the time of his election. Indeed, we would be surprised to learn of a handsomely rewarded public figure that he or she was truly paying a large tax.

One must surely concede that there are many benign activities which are in various ways supported by federal tax subsidies. The three-martini lunch industry stands beside home ownership as activities which are heavily supported by the indirect consequences of federal income taxation. But because these subsidy programs are indirect and derivative from what purports to be a progressive tax, they are regressive consequences. That is to say that the wealthiest taxpayers get the biggest benefits from the subsidies.

Moreover, not all of the activities which we thus subsidize are so benign as home ownership and entertainment. There is mounting evidence that the tax system diverts investment capital away from productive activities into less productive ones. Tax-wise investors actually prefer, for tax reasons, high risk enterprises which offer the combination of possible large quick capital gains with tax support for any accompanying losses. Other tax-wise investors are driven into tax-exempt securities which may be less productive of employment opportunities than are investments in non-tax-exempt activities. We are, in short, partly because of the progressive income tax, a people

often engaged in wildcatting, gold hoarding, and coupon clipping.

And, although we infrequently wish to acknowledge this, the federal income tax is unevenly enforced. Millions of taxpayers succeed in avoiding the tax with respect to significant elements of their income. And others, perhaps numbering in the millions, have been driven into the cash economy where no records are kept and where all income is criminally unreported.

At least in a university law school, these uncomfortable realities about the revenue system cannot be ignored. Here we have a professional duty to expound upon them. Students enmeshed in the intricacies of the Internal Revenue Code cannot properly be allowed to take leave of their subject without paying substantial heed to these major blemishes in the law.

### PRETRIAL DISCOVERY

For a third illustration, I assert that the present procedures employed for the resolution of civil disputes in federal and state courts are unworkable to the point that it is a frequent source of injustice. For the novices and non-professionals here today, let me explain that the system of civil procedure that has now become conventional in the United States is centered on the practice of pretrial discovery. A series of court rules require the adversaries to submit to a variety of procedures designed to result in the exchange of the critical factual material well in advance of trial. Parties are required to respond fully to written interrogatories; witnesses are subject to extensive questioning under oath; and the parties are required to produce documentary evidence bearing on the dispute.

At the time this system was designed, no one had imagined modern methods of duplication, or hence the enormous volume of information that is recorded and is available to be exchanged. Nor had any one imagined modern word processing, and the ease with which masses of questions and requests for information can be prepared and masses of disinformation supplied. Nor did the rule drafters contemplate the widespread practice of compensating lawyers by the hour, a practice which affords lawyers a selfish interest in elaborating and prolonging the discovery process.

What has evolved from this is rather a mean game. We have developed a vocabulary to describe some of the tactical conduct employed; tripping is the tactic of frustrating the adversary's search for useful information by withholding access under various pretexts; pushing is the tactic of frustrating the adversary by burying his search under a mountain of irrelevant information in which the relevant truth will almost surely be lost. So common are these practices now that litigators do not recognize them as other than routine. Thus, these tactics are employed to wear down adversaries, to soften them up for a favorable settlement. The game is one to be played by rich players,



or by desperate ones willing and needing to invest in long shot claims and defenses.

The costliness and injustice of this system is observed with increasing frequency. Recent efforts at reform have so far been very modest. Less modest, however, has been the growing search for what are described as alternative methods of dispute resolution. This latter movement is becoming a formidable force which bespeaks widespread dissatisfaction with our conventional methods. A time is coming, and soon, when we will more widely share a sense that radical surgery must be performed on the Federal Rules of Civil Procedure. I make no prediction here about the form of those changes. My point here is that whatever they may be, they belong squarely in the middle of the agenda of a university law school.

I will proceed no further in revealing the flaws of our legal system. I will not attempt the feat attributed by Salmon Chase to Henry Brougham of bringing before you the whole condition of the law. But it should be noted that my litany of legal woes could be very long. I could speak of the dreadful shortcomings of our employment discrimination laws and the extent to which they have become shelters for sloth and disloyalty in the workplace. I could speak of the woeful inadequacy of contemporary family law to protect interests of the children of parents who find their family obligations inconvenient. I could speak of the bankrupt system of retirement and disability security, of the diseconomies of zoning and other land use constraint systems, or of the countereffectiveness of antitrust law and the regulation of the securities industry. Or the clumsy operation of exclusionary rules of evidence, or the shapeless defense of insanity and what it has done to forensic psychiatry. Or the disaster which is our system of penal corrections. There is scarcely an area of the law which is not vulnerable to searing and sustained criticism at basic levels.

The folk wisdom that if it ain't broke, don't fix it, has limited application to the law. It is broken in so many places, and in so many ways.

As I utter these seemingly radical thoughts, I can almost hear the gnashing of teeth of some legislators, taxpayers, and trustees. If a university law school is to be a center for such troublemaking, why would we want it? Recall the famous dictum of Lord Macaulay when he was asked to join in some of Henry Brougham's efforts at law reform? "Reform! Reform! We need no reforms. Surely things are bad enough as they are."

#### LAW REFORM

It must certainly be granted that the history of law reform is littered with blunders. It is well to remember that the greatest speech of Henry Brougham, which I quoted earlier, and which so inspired Salmon Chase, led directly to the enactment in 1834 of the Hilary Rules, which replaced the common law forms of action with a new system of pleading in the English law courts. The Hilary Rules were a disaster, making quite unrealistic

demands on the skills of practitioners, and they were soon repealed as unworkable.

Acknowledging the likelihood that many of our efforts to improve law must prove to be ill-advised, a wise commonwealth must nevertheless welcome the attempts. With few exceptions, good law is a transient phenomenon. As Felix Frankfurter put it: legislation is not like poetry; it is not written for all time. As examples, the three laws which I placed under attack — marijuana control, the progressive income tax, and pretrial discovery — were for a time sound laws which worked. Good law is eroded into bad not only by changing circumstances in the environment in which it operates, but also by simple experience, which teaches those who are expected to bear the lash of the law where its weaknesses can be found and exploited. And the commonwealth cannot reasonably expect its legislators and judges to take care of these matters on their own initiative; given their political roles, they are almost always reactors, not actors. For these reasons, every commonwealth needs legal criticism in the same way that it needs artistic criticism and political cartoonists. The need is ubiquitous throughout the law, and it is perpetual. So, while the good university law school may be an irritant, and indeed the better the school the more the irritant, the public is on the whole well-served by institutions which supply the need.

Perhaps I also detect a few sighs of malaise from the faculty members present. If the public may on occasion feel its repose disturbed by noisome ideas emanating from its university law school, those of us within the cloister know how very harmless we truly are. Those of us with experience in the activity of law reform know that there is very little danger that our rash and impulsive thoughts will find their way into law. As Arthur Vanderbilt put it, law reform is no sport for the short-winded.

Success in law reform efforts is reserved for those with patience and endurance, and who happen to strike at a problem which is ripe with public dissatisfaction. Professors Keeton and O'Connell, the architects of no-fault auto accident compensation, are examples of academic critics who combined the traits of patience with timeliness. Another is Professor Wellman, the architect of the model probate reform which has reduced the high cost of probate in many states. It is, of course, not given to many of us to serve as architects of such major reforms. Most of us have to settle for lesser roles in the construction projects, and indeed most of us have to expect failure to the extent that our purpose is to achieve direct and measurable effects.

Engaging in a sustained effort that is highly likely to produce no visible result can be a hard life. Grant Gilmore has compared the legal academic's life with that of a spy in a foreign land. He acquires information and transmits messages back to his homeland, but can rarely know that the messages are complete and correct, or even that they are received. He must continue to ply his trade on behalf of people who do not even

know of his work. But these spies are not less important for their solitude. And like them, the university law professor must strive for rewards that will be enjoyed by unseen others who will often be unaware that they have received a gift.

Perhaps I can also detect among the law students present some shared impatience with the role of this law school as I have described it. Doubtless many students come to this as to other law schools with fairly specific career goals. Rightly, students want jobs. Jobs mean saleable skills. We study law, they are likely to be thinking, because we wish to practice it, not to become moral philosophers. I earlier acknowledged that practicing law is, or at least can be, an honorable activity. Yet there are several responses I would make to the taste for instant practicality in legal education.

The first is that the saleable skills of lawyers are not special to lawyers, save perhaps in the degree of mastery. The lawyer's skills are reading, writing, speaking, and listening. A person who has highly developed communication skills has mastered the essential skills of being a lawyer. There are many ways to practice and develop these skills, and these include rigorous participation in the study even of jurisprudence at the most ethereal levels.

Secondly, it takes more than skills to be an effective lawyer. In law, theory is practical. As Judge Carl McGowan has warned:

Do not let the siren song of practicality lure you toward the rocks of knowing where to file a lawsuit but unable to conceive a sound theory upon which to base it. You can learn the first within an hour after you are on your own or somebody else's law office; if you cannot do the second by the time you leave this school, you will in all likelihood never be able to.

#### OMNIPRESENT OUGHTNESS

Thirdly, the practice of law, more even than it calls for basic communication skills or a knowledge of legal theory, calls for judgment. I am speaking here particularly of legal judgment, not social judgment. (Social judgment, or skills of assessing the motives of others, may be of critical importance to much legal work. I acknowledge that university law schools may not be much good at supplying it.) Legal judgment, however, is important and peculiar to lawyers, and can best be developed in a university, by prolonged and systematic debate about what the law's blemishes may be. Legal judgment enables a lawyer to see beyond and beneath the words of a statute or a case or an argument in order to evaluate the force and worth of the words employed. This kind of judgment requires a feel not only for what the law is, but what the law is trying to do, and what the law is in the process of becoming. We have rightly abandoned the idea of law as a brooding omnipresence, but there is nevertheless an omnipresent oughtness about the law which is imperfectly shared by its students and practitioners. Achieving a personal harmony with this sense of oughtness is a major

### *... to perceive the law as an expression of our political values and ideas.*

achievement which can come to a student from heavy involvement with teachers who are engaged in the process of law reform.

Finally, there is a fourth benefit to students that can be achieved by linking law study to legal criticism and reform. You will have noted that I have been speaking of the law in the abstract, as an independent whole, a bloodless entity having relation to other matters but also a discernible existence of its own. It is a good thing which can happen in law school for a student to form an enduring relationship with the law as such a discipline.

There are in fact many ways in which our shared discipline may be appropriately viewed. It is, to be sure, as many students readily perceive it, a set of game rules, more complicated than chess or bridge or even yachting. It is useful to know the law in this way, as a kind of competitive activity. But even effective playing of the game is helped by other perceptions of the law. Those who are preoccupied with the possibility of improving the law may come to it in different and more endearing lights.

Thus, it becomes possible for students to perceive the law as an expression of our political values and ideas; and as a set of market factors that influence economic decisions and economic forces; and as a cultural phenomenon expressing the mores of the social order of which it is a part; and as a set of human behaviors involving very complex interpersonal relationships; and as a language which enables people to communicate regarding, and to regulate, the use of collective power.

Or as a common faith, a kind of secular religion which enables people to maintain hope and trust about matters in which their hope and trust is essential to mutual survival.

The law is all of these things and more. In order to accept this confounding reality, lawyers must learn to tolerate a lot of uncertainty and ambiguity. None of us can ever see all of the faces of our stone at once. But if you accept the mysterious and awesome aspect of the law, you can readily come to know it as a kind of intellectual companion for life. As a classical sage put it, your learning will be not only an ornament in prosperity, but a refuge in adversity. Always present will be the opportunity to enlarge your grasp, to stretch your vision, to grow. For so long as you are willing to invest effort in comprehending the law and all its many defects, your efforts will be repaid with those valuable secret rewards which every worthy craft bestows on its practitioners. Thus, a true test of your education is how well you have learned to love your discipline. And, in this important respect, studying and teaching law is like planting acorns: the full girth of the achievement will not be known for many years.

# The Future of the Equal Rights Amendment\*

Walter Dellinger

On July 14, bills were introduced in both houses of Congress to submit the Equal Rights Amendment once again to the states for a ratification campaign. After ten years of debate, hardly anything new can possibly be said either for, or against, the amendment. Seven more years of debate in the state legislatures is unlikely to yield new insights about the amendment or its impact. It would therefore be appropriate for Congress to consider an alternative constitutional mechanism for ratification of the ERA—one that would bypass the state legislatures and produce a speedy result.

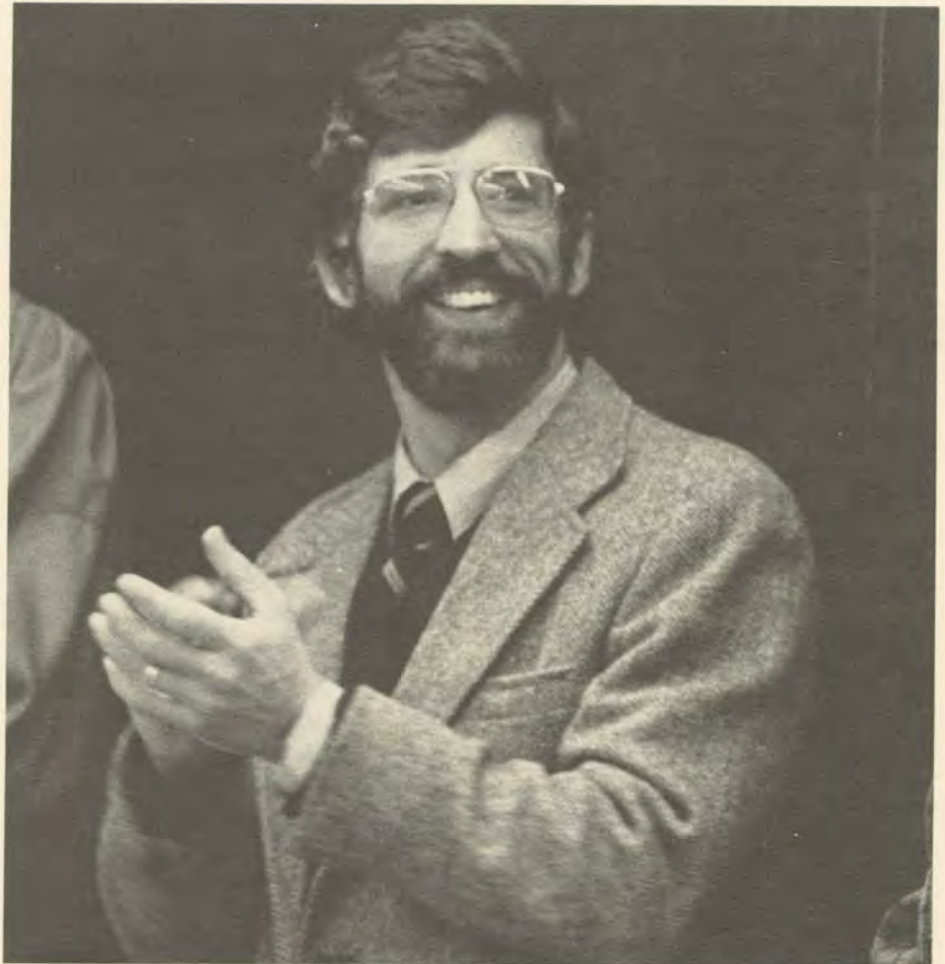
With one bold stroke, Congress could submit the ERA to special conventions in each state—conventions whose delegates were elected for the sole purpose of determining the fate of the amendment.

---

*... the use of the convention method is not unprecedented.*

---

Congress clearly has the power to make this choice. Article V of the Constitution provides that an amendment proposed by Congress "shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress." As the Supreme Court held in *United States v. Sprague* (1931), "The choice of the mode of ratification lies in the sole discretion of Congress."



The Constitution itself was submitted to ratifying conventions in each state, rather than to state legislatures. Congress was granted the power to make the same choice for each future amendment. For 25 of the 26 ratified amendments, Congress has chosen to submit its proposal to state legislatures. But the use of the convention method is not unprecedented: the 21st Amendment, which repealed Prohibition in 1933, was submitted by Congress to state conventions.

## DEFECT

The call for convention ratification of the 21st Amendment was based in large measure upon a widely held view that the state legislatures (which had ratified the earlier 18th Amendment imposing Prohibition) did not reflect public sentiment but had been unduly influenced by "dry" lobbies. Critics viewed the amendment process as one in which "the people" were denied direct involvement. The attempt by some states to remedy this perceived

defect by subjecting state legislative ratifications to a subsequent referendum of the people was rebuffed by the Supreme Court in *Hawke v. Smith* (1920). Congress therefore turned to convention ratification to satisfy those who felt that fair consideration of the 21st Amendment could not be obtained from heavily lobbied, malapportioned legislatures dominated by rural "drys."

In less than ten months from the time it was proposed by Congress, the 21st Amendment was ratified by conventions in three-fourths of the states. Most state statutes setting up the conventions provided for all delegates to be elected in either statewide or districtwide elections. Two slates of candidates, designated

---

*None of the conventions lasted more than a day. One lasted seventeen minutes.*

---

on the ballot as "For Ratification" or "Against Ratification," were typically presented to the voters.

In virtually every state the election of delegates was, for all practical purposes, a dispositive referendum on whether or not to ratify the amendment. None of the conventions lasted more than a day; one lasted seventeen minutes. In every state, the voters' wishes were expeditiously carried out by the slate that had won the election.

The episode appears to have been a successful experiment in the democratization of the amendment process. If the political support is once again mustered to propose an Equal Rights Amendment, should Congress send it to conventions or legislatures for ratification? An uneasy case can be made for convention ratification.

Just as with Prohibition, doubts have been raised about whether the state legislatures have reflected popular views on the ERA. Referral to conventions would provide for greater voter control over the out-

come. To be sure, voters choosing state legislators may take a candidate's position on ERA into account. But the ERA is only one of many factors involved in the selection; few districts will defeat an entrenched veteran legislator (the chairman, for example, of an important pork-barrel committee) simply on his ERA views, even if the district leans toward ratification.

Referral to conventions could ensure an up-or-down vote on ratification in each state and avoid the chance of the amendment being bottled up in legislative committees, as happened in some states with the first ERA proposal. Congress could also ensure an expeditious consideration of the amendment by providing for the selection of delegates at each state's next general election and requiring that all conventions be held within, say, six months.

#### ANALYSIS

Before finally advocating convention ratification, one should ask whether it would be a prudent use of constitutional processes. One who urges Congress to select the convention mode of ratification for the ERA ought to consider whether it might also be used later for amendments that would severely restrict abortions or permit governmentally organized prayer in public schools. What is missing in a process of convention ratification is the thorough examination of the proposed amendment in state legislative-committee hearings. A popular campaign for the election of convention delegates simply does not afford the same opportunity for detailed analysis. There is much to be said for a cautious approach to constitutional amendment, and for skepticism about any suggestion to streamline the process. Convention ratification thus should be approached warily.

The ERA, however, is a better candidate for convention ratification than any other pending amendment proposal. It alone has been the subject of state legislative debate and countless committee hearings for more than a decade. Like the 21st

---

*Before finally advocating convention ratification, one should ask whether it would be a prudent use of constitutional processes.*

---

Amendment, which repealed the 18th, it has already received sustained scrutiny as a constitutional proposition. Perhaps this time Congress should let the voters settle the issue by choosing convention delegates who are either for, or against, the proposition that "equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."

*\*This essay was first published in Newsweek, on August 2, 1982.*

*Alumna Profile***Life and Law in Utah**

Emerson wrote in his essay "Experience" that "life is a series of surprises." The first woman to be appointed to the Utah Supreme Court, Christine Meaders Durham, a 1971 Duke University Law School graduate, could certainly agree with that assessment. But Justice Durham feels that the surprises and side trips in her professional life all ultimately benefited her career. Collectively, these experiences have allowed her to attain the prestigious position of a state supreme court judge at the early age of thirty-six.

Justice Durham may be close to being the mythic "superwoman." Her achievements and credentials are all the more amazing when one surveys the crooked and obstacle-strewn path her career has followed. Despite her success, she shies away from such broad descriptions as "superwoman" or "role model." Justice Durham earnestly stresses the complexity of her lifestyle, its harrowing pace, and its brief moments of relaxation. She admits that it is not for everyone. Without family cooperation, she emphasizes, such a lifestyle would not be possible. Her four children and pediatrician husband all work together to make their system work. Essential to the effective coordination of the personal and professional parts of her life is Durham's determination to succeed.

Christine Durham, daughter of a Treasury Department official, grew up familiar with the international scene and spent her high school years in Paris before attending Wellesley College. It was at Wellesley that she made the decision to go to law school. The year 1967 was not a time when many women were admitted to or even applied to law



schools and Durham had her own particular difficulties. After graduation, she married George Homer Durham, II, a Biochemistry student at Harvard, who still had several semesters to complete before graduation. Although she still had the burning desire to attend law school, for a year Christine Durham taught English at Bryant and Stratton Junior College in Boston awaiting her husband's imminent graduation.

This year of teaching reinforced her desire to attend law school. Not willing to wait any longer, Durham entered Boston College Law School that fall, just days after the birth of the Durhams' first child. With the help of her husband and friends, she managed to juggle everything and was placed on BC's Dean's List for the first semester. For her second semester, the family was uprooted and headed to Arizona State University, where Justice Durham finished her second semester of law school while her husband taught Biochemistry. He entered Duke Medical

School in the fall, and Christine transferred to Duke Law School. Although her class had less than ten women in it, she found that the Associate Dean at the time, Tom Read, was extremely interested in the special problems that faced women in the school. With Read's help, she succeeded in making a painless transition to Duke.

Durham now admits that the judicial fever hit her while she was at Duke. As a member of the Moot Court Board, she was able to preside over the mock arguments. She also remembers that her Trial Advocacy courses fed that aspiration. Wanting to be a judge, Durham concedes, is often a secret ambition because it is not a goal that is easily fulfilled by any kind of planned course.

While Durham was still in law school, her second child was born, but she managed to continue all of her activities. During law school and summers as well as some time after graduation she worked with Professor Clark Havighurst on the Program on Legal Issues in Health Care as well as a Research Assistant for *Law and Contemporary Problems* and the *Duke Law Journal*.

1971 was a frustrating year for graduating women lawyers, especially those with a family and a husband finishing medical school. Local law firms refused even to consider women for employment. Despite this frustration, however, Justice Durham did not allow herself the lassitudes of motherhood and graduation. She hung out her own shingle, taught Medical Jurisprudence at the Medical School, and served as legal consultant at the Duke University Center for the Study of Aging and Human Development.

As an avowed feminist, Justice Durham also found in the early 1970's an exciting challenge in North Carolina. She, along with many other concerned citizens, worked for the passage of the Equal Rights Amendment in the state. The ERA failed to pass the North Carolina legislature that year by only one vote. She looks back upon that vote as the turning point in the push for the ratification of the Equal Rights Amendment which she advocated strongly.

When Justice Durham and her family moved to Utah after her husband's graduation from medical school, she again became active in the ERA ratification struggle. She encountered in her lobbying for the ERA in Utah very similar attitudes to those she had encountered in North Carolina. Some of these attitudes were quite hostile. She remembers one formal ERA debate

---

*The governor informed her that "you and I are going to make history together."*

---

against her friend, Rex Lee, now Solicitor General of the United States, where the hostility she felt from an audience superbly organized by a local church was actually frightening. After she was appointed to the bench, she unfortunately had to curtail these political activities, but still finds time to support the local women lawyer's group as well as being active in the National Association of Women Judges.

Before Christine Durham entered private practice in Utah, she was closely associated with Brigham Young University Law School as a teaching assistant in Legal Research and Writing and as a member of the Charter Board of Editors of the Law Review. She later taught several courses at BYU including Family Law, Law and Medicine, and Sex Discrimination and the Law.

About the time she moved to Utah, a friend from Duke Law School invited her to join the small firm where he was an associate. Although she started out with the firm only part-time because another child had recently been born, she quickly moved into full-time litigation. Largely because the firm was extremely small and her senior partner trusted her, she gained considerable trial experience in her four years with the firm, working on securities and general corporate litigation. Justice Durham feels that although she felt she had an aptitude for trial work, it helped to receive considerable support from other members of the bar as well as her senior partner. The most effective learning tool by far, she feels, was observation of the trial process.

In 1978 Christine Durham became the first woman appointed to the General Jurisdiction Trial Bench in the state of Utah. She was delighted with her selection; the many years of contact with the law schools and the different experiences in the legal profession had come to a happy fruition. The Judicial Selection Committee, which chose her, makes its decisions based on merit, although Durham admits that lobbying augments the process.

Once Justice Durham's name was sent out of committee, it went to the governor for final appointment. He insisted on an interview which she felt went smoothly. Just hours later, while at a convention to help a friend campaign for the Democratic nomination for Congress, she received a call from the governor. The governor informed her that "you and I are going to make history together."

Christine Durham found the transition from trial lawyer to the trial bench illuminating; being a judge was an entirely new profession. "A lawyer," she says, "is an advocate for a client advancing a particular point of view... A judge, on the other hand, must assess competing points of view and pursue some often abstract ideal of justice and the application of existing points of law."

Although Durham felt it was her duty to give up much of her political activism upon reaching the bench, she soon became involved with the activities and concerns surrounding the administration of justice. She feels that as a judge she has more general and higher responsibilities than she did before. Fulfilling her role as judge has placed Durham in closer touch with the point of the adversary system—the resolution of conflict.

---

*... determined to be a good, hard-working, efficient and fair judge.*

---

During her tenure as trial judge, Durham served on the Board of Trustees of the Legal Services for the Developmentally Disabled and served on the National Board of Directors of Odyssey Institute, a non-profit agency dealing with child abuse and drug abuse. Also, in the beginning of her term, she was elected secretary of the Utah District Judges Association. When one feminist friend asked her why she allowed the judges to elect their sole female colleague as secretary, Durham replied that it had been her observation that a judge elected secretary of the organization eventually ends up as president of the organization. Just as she had foreseen, in 1980 she was elected President of the Utah District Judges Association. She is very proud of her tenure as the Association's president, during which the group worked toward restructuring the Utah judiciary. The very next year her fellow judges elected her Presiding Judge of the Third Judicial District. She helped to guide that district in its transformation from a small metropolitan court to a major urban court.

As a member of a judicial minority, Christine Durham was determined to be a good, hard-working, efficient and fair judge. One of her visibility goals was to have the first car in the lot in the

morning and the last one out at night. She worked hard. During her time on the General Jurisdiction Trial Court, one of Durham's memorable experiences was presiding over Utah's longest civil jury trial. The case involved the construction of a coal mining facility in Wyoming. The case's complexity and length created an administrative nightmare for Justice Durham. That challenge she also met.

Christine Durham received a favorable response from the bar to her performance on the trial bench. Through her ability, she convinced many skeptics that she was on the bench to work, not for mere feminine adornment.

The controversy surrounding Justice Durham's appointment to the Supreme Court is filled with intrigue and siege-like waiting. When a vacancy had appeared on the court earlier, she had placed her name before the selection committee for consideration. Ultimately, however, the governor appointed another candidate. There was a public outcry against this gubernatorial "passing over," but that issue soon paled against the greater controversy surrounding the fight between the moderate democratic governor and the conservative republican legislature for control of the judiciary.

During the winter of 1981, the Utah legislature passed legislation that required senate confirmation of the governor's judicial appointments. The governor vetoed the measure; the legislature overrode the veto. Unwilling to accept defeat on this critical issue, the governor quickly sued the legislature, claiming that the legislation was an unconstitutional usurpation of the separation of powers doctrine in the state constitution. The district court held for the governor; the legislature appealed the case to the Supreme Court. Meanwhile, in the summer of 1981, the Chief Justice died and another vacancy appeared on the court. The governor, in the midst of this judicial upheaval, appointed Christine Durham to the high bench in September.

Justice Durham, however, had

to wait until February to take her place on the bench. The governor wanted her to be seated immediately, but many were unwilling for her to do so as it would appear to be a blatant aggravation of the crisis. The legislature would not confirm her until the court ruled on their appeal. Finally, the Supreme Court affirmed the district court's order and Justice Durham took her historic spot upon the bench. Durham is certain, however, that the Senate would have confirmed her anyway. Not only was she heavily favored by the bar, but at that time, Utah was getting bad press nationally because of the Sonia Johnson-ERA affair. Many believed that Durham's appointment would serve to redeem Utah's virtue in the public eye.

The composition of Utah's Supreme Court has completely changed since 1975. Durham expresses the convictions that the court is a progressive one, and that the Utah judiciary should make great strides in the next decade. The new justice enjoys her colleagues, but finds that it is harder to have her car be the first and last one in the lot. She teasingly refers to her colleagues as workaholics; yet, she finds it a great challenge to be in their midst. She often finds her ideological opponent in Dallan Oaks, past Dean at the University of Chicago Law School, a man she greatly admires. The situation is working out well, and Durham especially enjoys her new work environment. She feels it is the lap of luxury, compared to the district court, where she did not even have a secretary. She now has, in addition to a secretary, two full-time law clerks as well as many law student interns. The heavy case load, however, keeps them all fully occupied. When asked about the opinion of which she was most proud in her tenure of less than a year as a Supreme Court justice, she replied it was the opinion on which she currently was working, which has not yet been published. This pride reflects her nature as one who is always looking forward to the next goal.

Christine Durham is only willing to speculate about the foreseeable future—the next decade—although Durham certainly views the judiciary as her permanent career field. At this stage in her judicial career, she feels that she is still learning how to be a good judge. Durham, however, wants to be more than a good judge; she wants to be a great judge. In the next decade on the bench her personal objective is to acquire the depth and seasoning, the thoughtful type of experience which is necessary to be a good judge. During that ripening process, however, Justice Durham never wants to lose that fresh perspective she feels she brings to the bench as a young person. The Utah court is becoming increasingly more cohesive and progressive and the vitality that Durham brings to the bench can only tend to promote the increasing progressiveness of the Utah Supreme Court.

Justice Durham closed her recent speech at Duke University Law School by reciting Mahatma Gandhi's seven deadly sins. Obviously, Justice Durham tends to live her life keeping these "sins" in mind. Her admirable concern for extracurricular matters concerning the administration of justice as well as human welfare reflects Justice Durham's avoidance of Gandhi's seventh deadly sin—"knowledge without character."

## *An Approach to Elevate the Level of Legal Competency* **American Inns of Court**

Justice Christine Durham spoke on legal competence at the Alumni Meeting held on October 2nd at the Law School. Durham turned her attention to ways the legal profession can positively combat attacks on legal competence. The profession must turn its attention to the root of its problems. Durham distinguishes, however, an incompetent lawyer from a lawyer who has not been adequately trained; this lack of proper training is the profession's real problem. She feels that, given time, a young lawyer can always be properly and adequately trained. The

---

*... the responsibility to  
 turn a law school  
 graduate into a seasoned  
 practitioner lies mainly  
 with the judiciary  
 and the practicing bar.*

---

Justice feels strongly that this responsibility for training the young lawyer should not rest solely with the law schools. She believes that the responsibility to turn a law school graduate into a seasoned practitioner lies mainly with the judiciary and the practicing bar.

In an effort to implement this theoretical desire to improve advocacy, two American Inns of Court have been established in Utah. This experimental system is modeled on the English Inns of Court system, an integral part of a young barrister's legal education. The American Inn of Court was established in conjunction with the J. Reuben

Clark Law School of Brigham Young University. Its initial membership included four federal judges, three trial judges, a Tenth Circuit Court of Appeals judge, two Utah Supreme Court justices, several state trial judges, senior trial lawyers, junior lawyers with less than five years' experience and third-year law students. The students have a one-year membership, while the other members rotate with two- and three-year memberships.

The inn meets once a month over dinner and a demonstrative program is presented. The inn is then broken down into tutelages which consist of a judge, a senior and junior attorney and several students. The tutelages meet once a week in between the general meeting and either discuss a general theme or prepare a demonstration. Justice Durham gleefully cited one of the lighter demonstrations: a judge portrayed what lawyers do that annoys judges and a lawyer portrayed what judges do that annoys lawyers.

A side benefit, Durham noted, is the congeniality that the American Inns of Court meetings revived between members of the bench and the practitioners. Especially noteworthy is the coming together of the federal and state judges in Utah. These two bodies had a long history of antipathy stemming from the previous Chief Justice of the Utah Supreme Court, who made it clear in his opinions that he did not believe that the fourteenth amendment applied to the states.

Justice Durham believes that the inns are thriving and realistically provide young lawyers and students an opportunity to associate with and learn from experienced trial and appellate lawyers and judges.

---

*To educate a man  
 in mind and not in morals  
 is to educate a menace  
 to society.*

*Thomas Edison*

---

Justice Durham quoted Thomas Edison's statement that "to educate a man in mind and not in morals is to educate a menace to society." She feels, as do the other members of the program, that this extracurricular activity is essential in order to raise the level of competency of the trial bar.

Anyone interested in establishing an American inn of court may contact Judge A. Sherman Christenson, Chairman of the Inter-Organization Council of American Inns of Court, P.O. Box 11485, 125 South State Street, Salt Lake City, Utah 84147.



## Article Note

# Legal Malpractice in Estate Planning

## *Legal Malpractice in Estate Planning—Perilous Times Ahead for the Practitioner*

Gerald P. Johnston, 67 Iowa L. Rev. 629 (1982)

In this article, Gerald P. Johnston, a 1962 graduate of Duke University Law School and currently a law professor at the University of Kentucky, isolates the problem of legal malpractice in estate planning. Not only does Professor Johnston identify the disease, he traces its cause and suggests cures and policies to stabilize the establishment of a standard for a duty of care for practitioners.

Legal malpractice suits, especially in the estate planning area, have dramatically increased in the past few years. Professor Johnston points out several probable causes for the increase. Primarily, in the estate planning area, unlike other areas of the law, the essential elements for proof in a malpractice suit, causation and damages, are easily ascertainable. Another predictable reason for the recent proliferation in estate planning malpractice suits is that almost every lawyer at one time drafts a will for a client, thus exposing himself to liability for the consequences of that will. Unfortunately, lawyers who do not deal in this area frequently tend to minimize the importance and complexity of the individual will, thus also minimizing any thought of legal liability. Johnston asserts that in order to create a higher level of competency in this field, law schools should stress the importance of advanced courses in Estate Planning beyond the basic Trusts and Wills course.

The major cause for the increase in these malpractice suits, however, is that two long-time defenses to the action have been judicially elimi-

nated. First, the courts no longer follow the doctrine of privity. That doctrine had long been the accepted rule in that an attorney was not liable for professional negligence to anyone other than his immediate client. Of course, this practice eliminated the beneficiaries of the will as plaintiffs in a malpractice suit. Second, the statute of limitations defense also often prohibited malpractice suits. Since the statute began to run at the time that the will was drafted, often by the time that the mistake in the will was discovered at the testator's death, the statute had already run. Currently, most jurisdictions have substituted the more general rule that the statute does not begin to run until discovery of the error has occurred, in place of the antiquated "at the time of drafting" rule.

Professor Johnston summarily reviews the various bases of liability to which the practitioner is now exposed; he also suggests several precautionary measures a practitioner may routinely follow, thus eliminating many obvious and easily curable areas of possible malpractice actions. For example, a simple individual letter to a client for whom a lawyer has drafted a will describing the various effects a new law would have upon the testamentary desires of the client should ensure the lawyer's safety in a possible incompetency action.

Johnston then proceeds to the major issue of the article, whether a general practitioner of law has a duty to refer a client to a specialist in that area of the law. A California court in *Horne v. Peckham*, 97 Cal. App. 3d 404, 158 Cal. Rptr. 714 (1979), held that attorneys engaged in general practice can be held liable for malpractice if they fail to refer complex matters to specialists.

Despite Johnston's uncertainty about the case's holding, he does indicate that *Horne's* general holding is similar to Disciplinary Rule 6-101, which states that attorneys should not attempt to handle legal matters that they know they are not competent to handle. Therefore, the significant trend today is toward greater attorney accountability in the estate planning area. Johnston notes that the problem is that general practitioners, no matter where they practice, will be held to this same high standard of care.

Johnston suggests that in order to retain this high standard for the specialist, yet at the same time not penalize the country general practitioner, courts need to use the locality concept that is often used to determine the standard of care for medical malpractice suits. Professor Johnston admits that if a general practitioner is located in an area where a specialist is available, then he should have a duty to refer his client to a specialist; Johnston points out that if a lawyer refuses to act upon a client's wish and the client does not have reasonable access to a specialist, then the lawyer would be refusing to carry out the testamentary desires of his client. To solve this problem, Johnston advocates that the courts employ a "same or similar" locality standard.

Professor Johnston, despite his concern about the general practitioner, advocates the use of the geographic factor only for questions concerning the duty of a lawyer to refer his client to a specialist. He suggests that this standard of care must be applied narrowly because greater public accountability in the field of estate planning leads to improved attorney services, which should be our primary goal.

# THE DOCKET

## *Specially Noted*

### **Ken Pye Returns to the Law School**

This year A. Kenneth Pye is back at the Law School as the first Samuel Fox Mordecai Professor of Law, having completed a second stint as Chancellor of the University from 1976–1982. Pye joined the Duke law faculty in 1966, after serving from 1961–66 as Associate Dean at the Georgetown University Law School. He assumed the post of Dean at Duke Law School in 1968, staying until he went to the

Chancellor's office for one year in 1970–71, soon after Terry Sanford became President of Duke and created the chancellorship. From 1971–74 Pye worked as University Counsel, but he came to the Law School as Dean in 1978 pending the appointment of Dean Carrington. Pye occupied the presidency of the Association of American Law Schools in 1977. In recent years he has taught courses at the Law School in evidence and police procedure, Pye's primary research specialty.



### **Keith Brodie to the Chancellor's Office**

Professor of Law H. Keith Brodie succeeds Pye as Chancellor and similarly juggles a number of other duties. Until at least the spring of 1983 Brodie is acting provost of the University. Since last spring he has been president of the American Psychiatric Association, at age 42 the youngest person ever to hold that title. In spite of his new duties involving administrative policy and fiscal management, Brodie still sees patients two mornings each week and supervises residents at the medical center.

Brodie came to Duke in 1974 as chairman of the psychiatry depart-

ment and chief of psychiatric services. In 1981 he was named James B. Duke professor. For several years he and staff assistants have taught a clinical seminar in law and psychiatry at the Law School. This coming spring he is supervising a seminar in forensic psychiatry, using medical-clinical material to explore the disabilities involved in issues of criminal responsibility and commitment proceedings. Brodie's prize-winning medical research has concentrated on the use of the drug Lithium in the treatment of manic-depression, and the relationship between depressive states and the chemistry of the brain and nervous system. Brodie's most recent book is *Modern Clinical Psychiatry*, published in 1982.

### **Tom Read to University of Florida**

Frank T. (Tom) Read, Dean of the University of Florida Law School since July, 1981, has entered his fifteenth year in academic law. Since leaving his studies and, later, his

teaching and administrative positions at Duke Law School, Tom Read has been Dean of three university law schools: Tulsa (1974–79), Indiana (1979–81) and finally Florida. While still at Duke, Tom Read served both as Assistant Dean and as Associate Dean. He has also held visiting faculty positions at the

University of North Carolina, SMU, Brigham Young University and Hastings College of Law.

Dean Read began his legal career at Duke University, where he received his J.D. in 1963. He graduated Order of the Coif, and was a member of the Editorial Board of the *Duke Law Journal* and the legal fraternity Phi

Delta Phi. Upon graduation Read entered private practice for two years in Minneapolis and St. Paul. For the next three years he worked in the Long Lines Department of AT&T.

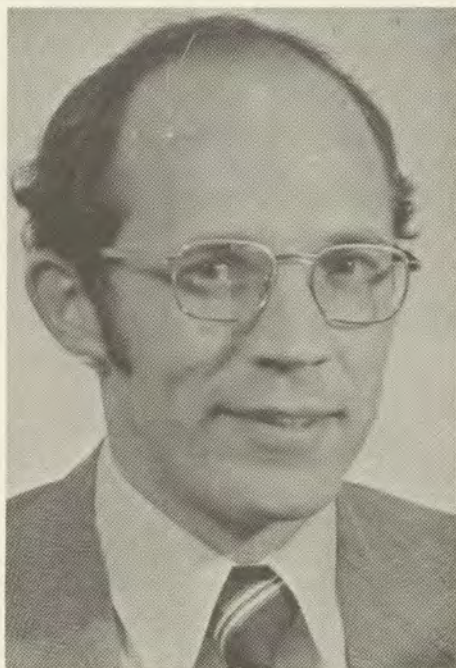
Dean Read returned to Duke as Assistant Dean and Assistant Professor in 1968. He became Associate Dean and a tenured Professor in 1972. In 1974 Read left Duke for Tulsa and his first full deanship.

Dean Read has taught Evidence, Civil Procedure, Insurance, and Civil and Criminal Trial Practice. He has written two books: *Let Them Be Judged: The Judicial Integration of the Deep South* (1978), co-authored with Professor Lucy McGough, and *Oklahoma Evidence Handbook* (1979), a practitioner-oriented text comparing the new Oklahoma Evidence Code with

the Federal Rules of Evidence. He has written articles for various publications, including the lead article, "Judicial Evolution of the Law of School Integration Since *Brown v. Board of Education*," for Duke's own *Law and Contemporary Problems* (Fall 1975).

Dean Read has been involved in local bar activities and has served on several AALS committees. He has lectured in Continuing Legal Education Institutes, delivered numerous special lectures, served on the Board of Directors of the Tulsa County American Civil Liberties Union, and is even a charter member of the Will Rogers Chapter of Westerner's International, a Western history study group.

His friends at Duke welcome him back to the Southeast.



## Dale Whitman to University of Missouri

Dale A. Whitman, J.D. '66, recently began service as Dean of the University of Missouri School of Law in Columbia, Missouri.

Whitman moved to Missouri after serving four years as Professor of Law and two years as Associate Dean at the University of Washington. His previous academic experience also includes tenures at Brigham Young University, the University of Tulsa, and the University of North Carolina at Chapel Hill (1967-70).

In addition to his academic work, Whitman has served as a program analyst at the U.S. Depart-

ment of Housing and Urban Development, and as a director at the Office of Housing and Urban Affairs of the Federal Home Loan Bank Board. He had one year of private practice immediately following his graduation from Duke with the Los Angeles law firm of O'Melveny & Myers.

Whitman has taught primarily in the areas of property, real estate, and housing and urban development. He is the co-author of several books on real estate financing, and is presently at work on a hornbook on the law of real property. He has also written many articles for legal journals.

Whitman is married to the former Marjorie Miller, and has six children.

## Thomas Kleinschmidt to Arizona Court of Appeals

Thomas C. Kleinschmidt, J.D. '65, assumed his new office as judge in the twelve-member Division One of the Arizona Court of Appeals in 1982. From 1977 to 1982 Kleinschmidt served as judge on the Superior Court of Maricopa County,

Arizona. He was presiding civil judge from 1980 to 1982, handling a general civil caseload as well as having administrative responsibility for seventeen civil courts.

Before ascending to the bench Kleinschmidt worked as an assistant federal public defender (1971-77) and as a lawyer in the firm of Jennings, Strouss & Salmon (1966-71). He is married to the former Margaret Gillson and has two daughters.



## Annual Currie Lecture

In November, David P. Currie, Harry N. Wyatt Professor at the University of Chicago Law School, delivered this year's Currie Lecture, named in honor of his father, the late Professor Brainerd Currie, one

of the most outstanding scholars ever to serve on the Duke law faculty. Professor Currie spoke on the constitutional decisions of the Supreme Court during the Chief Justiceship of Roger Taney (1836-64).

The Currie Lecture has been financially underwritten in perpetuity by John Lewis, J.D. '67, who now practices law in Florida and who, while still at Duke, helped organize the first Currie Lecture.

## Faculty Activities 1981-82

### Visiting Lecturer: Fall, 1982

*Ronald Clive McCallum* brings to Duke his expertise in industrial and employment law. His seminar in comparative labor law compares and contrasts American labor relations laws with compulsory conciliation and arbitration in Australia; the various regimes of collective bargaining in Japan, Canada, and Great Britain; and codetermination in West Germany.

McCallum received his B. Juris. and his LL.B. from Monash University

in Melbourne. Since completing a graduate law degree at Queen's University in Kingston, Ontario, McCallum has taught on the law faculty at Monash in subjects ranging from employment law, industrial organizations, industrial arbitration, industrial law and comparative labor law to administrative law, evidence and torts. From 1979-80 he served as principal executive officer of the Australian Industrial Relations Bureau. McCallum has published extensively in the area of his specialization. His current research focuses on legal aspects of trade unionism.



### New Professor

*Ronald Jay Allen* will join the Duke faculty as Professor of Law in January, 1983, bringing to the school a strong teaching and

research background in the area of criminal law.

Allen will come to Duke after five years at the University of Iowa College of Law, where he has established himself as an able scholar in the areas of evidence, criminal procedure, and criminal law. Allen has published articles on police rulemaking, the role of presumptions and burdens of proof in civil actions, and jury decisionmaking in criminal cases. This past year Allen served as President of the University of Iowa Faculty Senate. He is presently a University of Iowa Faculty Scholar, an award he received in 1980.

Allen's academic credentials include a B.S. degree (1970) from

Marshall University and a J.D. degree (1973) from the University of Michigan, where he was elected to the Order of the Coif. After graduation from law school, he served as clerk to the Honorable Wallace Kent of the United States Court of Appeals for the Sixth Circuit.

He began his teaching career at the University of Nebraska College of Law, moving from there to the State University of New York at Buffalo (1974-79), and then to Iowa. He has taught a variety of courses, most in the areas of criminal law and procedure.

Allen will teach evidence and criminal law courses at Duke. He will also serve as Co-editor of the *Duke Law Magazine*.

## Faculty Seminars

This fall's program of Friday afternoon faculty seminars, at which Law School teachers and visitors lead discussion on topics of current research or practice interests, began with a presentation by Professor Patrick S. Atiyah, Professor of English Law at Oxford University, Fellow of St. John's College and a Martha G. Price Visiting Scholar at Duke, on "The Evidentiary Theory of Promises." Professor Atiyah will return to Duke in the spring. In October Chris Schroeder spoke on "The Undistributed Middle in Regulation of the Chemical Industry" and C. Allen Foster, Lecturer in Law, spoke on "The Development and Role of a Dispute Resolution Center." In November Helmut Furth, Deputy Assistant Attorney General for anti-trust cases, looked at "Juries in Protracted Antitrust Litigation." "Legitimacy in the Amending Process" was the subject of materials distributed and considered by Professor Walter Dellinger. The final seminar for the semester was given in December by Sara Beale, who is completing an extensive research project on "Judicial Supervision of Grand Juries."

## Regular and Visiting Faculty

Assistant Professor *Jean Taylor Adams* gave the "Current Developments" lecture at the Duke Estate Planning Conference in October, 1981.

Associate Clinical Professor *Katharine T. Bartlett* taught at a training conference for Federal Trade Commission lawyers in Washington and at a state-wide training conference in Raleigh on advocacy for handicapped children in the public schools.

Associate Professor *Sara Sun Beale* wrote articles on federal criminal jurisdiction and federal mail fraud, forthcoming in the Encyclopedia of Crime and Justice. She

was a member of an interdisciplinary group of Duke researchers who received a major grant from the National Institute of Justice to study classifications of delinquency and crime. She gave an address on the insanity defense to the University of North Carolina School of Medicine Seminar Series in Psychiatry and Law.

Associate Professor *Donald H. Beskind* spent the academic year on leave engaged in the private practice of law in Durham. He taught trial advocacy in the fall of 1981 at the University of North Carolina School of Law and served as team leader for two training sessions of the National Institute of Trial Advocacy. He was elected to the Board of Directors of the North Carolina Civil Liberties Union and appointed to the North Carolina Bar Association's Committee on Continuing Legal Education.

*H. Keith Brodie*, James B. Duke Professor of Psychiatry and Professor of Law, served as Chairman of the Department of Psychiatry and President of the American Psychiatric Association. He was selected to become Chancellor of the University. He presented a paper entitled "The Future of Psychiatry: From Couch to PET" at the Rockefeller Archive Center Conference on Academic Medicine: Present and Future in May, 1982.

Professor *Paul D. Carrington* continued to serve as Dean of the Law School. He was on the Accreditation Committee of the Association of American Law Schools and gave an address at the University of Iowa in September, 1981.

Visiting Professor *David F. Cavers* served as consultant to the American Bar Foundation in its research program for the ABA Special Committee for the Study of Legal Education.

Professor *James D. Cox* chaired the University's Hearing Committee and its Committee on the Social Implications of Duke's Investments, and served as a member of the

Executive Committee of the Business Associations Section of the Association of American Law Schools. He spoke at the Southeastern Conference on Corporate and Securities Law on "A Closer Look at the Delaware Response to the Special Litigation Committee."

*Richard A. Danner*, Associate Professor of Legal Research and Director of the Law Library, served as a member of the AALS Committee on Relations with Publishers and Dealers and organized a North Carolina Library Association workshop on legal resources for non-law librarians in Durham in April, 1982.

Professor *Walter E. Dellinger, III*, spent the academic year on leave on a Rockefeller National Humanities Fellowship, working on a book on the constitutional amendment process. He delivered a paper at the Duke-McGill Conference on Canadian Constitutional Reform in March, 1982, and addressed the First District Bar Association on "The Anti-Federalist Critique of the Constitution" in Asheville in May, 1982. He also testified on a constitutional convention application resolution before the Resolutions Committee of the Missouri House of Representatives and attended an AEI conference on judicial power in October, 1981.

Professor *Deborah A. DeMott* served as Chairman of the University Review Committee on the Use of Human Subjects in Non-Medical Research, as a member of the finance committee of the Law School Admission Council, and as a member of the executive committee of the AALS Section on Business Associations.

Professor *Robinson O. Everett* continued both serving as Chief Judge of the United States Court of Military Appeals and teaching at the School. He addressed numerous conferences on military law subjects, testified before the House Armed Services Committee, and served as a member of the Continuing Education Board of the Federal Bar Association.

**Joel L. Fleishman**, Professor of Law and Public Policy Studies, continued to serve as Vice Chancellor for Education and Research in Public Policy, Director of the Institute of Policy Sciences and Public Affairs, and Chairman of the Department of Public Policy Studies. He was appointed by Governor Hunt to be co-chairman of the North Carolina Electronic Town Hall Task Force, served on several boards and committees, and addressed the Annual Conference of the Roscoe Pound American Trial Lawyers Foundation in Charlottesville in June, 1982.

Lecturer in Law **C. Allen Foster** addressed the Construction Law Seminar in October, 1981, on "Winning and Not Losing a Construction Claim" and spoke before the annual meeting of the Litigation Section of the ABA in Washington in November, 1981, on "Practical Tips in Presenting a Construction Arbitration Case."

Professor **Pamela B. Gann** held the School's Bost Research Professorship in the spring semester and was visiting Professor at the University of San Diego Law School's Institute of International and Comparative Law in Paris in the summer of 1982. She was elected to membership in the International Fiscal Association, attended the Association's meeting in West Berlin in September, 1981, and was named National Reporter for the Association's United States Branch on the subject of tax evasion and avoidance.

**Claire M. Germain**, Lecturer in Comparative Law and Legal Research, delivered a paper on "Comparative Law: Methodology and Research Problems" at the annual meeting of the American Association of Law Libraries in Detroit in June, 1982. She was reappointed Chair of the AALL's Foreign, Comparative and International Law Committee.

**Martin P. Golding**, Professor of Philosophy and Law, continued to serve as Chairman of the Department of Philosophy. He was appointed consulting Editor of *Law and Philosophy* and *Social Philosophy and*

*Policy*. He delivered papers at the conference on Knowledge and Decisions in Savannah, at Wake Forest University, and at the Conference on Art, Law, and Society at Temple University.

Professor **Clark C. Havighurst** was elected to membership in the Institute of Medicine of the National Academy of Sciences. He served as a member of the Private Sector Task Force on Competition appointed to advise the Secretary of Health and Human Services on Administration health policy. He testified twice before Congressional committees and addressed over a score of groups on topics relating to health law and policy. He continued to direct the Law School's program on Legal Issues in Health Care.

**Donald L. Horowitz**, Professor of Law, Political Science, and Public Policy Studies, served as a member of the Editorial Boards of *Ethnicity and Law and Society Review* and on the Council on the Role of Courts. He delivered several papers on ethnic relations, including ones at Ford Foundation Workshops in Kenya and Sri Lanka and at conferences in England. He participated in several other conferences and testified before the Senate Judiciary Subcommittee on the Constitution on amendments to the Voting Rights Act. He spoke before the Remedies Section of the Association of American Law Schools' annual meeting on "The Impact of Structural Reform Litigation on the Courts."

Professor **David L. Lange** continued to serve as a member of the Governing Committee of the ABA Forum on Entertainment and Sports Law.

**Arthur Larson**, James B. Duke Professor of Law Emeritus, lectured at numerous symposia and conferences and testified before committees of the Maryland and North Carolina legislatures on workmen's compensation measures.

**Richard C. Maxwell**, the Harry R. Chadwick, Sr., Professor of Law, received the UCLA Medal, that Univer-

sity's highest award and equivalent to an honorary degree. He visited at the University of Colorado School of Law in the summer of 1982 as Charles Inglis Thompson Professor. He lectured on oil and gas law at the University of North Dakota and served on several boards and committees, including the University of California's Program Review Committee on Law, the Board of Visitors of the Southeastern University Law School, and the ABA Commission on Public Understanding of the Law.

**William P. Pinna**, Senior Lecturer in Law, served as Chairman of bar committees on Agricultural Taxation and the Economics of Law Practice.

Associate Professor **Walter F. Pratt, Jr.**, served on the University's Rhodes Scholarship Committee and attended the annual meeting of the American Society for Legal History.

Professor **A. Kenneth Pye** completed six years of service as Chancellor of the University and returned to full-time teaching as the first Samuel Fox Mordecai Professor of Law. He delivered numerous addresses and papers, including ones before the Southeastern Conference of the AALS; the ABA Section on Legal Education and Admission to the Bar; the International Conference on University Governance in Ankara, Turkey; the McGill-Duke Symposium on the new Canadian Constitution; and the Second International Conference on Development in the Arab World. He served as Chairman of the Nominating Committee of the AALS and as a member of the Council for International Exchange of Scholars and of the American Council of Education Committee on Self-Regulation.

Professor **William A. Reppy, Jr.**, continued to serve as consultant on community property law for the California Law Revision Commission and was a member of the Condominium Statutes Drafting Committee of the North Carolina General Statutes Commission. He delivered several addresses, including ones on

community property law matters before a State Bar of Texas symposium, on condominium law before the North Carolina Land Title Association, on first-year legal research and writing at Boston University and the University of Maryland, and on animal rights laws before a conference in New York.

---

Professor **Horace B. Robertson, Jr.**, delivered a paper on "Law of the Sea and Its Relationship to Major Problems from the East Asian Perspective" at a conference in Seoul, Korea, in July, 1981. He has prepared chapters on straits passage and archipelago waters for a forthcoming multivolume analysis of the Convention on the Law of the Sea.

---

Professor **Thomas D. Rowe, Jr.**, served as Associate Dean for Research. He spoke on the law governing abortion before a Virginia Bar Association forum in May 1982.

---

Associate Professor **Richard L. Schmalbeck** served as an Associate Editor of the *ABA Journal's* "Tax Notes" column and was active in the ABA Section on Taxation. He prepared a forthcoming article on the normative branch of economic analysis of law.

---

Associate Professor **Christopher H. Schroeder** held the School's Bost Research Professorship in the fall semester.

---

Professor **Melvin G. Shimm** continued to serve as Senior Associate Dean of the School and addressed several alumni groups.

---

Professor **Bertel M. Sparks** continued to serve as a member of the Drafting Committee on Trusts and Trustees for the North Carolina General Statutes Commission.

---

**William W. Van Alstyne**, Perkins Professor of Law, spent the spring semester on leave as Visiting Professor at Boalt Hall, the University of California at Berkeley School of Law. He completed manuscripts for articles on judicial activism/judicial restraint and implied powers in the forthcoming *Encyclopedia of American Constitutional Law*. He spoke before judicial confer-

ences of the District of Columbia Circuit and of the Florida state courts and delivered other addresses in North Carolina, Washington, and California. He testified before the House Judiciary Subcommittee on Criminal Justice on proposed revisions of the federal civil rights acts and testified and wrote on the Equal Rights Amendment. He continued to serve as chairman of the AALS Committee on Academic Freedom and to serve on a national committee of the American Association of University Professors.

---

Professor **John C. Weistart** served as a member of the University's Chancellor Search Committee and was elected Chairman of the AALS Section on Sports Law. He served as consultant to the Director of the Bureau of Consumer Protection of the FTC and testified on regulation of sports franchises before the House Judiciary Subcommittee on Monopolies and Commercial Law in July, 1981. He delivered several speeches on sports law topics, including ones before the Center for Law and Sports at the University of Indiana in Indianapolis; the American Heart Association Physicians' Conference in New York; the Sports Lawyers' Association in Fort Lauderdale; and the Practicing Law Institute in New York.

---

Visiting Professor **Milton R. Wessel** delivered the Third Annual Earl Warren Memorial Lecture at the University of California at San Diego in November, 1981, on "Science, Technology and the Law: A 21st Century Plea."



# Alumni News

## Graduation With Distinction Class of 1982

James Bradford Anwyll  
Albert Fleming Bell, II  
Harris Taylor Booker  
David Richmond Burford  
Patricia Anne Casey  
Dirk Glen Christensen  
Terrence Patrick Collingsworth  
Peter Andreas Cotorceanu  
Penny Lozon Crook  
Michael Martin Darby  
Barbara Jean Degen  
Paul Brooks Eason  
Barbara Sara Esbin  
Richard Wilson Evans

David Samuel Felman  
Thomas Roland Grady  
Thomas Andrew Hale  
John Louis Hardiman  
Paul Russell Hardin  
Richard Louis Horwitz  
Mark Jensen  
Michael Hugh Krimminger  
Vincent John Marriott, III  
James Patrick McLoughlin  
Lauren Kathleen McNulty  
Thomas Michael Meiss  
William Zachary Messer  
Stanley Theodore Padgett

James Russell Peacock  
Gail Elizabeth Rising  
Frederick Robinson  
Stuart Frederick Schaffer  
Mark Donald Shepard  
Linda Jean Swofford  
Michael Bert Thornton  
Joel Barry Toomey  
John Andrew Tucker, IV  
Mary Ann Tyrrell  
David Michael Underhill  
Diane Winton Alexander Wallis

### Reunion

The largest turnout in recent memory for the Annual Law Alumni Weekend occurred October 1st and 2nd as over 200 law alumni/ae returned to campus for the festivities. Classes graduating in the years ending in 2 or 7 (e.g., 1952, 1957) held reunions.

Scheduled events included the first Law Alumni Gold Tournament, Cocktails at the President's House, a "Pig Pickin'" Barbeque, the Duke vs. Navy Football Game, an address by Hon. Christine M. Durham ('71) of the Supreme Court of Utah, and Reunion Class Parties.

Especial thanks are in order for each of the reunion class chairmen whose efforts helped insure a most memorable weekend indeed: Joseph T. Carruthers, Jr. ('32); John Mack Holland, Jr. ('37); Ralph Lamberson ('42); Lillard H. Mount ('47); E. Norwood Robinson ('52); Hon. Gerald B. Tjoflat ('57); Michael C. Troy ('62); John L. Crill ('67); Robert J. Winge ('72) and David C. Pishko ('77).



## CHANGE OF ADDRESS

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

## PLACEMENT

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

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

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

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

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

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

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

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

## ALUMNI NEWS

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

Address \_\_\_\_\_

Phone \_\_\_\_\_

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



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

Address Correction Requested

---

NON-PROFIT ORG.  
U.S. POSTAGE  
PAID  
DURHAM, NC  
PERMIT No. 60

---

University Librarian  
220 Perkins Library  
Campus