

Duke Law Magazine

WINTER, 1986



Spanning the Continents

Duke Law Magazine

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Editors' Column

The Law School at Duke has from its inception served as a national institution. In recent years, it has grown to be an important international institution as well. The contours of this development are more generally described in this issue. This growth is especially notable with respect to the School's ties to the continent of Asia.

Relative to its size, Duke now enrolls more students from Asia than any American law school. Duke has developed a close relation with a number of institutions in the People's Republic of China and is playing a significant role in helping that nation redevelop its legal system and legal profession. Ten students from China are enrolled in the School in 1985-86; all but one of the ten is studying for the J.D. In addition, there are five students from the Republic of Korea (3 J.D.'s and 2 LL.M.'s), three from Taiwan (2 S.J.D.'s and 1 LL.M.), three from Japan (2 LL.M.'s and 1 M.L.S.), one from India (J.D.), and one from the Phillipines (J.D.). Malaysia was also represented in the student body in 1984-85.

Because the Law School is relatively small and maintains a close sense of community, there is a great deal of interaction between its international students and its American students. Thus, the School affords a superior opportunity for Asian students and students with Asian interests to share a common intellectual enterprise. In recent years, four professors from Asian universities have been in residence at Duke for all or part of the academic year: one from China, one from Korea, and two from Japan.

By reason of the interests and activities of the faculty, the curriculum of the Law School has evolved in recent years to include a number of offerings of special interest to persons having an interest in legal developments in Asia. Donald Horowitz, a leading expert on ethnic conflict, regularly offers a seminar on the law of ethnic group conflict; a significant portion of the material studied is Asian. For the last six years, Jonathan Ocko has offered a course in the Chinese Legal Tradition. Recently, the School has also been offering a course in Japanese

Public Law conducted by Percy Luney in association with Japanese legal scholars. Several members of the Duke Law faculty have taught in China, including three in 1985; another has taught in India, yet another in Singapore. In addition, in 1985-86, five Duke Law students are studying in China for the year under the auspices of the School. These developments are also reported in this issue. Instruction in Chinese and Japanese languages is available at Duke.

The Duke China Law Fund is a loose association of scholars and practicing lawyers interested in the development of the legal system and the legal profession of China. It enlists the support of American law firms, international businesses, foundations, and government agencies having interests in China. It also sponsors an annual study trip to China to examine the interaction of law and economic development in that country, and to interview Chinese applicants to Duke.

On the Cover

The cover depicts a hand-woven African tapestry recently given to the School by Ralph Lamberson, LL.B. '42. Now hanging in redecorated Room 214, the weaving was designed by Afro Studio and executed by Elizabeth Tsholo. It comes from Phuthaditjhaba in Qwa Qwa.

Lamberson, formerly of New York City and now living in Williamsburg, Virginia, has given the Law School a number of works of fine art in the past several years. A print by Nissan Engel adorns the Faculty Lounge; an Engel poster hangs in Room 204 and two Engel watercolors hang in Room 211A. Room 213 contains two silkscreens of Mayan figures from Lamberson, as well as a block print on the Pegasus theme.



FACULTY ABROAD

Constitutional Change: Reflections on the American Experience*

by *Walter Dellinger*[†]

Walter Dellinger has travelled widely during the past year lecturing on a variety of constitutional issues. Last fall, he delivered addresses at the Brookings Institute in Washington, at the National Humanities Center, and at the annual meeting of the Association of American Law Schools. In the spring he gave a series of fifteen lectures on American constitutional law at the Catholic University in Leuven, Belgium.

While in Europe, he also gave talks at a number of leading universities. He lectured in Italy at the University of Florence and at the University of Sienna. He gave two lectures at the University of Copenhagen, Denmark, and delivered an address sponsored by the German-American Lawyers Association in Nuremberg, Germany.

This December Professor Dellinger was invited to address a convocation held in Rio de Janeiro, Brazil, on the eve of the drafting of a new democratic constitution for Brazil, which has turned to civilian government after twenty-one years of military rule. The conference was sponsored by the Instituto dos Advogados Brasileiros and the American Bar Association. Other American speakers included Harvard Law Professor Paul Bator, former Attorney General Benjamin Civiletti, federal court of appeals Judge Abner Mikva, and Michigan Law Professor (and former Solicitor General) Wade McCree.

Professor Dellinger delivered his address to the conference's final banquet on December 12, 1985. Excerpts from his address follow:

Dr. [Sergio] Ferraz [Presidente do Instituto dos Advogados Brasileiros] and Mr. [William] Falsgraf [President of the American Bar Association], ladies and gentlemen:

I am honored to have been asked to reflect with you at this propitious moment in the constitutional history of Brazil about the American experience with constitutional change. I will talk this evening about a mystery that reverberates through two centuries: how does a constitutional system of government, itself born of revolution, properly provide for its own revision—provide literally for its own re-constitution? To explore this question, I plan first to consider briefly the political and intellectual assumptions against which Article V of the United States Constitution—the amend-



Walter Dellinger

ment article—was drafted, and then to look even more briskly at the historical context in which the Constitution's twenty-six amendments have been adopted. With this as background, I will address a few specific questions concerning the law and policy of constitutional change that are currently the subject of lively dispute in America.

The place to begin is with that extraordinary experience in fundamental constitutional change that took place in Philadelphia in the summer of 1787. The states for whom a constitution was being drafted were hardly then a nation. The coming together of these colonies a dozen years earlier had been more difficult than we can easily now imagine. From the vantage point of 1776, the year of the American Revolution, the Constitution that emerged a dozen years later looms as an extraordinary creation. None of the Revolutionary leaders contemplated erecting over America a truly national govern-

ment with the power to operate directly on individuals. At that earlier time—1775—John Adams had written home to Abigail of “[f]ifty gentlemen meeting together all strangers . . . not acquainted with each other’s language, ideas, views designs. They are therefore jealous of each other—fearful, timid, skittish.” While to us they stand at the beginning, initiating a history, Gary Wills notes that “they saw themselves as defenders of a history accomplished; taking risks that might end, rather than launch, a noble experiment.” They came as representatives of legislative assemblies a century old. The colonies were more trading rivals than partners.

The physical distances were vast, and land travel between colonies was an arduous undertaking. None of the Massachusetts delegates had ever seen Philadelphia.

The American colonies fought the War of Revolution as allies, not as a union. At war’s end they confederated as thirteen governments under Articles of Confederation, each retaining its “sovereignty, freedom, and independence” except as expressly delegated to a Congress of limited authority, in which each state voted as a state and cast a single vote.

Although awesome problems beset this Confederation (“We are fast verging to anarchy and confusion,” wrote Washington to Madison), there was little doubt that the Government under the Articles of Confederation was a duly constituted, legitimate government. It was a government, moreover, whose fundamental constitution expressly provided that no amendment—no alteration designed to remedy its other defects—could be made without the unanimous consent of all the parties to the Articles of Confederation. But the required unanimity among the state legislatures on proposed amendments was impossible to achieve. This then was the framer’s dilemma: they sought, in part for the sake of stability, a new and sounder constitution. But that constitution could only be obtained by once again (for the second time in a dozen years) engaging in lawless (or at least clearly extra-legal) action in violation of the command of the existing constitutional order. It is with this dilemma that I will begin and end this lecture.

From the outset of the Philadelphia Convention, the delegates agreed upon the need for an amendment process through which future lawful revision would be a genuine possibility. The amendment process they adopted represented, in a sense, the domestication, the taming, of the right to revolution which had been proclaimed by the colonists. The early state constitutions had legitimated the right of revolution by boldly proclaiming the right of the people to “reform the old or establish a new government.” (Maryland, 1776). Most early state constitutions did not, however, contain any definite procedures by which reform or reformation could be accomplished. As Judge Jameson noted,

The doctrine of the Revolution, that governments were founded by the people, and could be amended by them as they should think fit, was erroneously understood to

warrant tumultuous assemblages of citizens, without legal authority, to dictate to the government not only its current policy, but amendments of the fundamental law.

The amendment article can thus be seen as part of the conservative thrust of much of the work of the Convention. The inclusion of a specific amendment procedure emphasized that changes of fundamental law were henceforth to be made only in accordance with modes sanctioned by the document itself. The amendment article thus served to confine the right to revolution within expressly prescribed legal procedures.

Most early state constitutions did not, however, contain any definite procedures by which reform or reformation could be accomplished.

The complex procedures provided for by Article V are these: Changes—amendments—can be proposed in either of two ways: amendments may be proposed either by Congress or by a national constitutional convention. And amendments may be ratified in either of two ways: either by the legislatures of three-fourths of the states, or by ratifying conventions in three-fourths of the states.

It has been said that in constructing a federal government the two most important issues are the initial allocation of power between the two levels of government and the location of power to change that allocation in the future. Throughout the summer of 1787, the delegates at the Philadelphia Convention had constructed the basic framework of American federalism. Only in the closing days of the Convention—*after* the delegates had completed the difficult task of achieving consensus on the balance of state and national power—was agreement reached on an amendment formula.

One striking aspect of the amendment process is this: nowhere in the Constitution is its federal character more pronounced: each state counts as one in the ratification process. Unlike the presidential selection process, Article V does not require that the votes of each state be weighted by population. It does not even require that states with a majority of the population ratify an amendment. How much popular support an amendment needs in order to be ratified varies enormously depending upon whether it is supported or opposed principally in small or large states. An amendment opposed by the twelve smallest states containing less than 4% of the national population will not become part of the Constitution even though ratified by the other thirty-seven states which have 96% of the population. On the other hand, an amendment sup-

ported by the smaller states could be ratified with the support of substantially less than half the population. An amendment can be ratified by the thirty-eight smallest states—states that contain barely 40% of the national population.

Of course, this was exactly what the framers intended: the equality that is relevant for purposes of amending the Constitution is not the equality of individuals, but the equality of states in a federal union. As a consequence, however, of this deference to federalism, the population percentage needed for ratification varies from 40% to 96% depending upon

[T]he equality that is relevant for purposes of amending the Constitution is not the equality of individuals, but the equality of states in a federal union.

whether an amendment is relatively favored by those in large or smaller states. Of all the proposals to change the American amendment process that have been made through history, the one that has the most appeal to me is the suggestion that we reduce the number of states required for ratification of an amendment from thirty-eight to, say, thirty-two, but add a requirement that the ratifying states contain at least a majority of the national population.

Does the American amendment process, as it is presently constituted, make changing the Constitution too hard or too easy? The opponents of the Constitution thought that it was much too difficult to amend. Patrick Henry, that precursor of the populists, fought against this Constitution with all his mighty powers of oratory arguing that the Constitution was an elitist document creating a powerful, distant national government far removed from the people and unduly tilted toward the protection of property rights. The supporters of the Constitution urged that it be ratified and argued that any defects could be cured by subsequent amendments. Henry saw the amendment process as holding out only the beguiling possibility—but not the reality—of change since amendments could be blocked by four states with less than 5% of the national population. His fellow opponent of the Constitution, Luther Martin of Maryland, ridiculed the framers' argument that the Constitution should first be ratified and then could be amended: They urge us, said Martin, "not [to] hesitate swallowing the poison from the ease and security of instantly obtaining the antidote."

Madison, the principal architect of Article V, defended the amendment process in the 43rd *Federalist*. "The mode preferred by the Convention seems to be stamped with every mark of propriety. It guards

equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults." How well has Madison's sanguine prediction fared? What does our history tell about the facility with which the Constitution can be amended? Since 1789 over five thousand bills proposing amendments to the Constitution have been introduced in Congress. Of these, only thirty-three received the necessary two-thirds vote of both Houses of Congress and proceeded to the states for ratification. Twenty-six were ratified, seven have failed. With only a few exceptions, the amendments proposed by Congress have come in clusters. History shows that a political movement with the strength to see one amendment through ratification usually succeeds in enacting a series of amendments. There have been four periods in our history in which cluster of amendments have been proposed and ratified. Virtually all of our amendments are the product of these four political movements.

The first of these four brief amendment periods ran from 1789 to 1804 and produced what may loosely be called the "anti-Federalist amendments"—the Bill of Rights and the eleventh and twelfth amendments—each of which was, in part, a concession to anti-Federalist or Jeffersonian interests. The eleventh amendment limited the authority of the federal courts (then in the hands of the Federalists) to hear suits against the states and the twelfth corrected a glitch in the electoral college process that had nearly cost Jefferson the Presidency. More than half a century passed before the Constitution was again amended. In 1865, sixty-one years after adoption of the twelfth amendment, Congress proposed and the states ratified the thirteenth amendment, the first of the three great Reconstruction amendments. The adoption of the fourteenth and fifteenth amendments followed in 1868 and 1870.

These three great civil war amendments fundamentally changed the American Constitution. The thirteenth amendment ended slavery and the fifteenth prohibited denying the right to vote on the grounds of race. But it is the fourteenth amendment that has provided the most dramatic continuing source of change in American constitutionalism. Before Congress approved the fourteenth amendment in 1866, the Constitution contained very few limits upon the legislation that states could adopt. The fourteenth amendment proclaimed in sweeping language that "No State shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person . . . the equal protection of the laws." The amendment provided further that Congress could enforce its sweeping provisions through appropriate legislation. It also provided a basis for the United States Supreme Court, in the exercise of judicial review, to invalidate those state practices that could be seen as violative of the amendment's broad commands, and has

been the source of almost all of the controversial judicial decisions issued by the Supreme Court in our time.

For almost half a century following the Civil War there were no amendments either proposed or ratified. And then, suddenly, in the short space of seven years between 1913 and 1920 five amendments were proposed by Congress and four of them were ratified by the states. The Progressive Movement rediscovered the amendment process and was able to run the gauntlet of that process to produce amendments providing for federal income taxation (the sixteenth amendment, ratified in 1913), direct election of senators (the seventeenth amendment, ratified in 1913), prohibition (the eighteenth amendment, ratified in 1919), and women's suffrage (the nineteenth amendment, ratified in 1920). These linked amendments sought to purify American life—particularly American political life—by curtailing the influence of great wealth through the tax amendment, by bringing into politics what was thought to be the uplifting influence of women, by banishing liquor and the saloon politics that went with it, by letting the people themselves choose United States Senators. Extending the franchise to women was thought critical to the success of the amendment prohibiting liquor and the proposed (but unsuccessful) amendment banning child labor. All in all, these Progressive Movement amendments constitute the most energetic use of the amendment process we have ever experienced.

Together, these first three brief periods of constitutional amendment activity (the Bill of Rights; the Civil War Amendments, and the Progressive Amendments) accounted for all but three of the amendments adopted before 1960. A fourth period of amendment activity lasted from 1961 to 1978. During these years, Congress proposed six amendments, four of which were adopted. The recent adoption of four amendments may create an impression that amending the Constitution is fairly easy. Each of the amendments adopted, however, enacted relatively uncontroversial propositions. The

amendment's adoption, only five states still imposed such a tax, it was not enforced in all of those, and the Supreme Court was on the verge of eradicating it anyway. The twenty-fifth amendment, providing rules for presidential disability and succession, was widely approved as a useful technical change in the Constitution. The twenty-sixth—lowering the voting age—seems dramatic, but the drama was all gone by the time of its adoption. The Supreme Court had upheld Congress's action that had by ordinary legislation lowered the voting age to eighteen for *federal* elections, making it extremely difficult for states to maintain separate voting lists for state elections. As a

To insure that the full range of future constitutional changes would be a viable possibility, the framers sought to provide some means of constitutional change free of the control of existing governmental institutions.

result, the twenty-sixth amendment was ratified in less than four months. The ease of passage of these four amendments thus does not support the conclusion that it is a simple matter to adopt an amendment that significantly changes the constitutional framework.

Wholly apart from the question of whether an amendment process is too difficult is the question of whether an amendment process tends to lock into place those existing institutions created by the original document. This is a problem that inevitably faces those creating constitutions. One must choose some institutions to propose and ratify changes. But how do you change those institutions that are given the power to initiate and ratify amendments? If, for example, Congress is to propose all amendments, and all must be ratified by state legislatures, how can you ever realistically expect changes to be made in those institutions and their powers?

To insure that the full range of future constitutional changes would be a viable possibility, the framers sought to provide some means of constitutional change free of the control of existing governmental institutions. The framers therefore included alternative mechanisms both for proposing and for ratifying amendments. From the earliest days of the Constitutional Convention, the delegates sought to avoid giving Congress the sole authority to propose amendments. If the proposal of all amendments ultimately depended upon Congress, George Mason argued, "no amendments of the proper kind would ever be obtained by the people, if the

[I]t is the fourteenth amendment that has provided the most dramatic continuing source of change in American constitutionalism.

twenty-third amendment provided three electoral votes for the District of Columbia; it affected only a small percentage of the national population. The twenty-fourth embodied a salutary principle: the abolition of the poll tax for federal elections; at the time of the

Government should become oppressive, as he verily believed would be the case." 1 *Farrand* at 629. Other delegates, however, were apprehensive about the threat to national authority if state legislatures could effectively propose and ratify amendments without the involvement of some institution reflecting the national interest.

So the Convention struggled to find some method of proposing amendments that would be free of congressional control. One possibility was to have a certain number of state legislatures agree upon an amendment, which would then be ratified by the state legislatures.

[T]he use of either a national convention for proposing amendments or state conventions for ratification are at present fraught with uncertainties.

This proposal was *rejected* by the Convention. Hamilton said, "The State Legislatures will not apply for alterations but with a view to increase their own powers— . . ." State legislatures were considered the problem to which the new constitution was a response. The last thing the framers wanted was a system by which two-thirds of the state legislatures could propose amendments which would then be ratified by three-fourths of those same state legislatures. Madison reminded the delegates that the "greatest evils complained of" were those of the state legislatures.

The solution to this dilemma was the "convention of the people." In addition to providing that amendments could be proposed by Congress, the final version of Article V provides that Congress must call "a Convention for proposing Amendments" whenever two-thirds of the state legislatures apply for one. Such a convention would be, like Congress, a deliberative body capable of assessing from a national perspective the need for constitutional change and capable of drafting proposed amendments for submission to the states for ratification. At the same time it would not be Congress itself, and therefore would not pose the threat of legislative self-interest blocking needed reform of Congress.

No national "Convention for proposing Amendments" has ever been called. In recent years, however, a number of state legislatures have petitioned Congress to call a convention limited to proposing a particular amendment specified by the applying state legislatures. Some scholars consider these applications to be valid and argue that if similar applications are received from two-thirds of the state legislatures Congress should call the convention and seek to limit the convention to the particular amendment (or subject) specified in the state legislative applications. Others argue that such state

applications are invalid because they erroneously assume that the agenda of the convention can properly be controlled by the applying state legislatures. These scholars argue that a "Convention for proposing Amendments" was designed to be free of the control of both Congress and the state legislatures, free to determine its own agenda, free to consider and debate alternative solutions and finally to decide what amendments should be proposed to the states for ratification.

In addition to providing this alternative of a national convention for *proposing* amendments, Article V also provides an alternative method of *ratifying* amendments. For each amendment (whether proposed by Congress or by a national convention) Congress is free to choose whether to submit the amendment for ratification to state legislatures or to "conventions" in each state. By giving Congress this authority, Article V preserves the possibility of reforms restricting the power of state legislatures. The Constitution itself was submitted to ratifying conventions in each state, rather than to state legislatures. For thirty-two of the thirty-three proposed amendments Congress chose to submit its proposal to state legislatures. But the use of the convention method of ratification is not unprecedented: the twenty-first amendment repealing Prohibition was submitted by Congress in 1933 to state conventions. Virtually every state chose to have delegates to its ratifying convention elected, and in every state the election of delegates was, for all practical purposes, a dispositive referendum on whether or not to ratify the amendment. In every state the voters' wishes were expeditiously carried out by the slate that had won election. In less than ten months from the time it was proposed by Congress, the amendment was ratified by elected conventions in three-fourths of the states.

"Excessive democracy" in the state legislatures was seen by many of those who gathered in Philadelphia as the central problem requiring a new Constitution.

The "convention of the people" was a familiar device in the eighteenth century. It now seems archaic, and the use of either a national convention for proposing amendments or state conventions for ratification are at present fraught with uncertainties. The convention device was nonetheless an imaginative effort to address a universal problem of constitution drafting: how to provide the means for future reform of governmental institutions, when the only institutions readily available for proposing and approving changes are

those already in existence, and possibly in need of reform themselves.

* * *

Let me finally come full circle and conclude by reflecting upon the dilemma with which I began. How is it possible to move from one constitutional system to another and yet maintain constitutional legitimacy? The American Constitutional Convention of 1787 confronted this difficult question as they grappled with the issue of the legitimacy or legality of their plan for ratification of the new Constitution. The Articles of Confederation and Perpetual Union—the existing constitutional government—provided that the articles “would be inviolably observed and the union shall be perpetual; nor shall any alteration be made in any of them . . . unless confirmed by the legislature of every state.” There was simply no way, however, that every state would agree; nor was there any significant hope that the state legislatures, the big losers under the Convention’s proposal, would ratify the Constitution. Power in the early American Confederation was lodged in the state legislatures—the most democratically elected bodies the world had even known. Popular democracy in these legislatures produced paper money and debtor relief legislation and provincial localism produced trade barriers between the states that threatened to ruin the economy. “Excessive democracy” in the state legislatures was seen by many of those who gathered in Philadelphia as the central problem requiring a new Constitution. But the state legislatures were unlikely to approve the kind of changes this new Constitution would make. So the framers decided to send this new Constitution not to the state legislatures but to specially elected conventions in each state for ratification. The Convention therefore simply declared that its Constitution would be the Supreme Law of the Land when ratified by nine rather than thirteen states, and indeed when ratified by specially elected conventions in those states rather than by the duly constituted legislative government specified by the existing Constitution. Could these revolutionaries in search of stability justify this (hopefully last) act of civil disobedience?

Madison in fact presented at least the outline of a substantial argument for the legitimacy of the Convention’s proposed self-validation. Ratifying con-

ventions would be directly elected by the people themselves. There was a substantial equation in the late eighteenth century between the concept of “the People” and the concept of the popularly elected convention. A phrase that was commonly used was “the People in Convention assembled.” It was the Articles of Confederation whose legitimacy was in doubt for they rested only on legislative ratification. To send the Constitution to the people was to recur, as Wilson put it, “to the original powers of Society.” [M-563] Madison argued that “The people were in fact the fountain of all power, and by resorting to them, all difficulties were got over.” [M-562]

Elbridge Gerry was nonetheless nervous to the end. As late as September 10, “Mr. Gerry urged the indecency and pernicious tendency of dissolving in so slight a manner, the solemn obligations of the articles of confederation. If nine of out of thirteen can dissolve the compact, six out of nine will be just as able to dissolve the new one hereafter.” [M-612]

Let me conclude with the answer to Gerry by young Governor Randolph of Virginia, an answer that effectively laid further discussion to rest: “Mr. Randolph . . . painted in strong colors, the imbecility of the existing confederacy, & the danger of delaying a substantial reform. . . . When the salvation of the Republic was at stake, it would be treason to our trust, not to propose what we found necessary. . . . There are great seasons when persons with limited powers are justified in exceeding them, and a person would be contemptible not to risk it.” [I F at 255, 262]

**This paper is the banquet address presented at the Symposium on the American Constitutional Experience in Rio de Janeiro, Brazil, on December 12, 1985. Portions of this address were drawn from Dellinger, The Legitimacy of Constitutional Change: Rethinking the Amendment Process, 97 Harv. L. Rev. 386 (1983); Dellinger, The Recurring Question of the ‘Limited’ Constitutional Convention, 88 Yale L.J. 1623 (1979); Dellinger, The Amending Process in Canada and the United States: A Comparative Perspective, Law & Contemp. Probs., Autumn 1982; and Dellinger, Another Route to the ERA, Newsweek, August 1982.*

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American German Tax Law Symposium in Heidelberg

Several Duke Law faculty members attended the American German Tax Law Symposium held in Heidelberg this summer. Organized by the Institute for Financial and Tax Law of the University of Heidelberg and sponsored by the Drager Foundation, the topic of the symposium was "Income Taxation in the Constitutional System of the United States and the Federal Republic of Germany." Professors Gann, Schmalbeck, and Van Alstyne all delivered papers on taxation topics, and Dean Carrington served as both moderator and speaker. The only other American speakers, aside from Duke faculty members, were Hugh Ault from Boston College,

Dennis Hutchinson from the University of Chicago, and Stanley Bergman, a practicing attorney. Symposium participants were supplied with written translations of the American lectures, and arrangements were made for simultaneous verbal translations of the German speeches. The program also included a boat excursion on the river Neckar, a reception given by the Rector of the University of Heidelberg, and travels into the Heidelberg environs. Additionally, former Duke alumni of both the J.D. and LL.M. programs met for an informal "reunion" luncheon at a local Heidelberg restaurant during the symposium.

A Constitutional Review of the American Income Tax[†]

*William Van Alstyne**

I. INTRODUCTION

Today there are nearly 160 nations with written constitutions, yet no more than six of these constitutions predate 1900. Of these six, the Constitution of the United States is by far the oldest, and the subject of taxation is its second most prominently featured subject.¹ Indeed, "taxes" are specifically addressed in eight separate clauses of the original Constitution of 1789 and twice more in subsequent amendments.

These two facts—the seniority of the American Constitution and the sheer number of its tax clauses—ought to make the American Constitution an abundant resource for comparative study. Combined with one other feature of our system, moreover, they might make our experience more valuable than practically any other, especially in respect to principles of income taxation.² That additional consideration is the special distinction the American courts have always enjoyed since *Marbury v. Madison* confirmed it. That distinction is, of course, the judicial power of substantive, constitutional review, a power the courts of most countries have not had.³

Yet, very generally our constitutional experience in the management of taxes has not been particularly illuminating. . . .

A number of our constitutional clauses are downright anachronistic; they are preoccupied with revenue sources (e.g., duties, imposts, customs, and excises) which were overwhelmingly the principal source of national revenue during the first century of American constitutional history, but have been long since overtaken by the income tax. Our sole constitutional provision explicitly directed to the income tax, on the other hand, is itself highly idiosyncratic. It was produced entirely in response to one peculiar crisis of American taxation without general counterpart in the constitutional history of other nations.

In this abridged paper I deal only with those clauses and principles concerned directly with income taxation, and even then in a very limited way. Specifically, the subjects are these: the source(s) of power to levy taxes;⁴ the peculiar dispute over "realization" as a limitation on income taxation; the interplay of federal and state income tax powers; and the degree of tax immunity thought to arise from considerations of federalism.



William Van Alstyne

II. AN OUTLINE OF THE ESSENTIAL (INCOME) TAX POWERS.

The essential plan of the American Constitution is exceedingly straightforward. It is this: the national government may do only those things the Constitution either expressly or impliedly authorizes it to do; the states may do whatever the Constitution does not forbid them to do.

In respect to a power to levy taxes (including income taxes), however, this first principle of American constitutional law amounts to very little because of what the Constitution itself provides. Among the many enumerated powers expressly vested in Congress, the power to tax is granted in the most expansive terms:

The Congress shall have power to lay and collect Taxes, Duties, Imposts and Excises. . . .

A tax on incomes is a tax within this power, authorized by this clause, unconstrained in the first instance in terms of rate or amount and unconstrained also in

terms of whom it reaches. The power is very great.⁵ There is thus no initial restriction limiting a power to tax incomes by amount, by source, by occasion, or by purpose. Similarly there is no initial restriction limiting a power to tax incomes by the character of the taxpayer (e.g., whether an individual, an association, a corporation, or a government) or by the nexus of the taxpayer or its income with the government of the United States.⁶

Initially, moreover, so far as this power is concerned, there is no requirement that the income to which the tax applies must even be realized, *i.e.*, that it be separately or physically received in some sense, or detached (or at least detachable) from the asset or thing said to produce it.

So far as the scope of congressional tax power is concerned, there is no constitutional limitation arising from the clause we are examining that precludes the use of very expansive notions of "income."

It does not matter in the first instance whether a gain in net wealth is a "true" instance of income according to some persons' thinking, or even whether it is (or is not) "income" in any reasonable sense of the word at all. The enumerated power vested in our Congress, again, is to impose a fiscal levy (a "tax"), *regardless* of what the tax falls on, *regardless* of one's ability to pay it, and *regardless* of its rate. Nice distinctions, such as whether the tax is an "income" tax, do not matter in the first instance. If it moves, Congress can tax it. If it doesn't move, Congress can still tax it. It is the simplest point to note, although too frequently forgotten. The first principle is thus one of an extremely unconstrained, enumerated national tax power—a power "to destroy" (by fiscal levy), of which the power to destroy (*i.e.*, to tax) incomes is but a lesser included example, regardless of how income may or may not sometimes be defined.

The enumerated express general tax power vested in Congress, moreover, is duplicated by a fully overlapping set of state government powers to impose their own income taxes. There is, in brief, no exclusive constitutional reservation of an income tax power to the national government alone or to the several state governments alone, or to both but in some measure of proportion or according to source. Rather, multiple taxation of income is constitutionally permitted in the United States and is in fact an altogether commonplace practice.⁷ The more important question thus becomes the different one, namely, what are the constitutional limitations (if any) that circumscribe these duplicative national and state "income" tax powers, and it is to these that we now turn.

III. THE PROBLEMATIC "REALIZATION" PRINCIPLE OF AMERICAN INCOME TAX LAW

We have already noted that the national power to levy taxes is not limited to the taxation of "income," but extends to virtually every imaginable object in the first instance. For instance, it extends even to the

power to tax each person merely for being a person (e.g., a "capitation" tax), whether one engages in no activity, has no income, and owns virtually no property. If, then, one need not even do anything or own anything in order to be subject to taxation, it must be obvious that when a tax is instead imposed only on some activity or some aspect of wealth, it obviously need not be limited to one's "income" from that wealth. Rather, it could as easily be a simple flat or graduated tax on "net worth" as such. Alternatively, any *accretion* to net worth might itself be made the subject of a tax of its own, the tax to be computed according to some flat or graduated rate as made applicable to one's wealth accretion within a fixed (tax) period. Some would call this an "income" tax.

Our earlier point was that nothing of any constitutional significance initially turned on any of these distinctions. Whatever the tax may be called or however it may be described (e.g., whether as an "income" tax, a "wealth accretion" tax, or a "property" tax), the fussiness or accuracy of one's nomenclature was without constitutional significance as to whether it could be taxed. In *all* cases, it comes within the tax power as described in Article I, Section 8, Clause 1, of the American Constitution:

The Congress shall have Power to lay and collect Taxes . . .

As it happens, however, there are three other clauses in the same Constitution that may make it critical to decide whether a tax is an "income" tax, as distinct from some other sort of tax. These are those other clauses:

Art. I, Sec. 2, cl. 3: Representatives *and direct* taxes shall be apportioned among the several states . . . according to their respective Numbers . . . (Emphasis added.)

Art. I, Sec. 9, cl. 4: No Capitation, *or other direct*, Tax shall be laid, unless in proportion to the Census or Enumeration herein before directed to be taken. (Emphasis added.)

Amendment XVI: The Congress shall have power to lay and collect taxes on incomes, from whatever source derived without apportionment among the several States. . . .

It is generally conceded that a tax on wealth as such is a tax on one's property (*i.e.*, on one's assets) and that the two quoted provisions which speak of "direct" taxes were meant to apply to direct property taxes. Such taxes, although plainly within the tax power of the national government, cannot be levied by the national government in the United States unless the Congress first decides what total amount of revenue is to be raised and then apportions the sum among the fifty states according to the fractional share of each state's population. The resulting tax *rate* applicable to any particular taxpayer-owner of the kind of property to which the direct, national property tax would apply would thus differ from the rate according

to which an identically-situated taxpayer-owner in a different state would pay. The resulting apparent inequity of that arrangement, while wholly constitutional (indeed, it is exactly the intended result), has generally inhibited Congress from using its power to tax by means of levying a "direct" tax.⁸

In 1895, the Supreme Court of the United States equated a tax on income from property (whether real property or personal property) with a tax directly on the property itself. The Sixteenth Amendment was adopted, in turn, to overcome that result, as a glance at its language is quite sufficient to suggest. Thus, it enables Congress to "lay and collect taxes on incomes, from *whatever* source derived, *without apportionment among the several States.*"

The Sixteenth Amendment in turn, however, leaves two or three matters quite unclear. And although none of them is necessarily interesting to an economist, unfortunately they do linger in theoretical importance in the United States. The problems are these. First, does it remain true under the American Constitution that Congress may not even now levy taxes on property (as distinct from taxes on income from property), unless it adheres to the apportionment formula we have already reviewed?⁹ If it does remain true,¹⁰ how does one minimally distinguish a tax on income from property from a tax "on property"? And third, assuming that one can make that distinction, to what additional extent may the Sixteenth Amendment require that the "income" also be income "derived" from its source in the sense of being already separated from the source before it becomes taxable? This last question becomes pertinent because of the apparent requirement of the Sixteenth Amendment that while income regardless of source may be taxed by Congress, yet it is only such income as has been fully "derived" from its source as is thus taxable without apportionment, assuming that the source is itself some kind of property.¹¹

The latter question is no longer regarded as controversial, although I am not personally clear why not.¹² Nevertheless, it is reasonably clear that any readily realizable "accession to wealth" may be subject to an unapportioned income tax, whether or not the taxpayer actually cashed it in or sought to cash in at the time. Effectively, "derived" thus means *not* derived in the sense of having been pulled off from or already converted as gain, but derived only in the lesser sense of an accountable (although unconverted) gain, currently realizable from an identified source which itself is already under the command of the taxpayer. It is therefore (by way of example) solely the discretion of Congress that currently permits "income" taxpayers to defer the income tax on each year's paper appreciation of their assets until such time as they dispose of them, rather than any alleged constitutional problem that otherwise the tax would be thought to be a tax on the asset (rather than a tax on income derived from the asset). A tax on a person for such realizable gain as

occurred in his property within a given accounting period, is thus, constitutionally speaking, widely regarded to be a tax on "income derived" from property, rather than a tax "on property" in the United States.

My own difficulty with this matter, alas, however, is that to a layman (although perhaps not to an economist) the specific example we just shared does not seem to have the same feel as an "income" tax ordinarily connotes. Rather, in several respects, it feels indifferently as a tax on land and its mere ownership rather than as a tax on income from land. Were the tax to fall on a person for rents paid by tenants, albeit to occupy the owner's land (the very item involved in *Pollock*), the issue is not at all doubtful. Whether one *actually* bothered to collect those rents while having a full right to do so which right one willfully postponed exercising, seems similarly to make no appropriate critical difference—certainly not a *constitutional* difference. If the mere theoretical gain in the land's value alone fixes the measure of tax, on the other hand, while the case seems comparable in some respects,¹³ it seems on the face of things still to be a tax on the land itself—which direct land tax is simply being measured by an eccentric measure (namely, the difference between fair market value as of one date and another, rather than by the fair market value on a single date). In brief, nothing seems to make it less of a land tax (and thus a direct tax) when nothing determines whether one is subject to the tax other than ownership of the land.

Indeed, if this seems to be a mere cavil (rather than a serious objection), then constitutionally-conceivable distinctions between "direct property" and "income-from-property" taxes appear to be nearly impossible to make in any coherent fashion. Consider, for instance, the following possibility: A tax on land might be measured, neither on the land's fair market value as of a certain date (which no one seems to claim is an "income" tax) nor on the difference between what the same land might have been sold for as of December 31st, minus what it might have been sold for on the preceding January 1st of the same year, which many contend is merely a tax on a realizable "accession to wealth" and thus a tax on realizable income. Rather, the tax on one's land might instead be measured by the sum of money one might have received had one rented it during the year, although one did not rent it at all, one received no rent, and, having elected not to rent, one had no right to rents. Such a tax would, of course, be valid under the power of Congress to levy taxes. The question is, however, whether it would have to be apportioned as a direct tax. It would seem that it might—or might not.

If one had lived on the land oneself, some economists insist that one has in fact realized "income." The measure of that income can be captured in a dollar figure representing the difference between what one might have rented the house for and the depreciation

of the house during the same year. One knowingly forewent that income by consuming personally its equivalent, i.e., by living in the house—they are inclined to call a tax on such a (consumption) choice an “imputed” income tax. If one neither rented the land nor even lived on it, moreover, still that choice may itself be said to constitute a consumption choice such that one has again “consumed” (and thus realized something—“income”?) reflected by the value of one’s election for oneself as to what one did. The proper figure for purposes of taxing that choice is again allegedly the difference between rents one might have received minus the expenses (including depreciation) incidental to the earning of those imputed receipts—call it a “preclusive” imputed (net) income tax—the income (consumption) value of the “right” one exercised in precluding others from having occupied one’s land in exchange for taxable rents.

But by this train of reasoning, the last possible clear distinction between a “property” and an “income” tax seems to have disappeared. And, indeed, at bottom, perhaps this is so. From one very strict economic perspective, perhaps *all* ownership values as such may be nothing other than the sum of some realizable (and taxable) stream of income(s). Still, to bring this concession fully within the Sixteenth Amendment seems logically to require one to answer the first question we put earlier, in a startling fashion: that the Sixteenth Amendment may not merely free a tax on incomes from whatever sources derived, from the requirement of apportionment. Rather, it may free Congress to impose direct property taxes without apportionment, to a *far* greater extent than one had imagined to be possible.¹⁴ If so, then it is correspondingly doubtful whether the “realization” principle of income taxation frames any significant *constitutional* restraint upon the American income tax, although it will doubtless continue to be a fair subject of concern as a matter of basic policy.

IV. CONSTITUTIONAL CONSTRAINTS OF FEDERALISM

We have already noted that nothing in the American Constitution precludes the states and the national government from levying income taxes on the same income, and that the practice is commonplace.¹⁵ It is a different question, however, as to how far each kind of government may tax the income *of the other government* and how far each may tax third-party incomes *derived from activities of the other government*. The general issue is thought to arise from the general principle of “dual sovereignty.”

The general principle holds that the respective state governments are fully sovereign governments within their own territory *except* to the extent that a specific and superior sovereignty is constitutionally ceded to the national government. A familiar statement of the principle in American judicial opinion is that our Constitution “looks to an indestructible union, composed of indestructible states.”¹⁶ If, then, the

power to tax is generally the power also to destroy (by taxation), it must not extend to intergovernmental taxation; were it to do so it would imperil the existence of each government subject to the raw tax powers of another.

The scope of intergovernmental tax immunities is problematic, however, because our Constitution nowhere expressly addresses the problem of intergovernmental tax immunity and nowhere explicitly draws *any* lines limiting either national or state tax powers. There are *no* express clauses providing for intergovernmental tax immunity in the United States, either for the respective national and state governments as taxpayers or as the respective source of income received by others as taxpayers.

The problem is nonetheless an obvious one, isn’t it? The “union,” *i.e.*, the national government, could hardly be indestructible if its own income were subject to unconstrained state income taxes, and so, too, with respect to the state governments and the national tax power. Similarly, the union could hardly be indestructible either if, although the national government itself could not be taxed by state governments, nonetheless any activity it carried on within any state (such as paying salaries to federal employees) were itself subject to an unlimited state income tax power, and vice-versa as well.

In the absence of express constitutional clauses providing explicit and particularized boundaries of intergovernmental tax immunity, the American Supreme Court has developed its own case law jurisprudence. The basic principles are as follows. Note that they are clear and strongly supportive of the national government, and considerably less clear (and less supportive?) of the several state governments.

The (income) tax immunity of the national government can be described in two steps:

1. The Impact of the Supremacy and Necessary and Proper Clauses

Because of the supremacy clause in Article VI of the American Constitution, Congress may provide virtually as wide and complete an immunity from state and local income taxes in respect to any thing or any activity or any entity or person, as Congress alone wishes thus to make immune. It may do so incidental to anything at all otherwise within the enumerated powers of Congress to provide for. Its power to determine an enormous swath of tax immunity (from state and local taxes) is said to be incidental to whatever substantive powers undergird the activity for which that immunity is provided and, in any case, the power to provide such immunity is confirmed by the “sweeping clause” of the article of the Constitution describing the principal enumerated powers of Congress.¹⁷ In practice, Congress has used this power to restrict states from taxing its own operations or those whom the national government wishes to exempt from state taxes quite sparingly,¹⁸ but for our immediate purpose, the

details of that practice are unimportant. The important, *constitutional* matter is that the ultimate income tax powers of the states are subject almost without limit to whatever scope of tax immunity Congress may provide in respect to *any* nationally conducted or nationally authorized activity to which Congress wishes to extend such immunity. Indeed, it is not necessary even to speak merely of "governmental" immunity from state income taxes, in this respect. The sweeping clause of our Constitution enables Congress to withdraw from state income taxation purely *privately*-generated (as well as governmentally-generated, but privately-received) income as well. It need only be able to convince the Supreme Court that its Act is expediently connected to some other power within its authority, a task that is virtually incapable of failure, given the latitude of interpretation the Court itself has allowed to those powers.

2. *Judicially Implied Immunity of the National Government*

In the absence of Congress making any provision¹⁹ in respect to immunity for itself or for others against state income taxes otherwise owing, the courts may nonetheless "find" such an immunity on implied, constitutional grounds. Where the taxpayer whose income would be taxed is itself the government (or an entity or agency of the government), it is treated by the courts as altogether immune. Where the taxpayer is someone else, but the income is income from the government, for activity undertaken for the government, the judicial test is a bit more complicated. Generally, however, an implied immunity will apply against any state tax that is either *discriminatory* in reference to the federal source of the income (e.g., at a higher rate than on other sources of income), or if regarded as though it were imposed virtually on the government itself. The sufficient points for our purposes are these: Congress may provide such immunity from state and local income taxes virtually as it pleases, and in the absence of congressional action, the courts deem the government itself to be immune as a taxpayer and also exempt a significant number of private parties and entities as well from such state taxes as the courts regard as undue interference with federal activity.

There is, on the other hand, no real symmetry in the constitutional structure of intergovernmental (income) tax immunity in the United States. That is, it is not the case that the states possess an equivalency of immunity in any degree comparable to that possessed by the national government.

The principal distinction arises simply from the fact that the supremacy clause of our Constitution is entirely a one way street. It has no counterpart for the states. The states are given no power (and neither is any power "reserved" to them) to enact laws which, when enacted, could possibly have the force of "supreme law," *i.e.*, supreme over contrary or con-

flicting acts of the national Congress. We have already seen that the opposite is the case. It necessarily follows, therefore, that to the extent Congress has been granted an express and protean tax power, and chooses to use it by requiring a tax to be paid on "income," there is no power in the states simply to "legislate" their own exemption or immunity from that tax. No power, that is, by mere legislation to exempt either themselves (to the extent they might be made to pay taxes on their own incomes even as pure governments), or anyone else (e.g., their employees, contractors, agencies, etc.).

In brief, whatever the scope of state and local tax immunity in respect to federal income taxes, it exists merely: (a) by force of congressional forbearance; or (b) by force of some kind of *implied constitutional* immunity. For unlike the national government, the states cannot "legislate" their own immunity. The question, then, remains only this: to what extent does the Constitution itself imply some degree of tax immunity for state and local government? And at this point, we reach one of the few yet unresolved issues in American constitutional income tax law.

Congress does not now in fact generally subject state and local governments to the income tax as *taxpayers*, *i. e.*, state and local governments do not report to the U.S. Treasury what their "income" is (whether from taxes, tolls, service charges, or sales), and do not now pay any federal tax on those incomes. Congress, moreover, has never attempted to do so. As to this part of our concern, therefore, the questions may be more theoretical than immediate or practical. It is widely assumed that Congress could not constitutionally apply the income tax to state and local governments, although for reasons I shall touch upon in a moment, this is in fact a doubtful matter.

Congress has also generally exempted even ordinary taxpayers from paying any tax even on their *own* income to the extent their income came from certain kinds of state or local governmental activity. The most prominent example is personal income received as interest paid on state or municipally issued bonds. Such payments are regarded as costs to the state and local governments of financing their own services; thus, though the interest received is certainly "income" fully received by the private investor, it has nonetheless been completely excludable from federally taxable income. The exclusion provides a very substantial tax shelter for the well to do in the United States. The national revenue thus foregone (by providing this exemption) also amounts to a substantial tax expenditure, *i.e.*, an indirect subsidy to states and local governments; it enables them to market their bonds at below general market rates. The question thus arises whether this treatment is constitutionally required by the principle of intergovernmental tax immunity, or whether it might be eliminated by simple act of Congress.

The question is especially interesting insofar as the

salaries of state and local government employees are not similarly excluded from the federal income tax, and the Supreme Court has rebuffed claims that they should be immune.²⁰ The question may also be raised still again as to whether Congress could tax the state and local governments themselves—on whatever income they receive, from “whatever source derived.” Indeed, to complete this description of theoretical problems, might not Congress be able to tax municipal bond interest payments (or to tax state government incomes) not merely equally with all other incomes being taxed, but even at a differential (*i.e.*, higher) rate?

The usual first answer sometimes proposed in response to all of these questions is “no.” It is alleged that the principle of intergovernmental immunity forbids these things. The “states” as such are acknowledged in the Constitution; it is understood that they cannot exist at all without revenue, and it is assumed, therefore, that the Constitution necessarily implies some degree of strong reciprocal immunity of the states from taxes on their incomes and on such activities (as interest payments to private parties) as otherwise provide their revenue from the sale of bonds or other instruments of government credit. The original Supreme Court income tax case, moreover, is itself cited as clear and express authority for the basic issue.²¹

Nevertheless, the usual first answer is almost certainly incorrect. The actual extent of state and local governmental immunity from federal taxes (including income taxes) is probably extremely small. It may not extend beyond two limited principles: an immunity from “discriminatory” taxes or tax rates; a “core” immunity for state and local governments as taxpayers, solely in respect to a narrow list of minimum, peculiarly state functions.

Despite a number of nineteenth century Supreme Court decisions that did hold for a broad implied constitutional immunity from federal taxes on persons receiving salaries from state governments, or interest payments for money loaned to state governments,²² the theory and foundations of that immunity were abandoned by the American Supreme Court during the past fifty years. Perhaps the key case is *New York v. United States*.²³ In sustaining a federal tax even as imposed on state sales of state property in the open market, Justice Frankfurter, writing for the Court, returned to a dictum by Justice Marshall in 1819.²⁴ Marshall, a committed nationalist, had taken the view that the states were principally protected from the threat of unreasonable taxes imposed by Congress by the adequacy of their own, vicarious representation in the national government. His suggestion was, therefore, that the Constitution protected the states by its provisions granting states considerable influence in the very structure of the national government itself—implying, thereby, that those built-in political means of influence might be exclusive as the *sole* source of

restraint. “The people of all the states, and the states themselves, are represented in Congress, and, by their representatives, exercise this power” (*i.e.*, the power to tax), Marshall insisted. He went on: “When they tax the chartered institutions of the states, they tax their constituents. . . .”

Thus, the theory ran, the national government required an implied constitutional immunity from certain state taxes insofar as national interests did *not* have any built-in political protection in the structure of the separate state governments. But, allegedly, insofar as the states were all powerfully represented in the manner of Congress’s composition and the (electoral college) procedure of the President’s own election, the Constitution protected the states in *that* way rather than through any additional, substantive implied immunity invocable in court.²⁵

Returning to this theme in 1946, in *New York v. United States*, Justice Frankfurter accepted it and employed it as the basis for eliminating most state claims of implied tax immunity. He explicitly denied that implied constitutional tax immunity was “reciprocal,” *i.e.*, as available to the states, in respect to national tax levies, as it was available to the national government in respect to state tax levies. “The federal government,” he intoned, “is the government of all the States, and all the States share in the legislative process by which a tax of general applicability is laid.”

Finally, in the current term of the American Supreme Court, this same theme was developed even one step more.²⁶ In a case involving the direct command by Congress to state and local governments to pay their own employees not less than the minimum wage Congress also required to be paid by private employers, the Court, in a five-to-four decision, upheld the Act against a claim of state sovereign immunity. In the course of doing so, it overruled the only decision during the preceding forty years to have favored the state claim. It also summarized the whole judicial history of state tax immunity claims—and indicated that previous distinctions²⁷ had proved “unworkable,” and were no longer enforced by the Court. The majority then wrote expansively of the adequacy of the states’ constitutive representation within the national government; it suggested that there was thus little need for continuing judicial monitoring of state implied immunity claims, and it concluded that only the most egregious sort of federal tax or regulation (*e.g.*, a tax on a state capitol, or a tax peculiarly discriminatory against only things governments can do), would be deemed protected by some small residue of implied, constitutional tax immunity.

In light of these developments, therefore, it is reasonably safe to suppose that for now,²⁸ in the United States, very little remains of justiciable implied constitutional state and local tax immunity. Concretely, were Congress to eliminate the current federal income tax excludability of interest payments private investors receive on state or municipal bonds, despite the orig-

inal holding in *Pollock* in 1895, I know of no basis (consistent with the more recent developments) according to which that change could be successfully challenged.²⁹

In brief, principles of federalism in the United States are asymmetrically favorable to the national government and unfavorable to state and local governments. The Constitution provides virtually no express protection for the latter from the former; and our Supreme Court is willing to find only the most modest residue of implied protection of the states from the protean tax powers of the national government. The accommodations that currently exist (and, to be sure, they are still quite substantial), exist largely as a matter of national political sufferance alone.

†The original version of this paper was prepared for and presented at the American-German Tax Law Symposium on Income Taxation in the Constitutional System of the United States and the Federal Republic of Germany, organized by the Institute for Financial and Tax Law of the University of Heidelberg, June 27-29, 1985. Several sections of the original presentation have been deleted from the version published here.

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1. Second only to the clauses which describe the structure of the national government.

2. Taxation of "income" is specifically addressed by the sixteenth amendment (1913) which provides: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

3. As an interesting historical aside, moreover, it is worth mentioning that while *Marbury v. Madison* is uniformly credited as the case settling the Supreme Court's power of substantive constitutional review, in fact the first case in which the power was used by the Court was a tax case—decided seven years prior to *Marbury*. (The case, *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796), held that a federal tax on carriages was not a "direct" tax and was therefore not subject to the apportionment formula required by Article I, Sec. 9, cl. 4.) Indeed, until the politics surrounding *Marbury* made the issue controversial, a general power of judicial review appears to have been widely taken for granted in the United States.

4. Some of the most important constitutional limitations have been judicially derived from clauses that do not on their face even mention taxation. E.g., the first amendment, as interpreted to limit the tax power as applied to newspapers (*Minneapolis Star & Tribune v. Minnesota Comm's of Revenue*, 460 U.S. 575 [1983]; *Grosjean v. American Press Co.*, 297 U.S. 233 [1936], or the equal protection clause as interpreted to limit taxes burdening voting or political activity (*Harper v. Virginia Bd. of Elec.*, 383 U.S. 663 [1966]).

5. Indeed, as Chief Justice John Marshall observed: "The power to tax involves the power to destroy." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

6. Generally, however, principles of due process (and of international law) have been loosely respected by Congress to confine the imposition of income taxes on citizens or entities owing primary allegiance to the United States and to such income as others derive from wealth-enhancing activity or ownership occurring within the United States.

7. By express statutory concession of Congress, state and local taxes, including state and local income taxes, have generally been deductible in computing the net income on which one is then obliged to pay the national income tax. But the concession is entirely discretionary and, in fact, the pending Reagan tax "reform" proposals in the United States propose to eliminate the deductibility of state and local income taxes.

8. Perhaps an example would be helpful. If Rhode Island has relatively less land but relatively more population than South Carolina, Rhode Island's share of the sum to be raised by direct real estate land tax would

be relatively greater than South Carolina's share. Correspondingly, to raise that relatively greater sum, a somewhat higher tax rate will need to be imposed upon an owner of real estate in Rhode Island than an owner in South Carolina, although the fair market value of the respective properties were identical. See also B. BITTKER, *FEDERAL TAXATION OF INCOME, ESTATES, AND GIFTS* 1-15 (1981).

The political objective of the restraint thus featured in the Constitution seems quite clear—to relieve the anxiety of the original "land rich" states (principally in the South) that Congress might be tempted to raise national revenue principally by property taxes, unless restrained by a constitutional requirement according to which the more populous northern states would have to absorb the cost by a population share.

The compromise thus reached (that the national power to tax would be vast, that it would include direct taxes, but that these would be "checked" by the population-apportionment formula), carries over to two other places in the original Constitution—namely, that for representation purposes and for direct tax apportionment purposes, five persons held in slavery (an institution confined to the South) would count as three members of that state's population. (See Article I, Sec. 2, cl. 3 and see also Section 1 of the 14th Amendment.)

9. Which apportionment formula Congress generally does not and is not likely to attempt to satisfy, so that there is no practical likelihood of Congress making use of its power to levy such property taxes.

10. And most commentators think that it does remain true, see, e.g., BITTKER at pp. 1-22, *supra* note 8. ("[A]ny direct tax that is not imposed on 'income' remains subject to the rule of apportionment.")

11. Note again, however, that if the source or object of the tax is itself not property, then since the tax might on that account not be deemed to be a "direct" tax, it may be levied by Congress without apportionment. For example, if Congress were to levy a tax on "corporations," the tax might be characterized as an excise tax levied on the privilege of conducting one's business as a corporation. Accordingly, so long as the tax were uniform (as required for all federal excise taxes), it might not matter that the amount of the tax were computed according to a fixed percentage of each corporation's assets or, alternatively, according to some uniform rate as applied to each year's appreciation of each corporation's assets. See *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911).

12. Certainly the case most frequently cited does not on its facts or in its language decide this matter. *Commissioner v. Glenshaw*, 348 U.S. 426, (1955) (income equated with "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion," as applied to windfalls of money actually received). Cf. the earlier, much more restricted (by source) definition, in *Eisner v. Macomber*, 252 U.S. 189 (1920), in which receipt of a stock dividend was treated as an insufficient "realization."

13. E.g., the owner had an unqualified right to sell it but "merely" chose not to sell it. Again, however, note also the tension in another respect. Had the owner sold, all of the received price may be "gross income" subject as the taxable event under an (unapportioned) "income" tax. Is there any constitutional requirement that only the net proceeds be treated as income, i.e., that the owner must (constitutionally) be permitted to subtract his basis and selling costs? Alternatively, is there any constitutional reason that the transaction of selling could not be the taxable activity, such that the tax is thus an excise (rather than an income) tax, imposable by Congress subject only to the "uniformity" requirement?

14. Which, indeed, was evidently Justice Holmes's view. See *Eisner v. Macomber*, 252 U.S. 189, (Holmes, J. dissenting). ("The known purpose of this [Sixteenth] Amendment was to get rid of nice questions as to what might be direct taxes, and I cannot doubt that most people not lawyers would suppose when they voted for it that they put a question like the present to rest.")

15. Insofar as the taxpaying entity or person may be unable or unwilling to pay the respective taxes due the national and state (or local) government, or insofar as there is any other sort of conflict between the national collection and the state or local collection of taxes, the Constitution resolves the impasse wholly in favor of the national government's claims. It does so via Article VI, which provides that "the laws of the United States which shall be made in pursuance [of an express constitutional power vested in Congress] shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding." (Emphasis added.)

16. *Texas v. White*, 74 U.S. (7 Wall.) 227, 237 (1868).

17. Article I, Sec. 8, cl. 18: "The Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or office thereof."

18. For instance, Congress does not now provide that the salaries of

federal employees residing in states having state income taxes shall be exempt from such taxes. Neither does it generally provide any immunity for corporations or for contractors from such state income taxes as they would otherwise owe from payments received for performance of federal contracts.

19. Congress may make provision in respect to state income taxes, incidentally, either to provide immunity *or to provide liability*. Thus, for example, when it is clear (to a federal court) that Congress regards it as proper for federal contractors to pay state and local taxes on income derived from work for the federal government, the contractor is liable whether or not he would be liable had Congress said nothing at all. For examples, cases, and further discussion, see, e.g., J. HELLERSTEIN, *STATE AND LOCAL TAXATION: CASES AND MATERIALS* at ch. 14 (3d ed. 1969).

20. *Helvering v. Gerhardt*, 304 U.S. 405 (1938).

21. *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895). The holding in *Pollock* was unanimous.

22. *Collector v. Day*, 78 U.S. (11 Wall. 113 (1871); *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895).

23. 326 U.S. 572 (1946). The case explicitly sustained a uniform federal excise tax as applied to state sales of mineral water bottled and sold by the state from its own, state-owned and operated springs.

24. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316.

25. Examples of the manner in which states are influentially acknowledged in the composing of the national government might include: (a) Election of the President by a College of Electors, the members of which are constitutionally reserved for selection *as each state legislature directs* (Art. II, Sec. 1, cl. 2) (But this *de jure* provision is of no *de facto* practical significance any longer, as "Electors" are chosen in popular election by people obviously voting for national party candidates and not for the electors at all); (b) Representation in one House of Congress (the Senate) of two Senators per state, regardless of population, the Senators themselves *to be chosen by each state legislature* (Art. I, Sec. 3). (But this original provision is also of little practical significance since election of Senators was taken out of the hands of state legislatures and submitted to popular election again under national political parties, by the 17th amendment of

1913); (c) The special requirement (Art. I, Sec. 7, cl. 1) that all "revenue" bills originate in the House of Representatives—whose members serve only two-year terms and thus presumptively are more immediately accountable to local and state-bound constituencies; and the provision in Art. I, Sec. 8, cl. 1, that Marshall expressly noted in *McCulloch v. Maryland* requiring "excise" taxes to be "uniform,"—and thus presumably adequate to protect any from fear of other states or other interests "ganging" up in Congress to impose an unfair (because nonuniform) tax. (But this requirement also is of virtually no *de facto* significance. The uniformity requirement has never been more than one of nominal geographic uniformity [thus, "discrimination" is possible by selecting a subject for taxation which subject is of economic concern only to a few states alone], and, recently, *even the requirement of strict geographic universality has been partly abandoned*. *United States v. Ptasynski*, 1103 S. Ct. 2239 (1983) (express one-state exemption from federal tax upheld).)

26. *Garcia v. San Antonio Metropolitan Transit Authority*, ——— U.S. ——— (1985).

27. Such as whether the federal tax was levied on a "proprietary" rather than a "governmental" function of state government, i.e., that the tax was collectible merely to the extent a state had entered into a conventional sort of business under state auspices (and so, like any private entrepreneur, should be made to pay its fair share of federal taxes on the activity being pursued).

28. I say "for now," not to be coy or simply equivocal, but rather because the decision in *Garcia* was itself a narrow majority and because I do not believe the intellectual foundations for the Court's near total abdication of judicial review in this manner to be sound. I have just now attempted to address its difficulties in a separate manuscript, *VAN ALSTYNE, USERY, GARCIA, AND THE SECOND DEATH OF FEDERALISM*, ——— MICH. L. REV. ——— (1985).

29. Presumably, a rare example of one kind of state income that may be constitutionally immune from taxation by the national government would be the states' own income derived solely pursuant to their own income taxes. (The example is taken from Chief Justice Stone's concurring opinion, in *New York v. United States*, 526 U.S. 572 (1946).)

Case Law Substitutes for Constitutional Structures in Computing Taxable Income in the United States

*Richard Schmalbeck**

INTRODUCTION

Both the United States and the Federal Republic rely heavily on individual and corporate income taxes. In the current U.S. government's fiscal year (October 1, 1984, to September 30, 1985), it is expected that \$328 billion of income tax will be collected from individuals, and that an additional \$77 billion will be collected from corporations. Together, these taxes will yield about 54 percent of the total receipts of our national government.

The Federal government in Germany relies less, in percentage terms, on income taxes, partly because it shares more than half of those revenues with the *Laender* and municipal governments, and partly because Germany has another major source of revenue in its value added tax—a tax which has been considered, but never adopted in the United States. Still, the portion of federal revenues in Germany accounted for by the income tax is substantial—nearly a third of all revenues in recent years.

Given the importance of income taxes to both countries, it is in some respects surprising that their respective constitutions are virtually silent on the question of what constitute income—the base against which these very important taxes are assessed. What constitutes "income" is by no means self-evident, yet both the U.S. Constitution, in the Sixteenth Amendment, and the German *Grundgesetz*, in articles 106 and 108, simply refer to taxes on income, without further elaboration.

Of course, the absence of detail in the constitutions themselves does not mean that there is no constitutional law in these areas. I am told that there is a good deal of constitutional law on the proper definition of income in Germany. However, there has been very little constitutional development in the U.S. defining income.

THE STUNTED CONSTITUTIONAL RESTRAINTS ON INCOME DEFINITION

In the early going, it looked as though there might be some significant Supreme Court elaboration on what the Constitution did or did not permit. The Sixteenth Amendment itself, of course, was largely



Richard Schmalbeck

prompted by the Supreme Court's decision in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895) and 158 U.S. 601 (1895), that an income tax which taxed such things as rents from property was a direct tax on that property, which, not being apportioned by population, violated Article 1, section 9 of the Constitution. And, shortly after passage of the Sixteenth Amendment, the Supreme Court made several pronouncements on the validity of Congress's efforts to exercise its power to tax income, including the famous case of *Eisner v. Macomber*, 252 U.S. 189 (1920). In *Macomber*, the Court said that Congress was not permitted to tax corporate dividends that were paid in the form of additional shares of stock in the distributing corporation. The grounds for that decision were complex, explained in a

majority opinion of more than thirty pages. But, essentially, the majority view was that the concept of income included a notion of realization: the taxpayer had to have received something of value, something that was separated from the property he already owned. Because dividends paid in stock left the taxpayer with the same proportionate ownership of the same corporation as she had had before the payment, she could not, in the majority's view, have received anything that could be called income.

This was a strong start, but the Court did not sustain this restrictive view of Congress's income-defining powers in subsequent cases. In a few isolated areas of little importance, constraints were found. (For example, the Court found in *Evans v. Gore*, 253 U.S. 245 (1920), decided shortly after *Macomber*, that the constitutional prohibition on reducing the salaries of federal judges while in office precluded inclusion in income of any judicial salaries paid to federal judges, at least as to those judges who were appointed before passage of the Sixteenth Amendment.) However, in the mainstream income definition cases, the Supreme Court, and, *a fortiori*, the lesser courts as well, have been very reluctant to find constitutional barriers to Congress's definitions of income, even if those definitions go beyond what the majority in *Macomber* would apparently have permitted. Courts do sometimes find that things that the International Revenue Service thinks are income are not in fact income, but not on constitutional grounds.

And Congress has on at least a few occasions enacted statutes that would be suspect under the *Macomber* explanation of the realization requirement. An example, to which I will return later, is provided by the tax treatment of original issue discount. Simply stated, Congress has, since 1969, required that taxpayers include in income the annual improvement in value of zero coupon bonds sold originally at a discount, despite the fact that the holders of the bonds receive no cash—and have no right to receive any cash—until the maturity of the bond.¹ Despite the absence in such cases of a traditional realization event, I was unable to locate any cases in which taxpayers had challenged the inclusion of those value improvements on constitutional grounds.

We have thus reached a point where there are very few, if any, truly constitutional constraints on the definition of income for tax purposes.²

Perhaps even more surprising is that on the basic question of income definition, even the Internal Revenue Code speaks with remarkable generality: section 61—titled “Gross Income Defined”—says simply that “gross income means all income from whatever source derived. . . .” That section does elaborate a bit, but only to note that certain types of income are specifically included: compensation for services, rents, royalties, gains from dealing in property, and several others. But these elaborations also are conveyed only in very general terms. Section 61 does not tell taxpayers when

to report gains from dealing in property, or how to compute those gains, for example.

To be sure, certain other sections of the Code provide some clarification. Subchapter O of the Code (approximately sections 1001-1100) provides rules for computing gain or loss from dealings in property. But even these sections are prone to speak of such things as making “proper adjustments” to the basis of assets to reflect certain events, without providing much detail as to what a proper adjustment might be in particular cases.

THE CASE LAW STRUCTURES

Thus, as in many areas of the law, it has fallen to the judiciary to provide, incrementally over many years, a basic structure to the American income tax. And this structure has generally provided an adequate substitute for the constitutional development that we lack. It is not, of course, a perfect substitute. Like constitutional law, the non-constitutional American tax case law both enables and constrains: some cases enhance the government's ability to collect the tax, while others limit that ability. Unlike true constitutional law, however, it is ineffective against concerted efforts by Congress to produce particular results. This is, of course, no small distinction; the American courts have simply not exercised a role in the definition of income that even approaches the power of their role in areas such as freedom of speech and religion, criminal procedure, etc. The case law of tax is not super-statutory; it is entirely developed within the framework of the Internal Revenue Code. It cannot “trump” explicit congressional enactments. And yet, it seems to me that the cases provide a framework to support the Code at least as much as the reverse is true. This common law of tax provides a structure, a powerful set of presumptions, within which the statutory materials are interpreted and applied.

The case law of tax is, as one could imagine, very rich in material, and growing richer by the moment. In each of the last several years, the Internal Revenue Service has proposed deficiencies on over one million tax returns. Most of those are settled without litigation, but in 1984, over 40,000 federal tax cases were filed by taxpayers who could not reach agreement with the IRS about what they owe. Many of these cases reflect simply factual disputes, but at least 200 or so decided cases each year involve genuine issues of law.

How courts decide these cases is a subject about which volumes could be written. In this paper, I will describe briefly four basic principles used by courts in deciding cases—four choices that judges appear to make fairly consistently, which together form a substantial part of the basic structure of our tax law (though they are by no means intended as a comprehensive list of the principles used by courts in tax cases). In all four of these choices, the choice made by the tax jurisprudence *appears* to be a sound one, indeed, the choices seem at first so obvious as hardly to involve choices to

all. I will try to show, however, that they are not obvious, and that good, perhaps preferable, alternatives exist.

1. TAXABLE INCOME ACCOUNTING

The first principle is one that I would call the "taxable income accounting" principle. Under this principle, courts give a very high priority to getting a correct count of the dollars of taxable income a taxpayer has enjoyed from an activity. This certainly seems reasonable: who can criticize the effort to account correctly for the gross income, and for the appropriate deductions, so as to reach the right amount of taxable income? But I would assert that this goal of computing correctly the taxable income is sometimes pursued at the expense of other legitimate goals of a sound tax system.

This can be seen by examining one of the American tax system's basic doctrines: the so-called "tax benefit" rule, a rule now partially codified,³ but one that was created by the courts and continues to be substantially developed by the courts. The rule is stated variously, but for present purposes it will suffice to state it as follows: if a taxpayer recovers⁴ in one year property or cash that had been lost or otherwise disposed of in an earlier year, the taxpayer has income only to the extent that the event in the earlier year produced a "tax benefit"—which appears to mean nothing more than that it produced a reduction in taxable income in the prior year. Let me illustrate this rule by a not entirely hypothetical set of facts that closely resembles a 1967 case, *Alice Phelan Sullivan Corp. v. United States*, 381 F.2d 399 (Ct. Cl. 1967). Suppose in year one a taxpayer gives \$10,000 worth of property to a charitable organization, that this results in a deduction of \$8,000, and that this deduction reduces the taxpayer's tax liability for that year by \$2,000. Suppose further that in year five, two events happen: Congress approximately doubles the relevant marginal tax rates, and the charitable organization, finding that it no longer has any use for the property, returns it to the taxpayer. What should be the tax result, assuming that the property still has a value of \$10,000, and that a court is called upon to determine the appropriate tax treatment without any explicit guidance from statutes or prior case law?

There are, I think, at least three general approaches to this problem, each of which may have some possible variations. One would be simply to require the taxpayer to pay \$2,000 of additional tax in year five. He saved \$2,000 in year one by making what appeared to be a permanent property transfer to the charitable organization, but it is now known that no permanent transfer took place.⁵ The taxpayer should therefore refund the tax that was saved in year one upon erroneous grounds. One might also consider whether interest should be added to this amount, and how such interest should be computed.⁶

An alternative approach would pay more respect to the American system's intermittently strict annual accounting period. It would disregard entirely the

events of year one, noting only that in year five the taxpayer received property worth \$10,000 at no cost to him. Under this approach, an additional sum of \$10,000 would be added to his taxable income.

A third approach is the one in fact chosen by the court in *Alice Phelan Sullivan Corp.*, and the one that embodies the tax benefit rule. Since only \$8,000 of the property's value was deductible in year one, only \$8,000 should be added to income in year five. Of course, since the relevant marginal rates had doubled, this means that the taxpayer will owe \$4,000 of additional tax as a result of having taken a deduction worth only \$2,000 to him in year one.⁷

None of these choices seem unreasonable. Indeed, each is consistent with the tenor of at least some early case law in this area. The second approach is probably the easiest to support under strict conformance with the Internal Revenue Code: there is an annual accounting requirement that makes each tax year a free-standing unit, and it is clear that windfall gains are income. And the second approach to this general problem was the one initially approved by the Supreme Court in *Burnet v. Sanford & Brooks Co.*, 282 U.S. 359 (1931).

The first approach—in which the taxpayer simply refunds the tax savings when the event on which the savings were premised proves erroneous—was also endorsed by some case law; in particular, *Perry v. United States*⁸ adopted this approach. *Perry* has been criticized as lacking support in either the statute or the prior case law. That is clearly true, but that criticism seems true to a considerable degree of the third alternative—the rule that inclusion is limited to the amount that produced a tax benefit in an earlier year. Indeed, the intermediate court in the case that firmly established the tax benefit rule—*Dobson v. Commissioner*, 320 U.S. 489 (1943)—made exactly that criticism of the tax benefit rule.

By now it is quite clear that courts have chosen the third approach—the tax benefit rule—which does manage to count exactly the total taxable income existing in the hypothetical situation I described. Taxable income was understated in year one by \$8,000, so the corrective action to be taken is to add \$8,000 back to income in year five, when the recovery takes place. I would argue that an approach based on the actual amount of the tax saved would be fairer, and an approach based on strict adherence to annual accounting requirements would be more consistent with the Internal Revenue Code, but the courts have focussed instead on finding the right numbers for taxable income.

2. THE ATTRIBUTION PRINCIPLE

A second major principle developed almost exclusively in the case law of the American tax system may be called the income attribution principle. Simply stated, it is that the income belongs to the taxpayer who earns it, either through personal services or through ownership of the capital that has produced the return. Again, as

stated, this principle seems entirely unobjectionable, and, indeed, it is generally thought that this principle is necessary to protect the progressivity of the income tax. The danger of any contrary principle is well illustrated by the first major income attribution case, *Lucas v. Earl*, 281 U.S. 111 (1930). The taxpayer in that case, Mr. Earl, had executed a contract with his wife in 1901 under which they agreed that any earnings of either would be owned jointly by both. The date of the contract is of some significance, since the agreement was executed twelve years prior to the passage of the Sixteenth Amendment, which means that a federal income tax was neither present nor imminent at the time. Nevertheless, the possibility of splitting one large income into two smaller ones to avoid the progressive rates that would otherwise apply to the one large income was obvious enough once the income tax took effect. What was not clear was whether the Internal Revenue Service, or the courts, could prevent this tax avoidance. After all, it was conceded that the contract was effective under applicable property law to transfer rights to half of Earl's income to his wife. Could the assigned half of his earnings be "income," constitutionally and under section 61 of the Internal Revenue Code, if he had no right to that half under property law?

Again, there are three general approaches to this situation. The most easily justified approach—and the one actually adopted by the intermediate court in *Earl*—is to say that a minimal characteristic of "income" is that the taxpayer has some right to possess it, or at least to control the direction in which it will flow. Since Mr. Earl did not, at the time the earnings were generated, have any such rights as to the half of his earnings owned by his wife, the "income" would have to be hers, not his, under this view.

A somewhat more aggressive approach, reflecting an effort to protect the integrity of the progressive rate structure, could have taken the form of conceding that half of Earl's earnings were his wife's "income," but at the same time insisting that the proper interpretation of Congress's rate schedule was that that schedule must be applied only once, to Earl's total earnings, with the resulting tax liability split between spouses in the same proportion as the income was split.

The most aggressive approach of all was the one chosen by the Supreme Court: that all the income was the husband's, and that the full tax liability computed on that income was his as well. One wonders if the Supreme Court would have been as willing to adopt this approach if the overall rate of federal tax assessed against Mr. Earl had exceeded fifty percent. His tax liability would then have been greater than his share of earnings, which would presumably have compelled him to deplete assets accumulated earlier, or to borrow from his wife to pay his tax bill.

But I do not mean to criticize the *Earl* decision. It does seem to be the easiest way to protect a progressive rate structure, and, all things considered, the American tax system probably works better with the attribution

principle in place than it would under any alternatives that are readily imaginable. Still, nagging doubts persist about the looseness of a definition of income that permits inclusion of amounts a taxpayer will never have any rights in, especially where, as in *Earl*, the taxpayer's decisions that produced this result were made long before these tax consequences could possibly have been anticipated. And if this approach is constitutionally permissible, questions still remain regarding the role of the courts, as opposed to Congress, in this area.

I think concerns in this area are more theoretical than real today: taxpayers are certainly on notice that transfers of rights sufficient under property law may not be sufficient to transfer the tax liabilities associated with those rights. Occasionally, however, a real case will appear that comes close, at least, to raising doubts about the fairness and propriety of what I have called the aggressiveness of the American attribution doctrine. A relatively recent case that may be of this sort is *Armantrout v. Commissioner*, 570 F.2d 210 (7th Cir. 1978), in which it was held that financial assistance provided by an employer to college students who were children of employees was income to those employees. To imagine the really troubling case, one must vary the facts of *Armantrout*—though not implausibly, I believe—to have an employee who has no election about whether to participate in this benefit, and who has an estranged, emancipated child who qualifies for and claims the education benefit. Such a parent would enjoy no benefit from the program, but would be powerless to avoid the tax liability under the rationale of *Armantrout*, which is itself consistent with the other court decisions in the attribution area.

3. REALIZATION (REVISITED)

As I noted at the outset, it does not appear that there is much left of the realization doctrine as a constitutional requirement. I do think, however, that courts show a great reluctance to improvise when they are faced with realization questions—perhaps because the *Macomber* case, much-disparaged though it is, still casts a shadow over the courts, particularly the lower courts.

I see this reluctance principally in some cases where acceleration of realization would seem to have been an obvious solution to the problem confronting the courts in those cases, but where the court in question backed away from such solutions. An example is *United States v. Midland-Ross Corp.*, 381 U.S. 54 (1965), a relatively modern Supreme Court case in which the Court found that gain on disposition of noninterest-bearing notes was, in effect, interest income, and not a gain for which the more favorable long-term capital rates were available. If the gain was interest, however, and if there were no realization requirement, why should the government be made to wait until disposition of the note to tax the interest income? Yet the Supreme Court pointedly refused to consider whether the tax liability could be imposed prior to disposition. A few years after *Midland-Ross*, Congress decided to tax

so-called "original issue discount" as interest income as it accrued each year.

Similarly, it has been clear since the Supreme Court decided *Helvering v. Bruun*, 309 U.S. 461 (1940), that buildings constructed by a tenant on a landlord's property will produce income to the landlord at the termination of the lease. In at least some cases (though not in *Bruun*), it is clear that construction of the improvement is at least a partial substitute for rent. But if it is rent in disguise, or even if it is merely windfall gain, why shouldn't it be taxed each year, as the lease termination draws nearer?⁹ The analogy to original issue discount is clear; and, again in this case, this time more explicitly, the Supreme Court rejected this approach. In *M.E. Blatt Co. v. United States*, 305 U.S. 267 (1968), a case decided shortly before *Bruun*, the Court refused to allow the Internal Revenue Service to tax annually a portion of the value of a tenant's improvements, not on the grounds that it was unconstitutional, but rather on the grounds that: "any enhancement in the value of the realty in the tax year was not income realized by the lessor within the Revenue Act." Thus, the realization requirement, originally a constitutional requirement, found itself appended instead to section 61 of the Internal Revenue Code, though it would be difficult to prove that Congress had ever intended to put it there.

4. SUBSTANCE OVER FORM— THE DISREGARD OF FORMALITY

The last doctrine I will discuss is the notion that the tax system should focus on what is actually taking place in a transaction—its substance—rather than on the manner in which the transaction may have been presented—its form. The fact, for example, that the document memorializing a transaction is called a "lease" does not guarantee that it will be treated as a lease, if the circumstances of the transaction indicate that it is more like a sale.

However, I hesitate to include this in the list of basic doctrines for two reasons. First, the doctrine is overstated. Form frequently matters a great deal. For example, distribution of corporate assets to shareholders followed by a sale of those assets for cash may not be treated the same as a sale of the assets for cash followed by a distribution of the cash to shareholders. Second, even when the doctrine seems applicable, it often is not very helpful. In many cases, the problem is that the substance of a transaction is ambiguous, falling somewhere between two better-known categories that have different tax consequences. In such cases, the substance over form doctrine—though frequently invoked—does nothing to help identify what the true substance is.

But I do include the substance over form doctrine in my list of case law principles because it seems clear that, while all areas of the law have some formal aspects, and some aspects where formality is disregarded, it is possible to make some meaningful statements about

the position of various legal specialties on the continuum from formal to non-formal. In the American system, one can surely say that real property conveying and the laws of succession are still quite formal: it is important that a mortgage call itself a mortgage, and that a will call itself a will. Federal tax law is distinctly at the other end of the continuum, and it got there because of what judges did to the law in early, largely non-constitutional cases.

As in the other areas, there are many illustrative cases that could be chosen to demonstrate this. One case that specifically faced the question was *Irwin v. Gavit*, 268 U.S. 161 (1925), in which the Court held that there was no distinction worth making for purposes of the exclusion of bequests from income between a gift of income and gift of an interest in an income-producing fund. The principle continues to be used frequently, and was a prominent part of the Supreme Court's analysis in the recent *Diedrich* case.¹⁰

CONCLUSION

It is interesting to speculate about why the development of constitutional constraints in the early years of our income tax was stunted, especially in the light of the fact that the Supreme Court in the 1920's and 1930's was generally not reticent about invalidating what it thought were unauthorized exercises of power by Congress. It may have been that the Justices, having been mature witnesses to the process of ratification of the Sixteenth Amendment, understood that Amendment to be a repudiation of the Court's previous efforts to restrain federal taxing authority, as they had in *Pollack*. That seemed to be Justice Holmes's view when he wrote, in his dissent to *Macomber*, that: "The known purpose of [the Sixteenth] Amendment was to get rid of nice questions as to what might be direct taxes. . . ."

The role of Justice Holmes himself in preventing the vigorous development of constitutional impediments to collection of the income tax appears to have been considerable. In addition to this dissent in *Macomber*, he authored several opinions that adopted a broad view of what Congress and the Internal Revenue Service could do in refining the definition of income.¹¹

In any event, as I have attempted to show, the vacuum left by the absence of true constitutional law in the income tax field has been filled to a fair degree by development of the non-constitutional tax common law. As I noted at the outset, that case law structure is not a perfect substitute for constitutional structures. However, the structure that has emerged, coupled with the restraint shown by Congress, have resulted in a tax system that is acceptably free, I believe, of the sort of abuses by the government that it might have been thought could only be prevented by a robust set of constitutional constraints.

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1. Tax Reform Act of 1969, Pub. L. No. 91-172, 413(a), 83 Stat. 487, 609-11 (1969).

2. A word of caution may be appropriate here. Though it is generally believed that the realization requirement—the single significant constitutional constraint on income definition articulated by the Supreme Court—has lost most of its vitality, it is also true that Congress has not aggressively sought to explore the boundaries of what is now permissible. On the few occasions when Congress has enacted statutes that appear to go beyond the bounds of *Eisner v. Macomber*, it has been to control obvious abuses. (The original issue discount rules discussed above provide one example; another is the “market to market” rules of section 1256 of the Internal Revenue Code, regarding certain options contracts.) One can only speculate about the response of the Supreme Court if Congress were to enact, say, a rule requiring that gain on all publicly traded stock be reported each year based on its year-end closing price.

3. Principally in I.R.C. 111.

4. An actual “recovery” is no longer necessary. See *Hillsboro National Bank v. Comm’r*, 460 U.S. 370 (1983). However, this language remains the most convenient description of the doctrine.

5. It may occur to the taxpayer that a deduction would be appropriate for the fair rental value of the charity’s use of the property in years one through five. However, the taxpayer would not have included that rental value in income, so it has, in effect, already been deducted. Cf. Treas. Regs.

170A-1(g) (no deduction for value of services contributed to charitable organization.)

6. It would seem that adding interest would be appropriate, but only if computed at an after-tax rate of return. The taxpayer has presumably paid some tax on the earnings generated by the tax savings in year one. Only the after-tax amounts represent gain from the value of the deduction.

7. This was in fact the central issue in *Alice Phelan Sullivan Corp.*: a change in rates caused the taxpayer to pay much more tax in the recovery year than he had saved in the year of the contribution. 381 F.2d at 400. This greatly aggrieved the taxpayer, but did not trouble the court.

8. 160 F. Supp. 270 (Ct. Cl. 1958). *Perry* was overruled by *Alice Phelan Sullivan Corp.*

9. The Treasury regulations presently require current inclusion if “the facts disclose that such buildings or improvements represent in whole or in part a liquidation in kind of lease rentals. . . .” Treas. Regs. 1.109-1(a).

10. *Diedrich v. Comm’r*, 457 U.S. 191 (1982) (so-called “net gifts”—those on which donee agrees to pay gift tax—should be treated as part gift, part sale of the gifted property).

11. In addition to authoring the *Earl* and *Gavit* opinions cited above, Justice Holmes wrote the opinions of *United States v. Kirby Lumber Co.*, 284 U.S. 1 (1931), holding that bonds bought back at discount by their issuer yield taxable income, and *Cortiss v. Bowers*, 281 U.S. 376 (1930), holding that income earned by revocable trusts could be taxed to the grantor.

Duke in Denmark

The Duke University Law School, in conjunction with the University of Copenhagen, is offering a four-week educational program this summer at the University of Copenhagen. Law faculty for the program are from both American and European universities and participants in the program will be primarily from the United States and Europe. The purpose of the program is to bring lawyers and faculty together from both the United States and Europe for an intensive educational experience in an environment in which they can work and learn together, comparing European and American law in selected subjects important to lawyers engaged in an international business transactions practice. Opportunities will also be provided for the participants to see and learn about legal institutions in Denmark itself and to enjoy one another on excursions in Copenhagen and Denmark. Various aspects of the program are described in more detail below.

Date. The program opens with a meeting and reception of participants and faculty on Sunday, July 6. The instruction begins Monday morning, July 7, and continues for four weeks, ending on Friday, August 1.

Participants. Enrollment is planned for seventy-five lawyers—half from the United States and half from Europe. Enrollment is not limited, however, to lawyers from these geographical areas.

Program of Instruction. All classes will be held at the University of Copenhagen, which is located in central Copenhagen, and conducted in English. Written materials for each course will be provided to the participants on Sunday, July 6. Classes will meet on Monday through Friday for the four-week period. Two courses will be offered at each class period, and participants can elect between the two courses. Some courses are primarily designed

for the European participants, and others are designed primarily for the American participants. The schedule for the program of instruction is as follows:

INSTRUCTION PRIMARILY FOR AMERICAN PARTICIPANTS

9:15-10:15 AM
Introduction to EEC
(Institutional Organization and Substantive Law)
10:45-11:45 AM
International Commercial Transactions
1:30-2:30 PM
European Intellectual Property
2:45-3:45 PM
European Antitrust

INSTRUCTION PRIMARILY FOR EUROPEAN PARTICIPANTS

9:15-10:15 AM
Investment in the United States
10:45-11:45 AM
Introduction to U.S. Legal System through Labor Law
1:30-2:30 PM
U.S. Antitrust
2:45-3:45 PM
U.S. Intellectual Property

Instruction in antitrust and intellectual property is a primary emphasis of the program. The schedule permits a participant to take both the U.S. and EEC antitrust courses, or both the intellectual property courses, or to take one of each. During the final week of instruction the antitrust classes will combine to study comparative EEC and U.S. antitrust law.

Also during the final week, the intellectual property classes will be combined for purposes of a seminar program organized by Professor David Lange. The participants will be offered a choice of eight seminars in intellectual property—five pertaining to entertainment law (motion pictures, music television, publishing, theater) and three pertaining to other types of intellectual

property subjects (patents, trademarks, software). These seminars will be taught by some of the most well-known and distinguished lawyers in their areas of specialty. Lawyers who do not participate in the four-week program will be permitted to enroll separately for these one-week seminars.

The International Commercial Transactions course will also include a segment on international arbitration, including a discussion of the use of the International Chamber of Commerce in Paris and the Stockholm Chamber of Commerce.

Three Duke alumni will participate as faculty in the program. Edward Rubin, J.D. 1936, will teach one of the entertainment law seminars, giving five hour-long lectures on motion pictures, television, and the new technologies, organized primarily around the theme of international deal-making. William Patterson, LL.B. 1950, will teach some of the classes on inbound real estate investment in the U.S. in the course on Investment in the United States. Robert Pringle, J.D. 1969, will teach the intellectual property seminar on trademarks and so-called "gray" goods.

Organization, Administration, and Faculty. Professor Pamela Gann is the Duke director of the program. Judy Horowitz, who administers our law program for international students, will also administer this program. A program like this one could not be organized without the substantial contribution of persons in Copenhagen and the University of Copenhagen. Dean Claus Gulmann of the University of Copenhagen law department is teaching the course on the introduction to the EEC and is handling all the arrangements with the University of Copenhagen. Marianne Philip and Per Schmidt, graduates of the University of Copenhagen and graduates of our LL.M. program in 1983, are also helping us



Pamela Gann

make all the local arrangements in Copenhagen.

Faculty from the law school include James Cox, Pamela Gann, Donald Horowitz, and David Lange. Professor Tom Kauper of the University of Michigan, and former Assistant Attorney General, Antitrust Division, U.S. Department of Justice, will teach the U.S. antitrust course. European faculty include, in addition to Dean Gulmann, Professors Joseph Lookofsky, University of Copenhagen; Ulrich Immenga, University of Göttingen, West Germany; and Wernhard Moschel, University of Tübingen, West Germany. Professor Immenga, who is a member of the German Monopolies Commission, will teach the comparative EEC and U.S. antitrust course.

Housing. Participants in the four-week program will live at Shaffer-gaarden, an estate owned by the Danish Norwegian Society. It is situated in a park just north of Copenhagen, close to both forests and to the beach.

Excursions and Other Events. The four-week program includes weekly lunches, opening and closing receptions, a trip to the Denmark Supreme Court, and two weekend excursions outside Copenhagen.

Information. We hope that Duke alumni will participate in this program. For more detailed information about the four-week program, or the one-week seminars in intellectual property, please write to Judith Horowitz at the Law School.

Faculty Travellers: Summer 1985

In the wake of the Cultural Revolution, China experienced a dearth of trained legal professionals and educators. However, China is clearly in the midst of what one professor termed the "renaissance of legal education" and Duke University Law School is taking an active role in educating Chinese legal professionals, both in the United States and in China.

Since the establishment of diplomatic relations between the United States and China in 1979, China has prioritized the expansion of law faculties. In only a few years, institutions providing legal training have grown in number from three to more than forty. In addition, the number of "law workers" has increased from three thousand to more than nine thousand in the same period and is expected to reach 500,000 by the year 2000. China's international trade has expanded, and the country is presently reacting against the historic family and cultural ties which have held the society together without resort to a traditional legal system.

During the summer of 1985, four Duke professors taught in China. Paul Carrington, William Van Alstyne, and Pam Gann participated in the first session of The China Center for American Law Study at Jilin Law Faculty in the ancient Manchurian capital of Changchun. The four-week program was sponsored by the Committee on Legal Education Exchange with China (CLEEC)¹ in conjunction with the Chinese Ministry of Justice, the Chinese Commission on Education. In addition, George Christie was invited to teach at Fudan University in Shanghai and People's University in Beijing.

The stated purpose of The China Center for American Law is to give Chinese jurists and legal scholars "an introductory understanding of the origins, structures, methods, and administration of American law." Its



Paul Carrington

primary objective is furthering the work of Chinese law workers who are planning to come to the United States for advanced study or research. The need for such a program was recognized by scholars at American law faculties, who found that Chinese students, whatever their intellectual quality, often lost many months becoming sufficiently oriented to the American method of legal education. Thus, the summer program was designed to give Chinese visitors a running start before they arrived in the United States.

At the same time, the sponsors of The China Center for American Law Study were eager to welcome others who might never come to the United States, but whose present or future professional work might be furthered by acquaintance with American law and methods. The Center sought to attract "not only academic personnel of every age and status, but also government and enterprise officials. . . . We believe that a varied group of persons drawn from many areas of China, with diverse purposes and with different backgrounds of experience, will find

much interest in value in the new friendships that may be formed during the four weeks of the session."

A diverse student body was definitely achieved. The sixty participants included staff members of seventeen law faculties, a judge of an intermediate appeals court, an administrator in the Foreign Trade Department of a provincial government, three staff members of the People's Bank of China, an official of the Supreme Procuratorate, a lawyer in the Chinese Patent Office, and the former defense counsel for Jaing Quing, the widow of Mao Zedong, when she was prosecuted as a member of the now notorious Gang of Four. Approximately half of the participants of the 1985 session expected to engage in academic enterprise in the United States during the subsequent academic year.

Many new friendships were formed both in the classroom and on a more informal level as professors and participants lived in the same hotel, travelled together by bus, or met individually or in small groups. In addition, there were "educational excursions" on Saturdays to interesting locations such as a penitentiary, a court, and a major industry that functioned for all intents and purposes as a local government and not merely as a manufacturing enterprise.

Paul Carrington and William Van Alstyne, along with Whitmore Gray from the University of Michigan, provided the bulk of formal instruction at The China Center for American Law. Three courses, Civil Procedure (Carrington), Constitutional Law (Van Alstyne), and Legal Method (Gray), were required. In addition, International Business Transactions and International Commercial Arbitration were optional course offerings and supplemental lectures on a variety of topics were available.

Although the program was very demanding and each day included

three hours in class plus preparation in a foreign language, voluntary attendance at supplemental lectures was generally high. Dean Carrington spoke to the students about the organization, training, and function of the American legal profession and examined the role of the modern university law school as a center of professionalism in the United States.

Professor Van Alstyne introduced some currently contentious issues of social policy, such as abortion, that have taken on constitutional dimensions in the United States. The issues surrounding abortion are very different in China where the government "encourages" abortions as a means of population control. The abortion decision in *Roe v. Wade* was also used to demonstrate how the Supreme Court could engage in "politics" through the interpretation of nebulous concepts and terms.

Professor Gann lectured about bilateral trade agreements with special reference to the policy differences that have thus far precluded an accord between China and the United States. One example of widely divergent points of view can be seen in the ways the two countries screen investments. In China, government approval must be obtained before a foreign company is allowed to make an investment. However, there are many ways in which the two countries are moving closer together as China opens up its economy by making foreign investment more attractive.

Dean Carrington noted that along with increased international trade, especially with the United States and Japan, another reason for the proliferation of legal professionals can be identified. The period between 1966 and 1976 known as the Cultural Revolution seems to be generally regarded as a negative era when individual rights were minimal. The existence of lawyers is thought to be one way in which government power can be kept in check. However, Professor Van Alstyne also stressed that even though there is a bill of rights in the 1982 Constitution, Chinese legislation is not subject to judicial review. Rather, the concept of

"democratic centralism" controls, and civil rights are controlled by the people's representatives who are instructed by the Communist Party.

In China, legal research and training occurs through four parallel systems. The Ministry of Education supervises approximately forty law faculties in comprehensive universities. More than half of China's legal specialists are trained under the auspices of the Ministry of Justice in four institutes and one university of law and politics. In addition, a relatively small number of lawyers and researchers are trained by the Chinese Academy of Social Sciences and the Ministry of Foreign Economic Relations and Trade. Many of the top graduates of these institutions find jobs relating to foreign trade and investment. The highest concentration of academically trained lawyers can be found in the legal department of the Ministry of Foreign Affairs, while another large group finds employment with trust and investment companies. In addition to government organizations and trust companies, law firms have recently been established.

The difference in legal teaching methods was noted by all the visiting American scholars. Chinese instruction consists predominantly of didactic introduction to broad principles. The visiting professors found that classroom discussions tended to be less lively than at Duke. Chinese students who were unfamiliar with the American case method of teaching expressed the wish that their instructors had stated "more firm conclusions" or had "systematically told what the law is." Dean Carrington commented that many of the students initially had difficulty locating or understanding the judge's holding in a particular case. However, it seemed the students had mostly cleared over that hurdle by the time he finished his two-week course on civil procedure. Perhaps the introduction to methodology was even more valuable than the substantive course material, especially for the students who planned to study law in the United States.

Remuneration for teaching at the

1985 China Center for American Law Study consisted of travel expenses, including one week of travel in China. Although few of the cheerful people on the bustling streets spoke English, they seemed always eager to help their American visitors. Dean Carrington travelled by both plane and train to visit friends he had made on his 1984 trip to China. In addition to these more familiar means of transportation, Professor Van Alstyne and Gann spent three very hot and very interesting days travelling by boat on the Yang Tze River.

Professor George Christie also spent four weeks lecturing in China, predominantly at Fudan University in Shanghai and also at People's University in Beijing. His series of lectures to graduate law students provided an overview of the American law of torts. In addition, he participated in small group meetings with faculty and students. Because of the expanding trade between the United States and China, students seemed especially interested in products liability law as it applied to both Chinese and American products.

Many things have changed in China since Professor Christie was there in 1978. He was especially struck by the economic dynamism of China today. Greater material wealth seemed apparent from the increase in building activity and the fact that people appeared to be eating better. In addition, American tourists were much less of an oddity and Chinese clothing styles were much more Westernized than they had been seven years ago. However, Professor Christie believes that the more inchoate Chinese law of torts is unlikely to follow this trend toward Westernization, especially in the areas of psychological and emotional torts which have been evolving in the United States.

Pam Gann is very affirmative about the Duke program for foreign students which has attracted a large percentage of the Chinese students studying in the United States.² She believes Duke is "serving a very useful function since concepts such as capitalism, free markets, securities, and anti-trust are very much foreign

ideas to the Chinese." These concepts become especially important as they move from the teaching facilities into Chinese law firms which are working with foreign investors or representing foreigners in the Chinese court system.

Duke Law School students and faculty who remain in the United States also have a chance to benefit from the increasing presence of Chinese students who come to North Carolina to receive J.D. degrees. The cultural exchange not only provides the potential for new ideas and professional ties; it is also a connection with the radical changes occurring in China, which Dean Carrington believes to be "the most exciting thing happening to law in the twentieth century."

Dean Carrington is not sure what role Duke Law School will play as China continues to respond to changes in its culture and government, but he has found his involvement with China and its students to be both "interesting and fun." Although China has had the same leaders for the past thirty years, the government is in the process of changing, and leaders are now younger. Many of these current leaders, who are in their fifties, were educated in the Soviet Union when U.S.-Chinese relations led China to greater involvement with the U.S.S.R. Now that more Chinese students are being educated in the U.S., Europe, and Japan, Duke Law School is in a position to play a major role in this trend.

Professor of Philosophy and Law, Martin P. Golding, was a visiting senior Fulbright lecturer in Australia for six weeks during June and July. He gave lectures in two courses on jurisprudence at the University of Sydney, and delivered a paper on "Community and Rights" to a meeting of the Australian Society for Legal Philosophy held in Sydney. In addition, he spoke at Law faculties of the universities of New South Wales, Melbourne, Adelaide, and La Trobe, to the Philosophy Department at Queensland, and to the Research School of Philosophy and the Philosophy Department of the Australian



Martin Golding

National University in Canberra. Topics of these lectures included "Discovery and Justification in Science and Law," "Aesthetics in Legal Reasoning," and "The Idea of Moral Pathology." In August, Professor Golding participated in conferences held in Jerusalem and Athens. In Jerusalem he delivered a paper on "Maimonides and the Theory of Legal Reasoning" at the Second International Seminar on the Sources of Contemporary Law: Maimonides as Codifier of Jewish Law, which was sponsored by the Ministry of Justice of the State of Israel. In Athens, he spoke on "The Presuppositions of Rights Discourse" at the Twelfth World Congress of Legal and Social Philosophy.

Professor George C. Christie spent four months during the summer of 1985 lecturing on torts and jurisprudence in New Zealand. He replaced Professor John Smillie, who had been a visiting professor at Duke Law School in the spring of 1980 and who was on leave in Canada for last summer's term. Mr. Christie lectured at the University of Otago in Dunedin, which is in the southern part of South Island. The University of Otago is the oldest university in the country. While he was there, Mr. Christie also lectured at the only other three law schools in New Zealand: the University of Auckland, Victoria University in Wellington, and Canterbury University in Christchurch.

Mr. Christie went to New Zealand on a Fulbright travel grant that paid

his way and enabled him to travel around the country. His Fulbright research was on the New Zealand accident compensation scheme. He met with government officials who administer the scheme, including the Deputy Prime Minister and Attorney General, Geoffrey Palmer, and the president of the Court of Appeal, Sir Owen Woodhouse. Mr. Christie plans to use the results of his research to expand an already existing section in his torts casebook on the New Zealand Accident Compensation Act.

Two of Mr. Christie's children, Serge and Rebecca, joined him for ten weeks during the summer. While they were there, Serge, who is



George Christie

seventeen, attended art college and seven-year-old Rebecca went to public school. The Christies spent a week at the end of the summer travelling in Australia. They visited friends in Sydney, and in Melbourne they saw Ronald McCallum, who is a former visiting Duke Law School professor.

1. In December of 1984, Dean Paul Carrington was unanimously elected to be a member of the Committee on Legal Education Exchange with China (CLEEC), which is an organization of American law professors who seek to strengthen cultural and professional relations with China.

2. Compared to the ten PRC students currently enrolled at Duke Law School, nine in the J.D. program alone, there are about nine Chinese students enrolled in other J.D. programs in the U.S.

*Book Review***Ethnic Groups in Conflict***by Donald L. Horowitz*

Most of Professor Donald L. Horowitz's professional career has been devoted to research, although he has also served as a judicial law clerk and as a government lawyer. He received his A.B. and LL.B. degrees from Syracuse University, and earned the LL.M., M.A., and Ph.D. degrees at Harvard. He has held research appointments at the Harvard University Center for International Affairs, at the Brookings Institution, and the Smithsonian Institution. His work on ethnic conflict in Asia and Africa, supported by the Guggenheim Foundation, featured extended field work in Nigeria, Sri Lanka, and Malaysia.

Horowitz's new book, reviewed here, is published by the University of California press. This past summer Horowitz spoke on the subject of ethnic conflict and violence in a National Public Radio "Soundings" broadcast. This fall he was interviewed on the subject of British and American race riots and race relations for the British ITV program, "Weekend World." In September, he delivered a paper on "The Reduction of Interethnic Conflict in Developing Countries" at a conference on intergroup relations sponsored by the Human Sciences Research Council in Pretoria, South Africa. His wife, International Advisor Judith Horowitz, accompanied him on that trip and gave a series of lectures on American higher education at Vista University in Soweto, the University of Natal in Pietermaritzburg, the University of South Africa, and Rand Afrikaans University.

Professor Horowitz was recently appointed to a Carnegie Corporation committee on social reform in South Africa. His speech on South Africa, presented at the Law School this fall, is discussed in the "Inter-



Donald Horowitz

national Relations" section of this issue of the Magazine.

The recurrent hostilities in Northern Ireland, Chad, and Lebanon; secessionist warfare in Burma, Bangladesh, the Sudan, Nigeria, Iraq, and the Philippines; the Somali invasion of Ethiopia and the Turkish invasion of Cyprus; the army killings in Uganda and Syria and the mass civilian killings in India-Pakistan, Burundi, and Indonesia; Sikh terrorism, Basque terror-

ism, Corsican terrorism, Palestinian terrorism; the expulsion of Chinese from Vietnam, of Arakanese Muslims from Burma, of Asians from Uganda, of Beninese from the Ivory Coast and Gabon; ethnic riots in India, Sri Lanka, Malaysia, Zaire, Guyana, and a score of other countries—these comprise only the most violent evidence of ethnic hostility.

Endorsed by political scientist Samuel P. Huntington as a brilliant "landmark work," Professor Donald L. Horowitz's *Ethnic Groups in Conflict* explores the relationship between ethnicity and the political systems of severely divided societies. In a comprehensive study of the nature of ethnic affiliations, the sources of ethnic conflict, and the impact of ethnic conflict on party and military politics, the author probes questions such as: What is it about ethnic affiliations that makes them conducive to severe conflict? Why does ethnic conflict tend to be more intense and violent in Asia and Africa than in Europe and North America? What relationship does ethnic conflict bear to social-class conflict and why do ethnic groups attempt secession when it appears they would have much to lose by leaving the undivided state? Using case studies of political developments in Lebanon, Nigeria, Sri Lanka, and numerous other countries, the author shows why conciliatory policies have failed and indicates promising methods of ethnic accommodation and "coup-proofing" in ethnically segmented societies.

Donald Horowitz breaks new ground in providing all-embracing principles for the study of ethnic group relations. He notes a lag in the understanding of ethnicity due to the fact that eruptions of violence are frequently studied alone rather in the context of similar occurrences worldwide. His comparison focuses on states in Asia, Africa, and the Caribbean which received their independence during or after the Second World War. In such states, he says, questions such as "Who are you?," "What is your nationality?" and "What is your country?" uniformly evoke ethnic responses. While European societies are also divided along regional, class, and religious lines, diffusing the bases of conflict, in the societies of the developing world, there is a less complex pattern of group loyalties and divisions. Political parties are formed on the basis of ethnicity, and "unranked" groups, that is, groups which are not presumed to be superior or inferior in all respects to others, engage in the struggle for centralized power.

Why is ethnicity chosen as the basis for cleavage? Professor Horowitz notes that ethnicity, which he describes as "a family resemblance," is used by individuals in developing countries to help smooth the transition from traditional to modern institutions and economies. For instance, an individual villager in the pre-colonial era considered most non-villagers strangers. When the colonists imposed territorial boundaries many times the size of previously existing borders, however, individuals were introduced to strangers much more frequently than before. Thus thrown together, individuals began to discover resemblances between themselves and those whom they would have previously classified as outsiders. Language, religion, and similar factors all became part of an ethnic identity. Ethnic group members were then ready substitutes for family when reciprocal help was needed in coping with the larger environment. Group members performed all of the functions of family on a larger scale.

Having created an awareness of ethnic ties where little appreciation may have previously existed, colonialism further encouraged ethnic divisions by establishing occupational niches for various groups. Often a group of people would be singled out as good soldiers. Others, who perhaps were located near the colonial capital, were mission educated and so drafted into the civil service. Yet other groups (sometimes brought in from far-flung colonies) were used as traders and plantation laborers, and others left in their rural settings as subsistence farmers. The result of this

There is much more scope for constructive policy innovation in the area of ethnic conflict than policy makers in divided societies have generally acknowledged. Ethnic problems are intractable, but they are not altogether without hope.

differentiated treatment, according to Professor Horowitz, was the creation of group comparisons. Some groups sensed that they were "backward," since they came from rural regions and were not mission educated. With the advent of independence, these groups feared that ethnic strangers, who had learned the ways of the colonists, would deny them political participation. Such exclusion, they assumed, would lead to domination by the outsider group. Thus, the greater the perceived inability or undesirability of "catching up" with those groups versed in colonial ways, the greater the interethnic tension.

Professor Horowitz states that the goal of ethnic groups in divided states, therefore, is to shift the balance of political power in their favor. He cites five explanations put forward by ethnic groups in newly independent states to justify their political preeminence: (1) Prior occupation of the territory/indigenes; (2) a special mission (generally religious in character); (3) traditional rule; (4) the right to succeed the colonial power by those best able to fill its shoes; and (5) the right to succeed the colonial power by those who had made the most sacrifices to rid the country of the colonial power. The conflicting nature of such claims is apparent. When coupled with shifts in the balance of influence due to demographic changes, claims to political priority can be explosive.

The author notes that actual hostilities often surface over symbolic issues. Bitter quarrels occur, for instance, over whose language and religion will become the official language and the national religion, who will

occupy the post of university president, and what name will be given to a particular town or region. Since the struggle is one for greater ethnic group status, such issues show how each group is faring in relation to the others. An illustration of the situation is recounted from the history of the United States: the temperance movement distinguished nativist, Protestant, small-town groups from immigrant, Catholic, urban groups. The state was used to take symbolic action, indicating the higher status of the former and degrading the latter.

Where groups are territorially separate from each other, why does such ethnic friction not result in successful secessionist movements? What kinds of groups attempt to secede and under what circumstances? Professor Horowitz states that, as a general rule, when a secessionist movement will emerge is determined by domestic politics, but when it will succeed is determined by the balance of international forces. Because backward groups in backward regions are the most fearful of competition in a single arena with their advanced neighbors, they are likely to attempt a secession soon after independence. Despite the low success rate and despite the fact that loss of subsidies from the center will cause economic hardship, such groups typically choose to suffer rather than to try to compete with advanced groups. A common grievance of backward groups after independence is that ethnic strangers are sent as government administrators to their regions. Groups that are educationally and economically advanced in relation to their neigh-

which blocks access of other ethnic groups to the political process. This is especially likely during the rule of a military government. The second is when ethnic group members are lost through assimilation with other groups, and ethnic strangers migrate into the potentially separatist region. Both conditions exacerbate the fear of extinction.

The only successful secession which has occurred since the Second World War, however, has been that of Bangladesh. Professor Horowitz accounts for the failure of wars of separation by noting the failure of consistent foreign support for separatist groups. Foreign governments, he states, are inhibited from aiding rebel forces by both internal and international political pressures, and by fear of contagious separatism in their own countries. The government of the rump state, moreover, often obtains its own foreign aid, and attempts to exploit divisions between various rebel armies.

For similar reasons, irredentism (the retrieval of ethnically kindred people and their territory across an international border) has generally failed. While the desire to retrieve ethnic kinsmen across territorial borders is great, the political costs are high. It is remarked that the states which undertake irredentas are led by leaders ethnically akin to the groups which they are attempting to retrieve. One example is Libya, whose Colonial Qaddafi has family roots in Northern Chad. Though separatist and irredentist groups have not reached their primary goals, however, they have affected the political structure of their societies.

Professor Horowitz moves from his discussion of ethnic affiliations and the sources of conflict to describe political structures in ethnically divided societies. He begins by analyzing why political parties in severely divided societies split along ethnic lines, even when such a split means perpetual minority status for one of the participants. Since politicians generally aspire to political power, their decisions to form minority parties seem paradoxical. Professor Horowitz unravels the paradox in terms of a peculiar electoral logic operating on party leaders in severely divided societies. They come to fear that, if they do not organize political parties along ethnic lines, some other leaders will do so first and, by so doing, steal their following, leaving them with nothing. So the move to ethnic parties, even when that means a minority position and exclusion from power, is explained by the logic of the situation in which politicians find themselves, despite their best intentions. Parties which stubbornly try to preserve their multiethnic following do indeed tend to be outflanked by parties which cater to the interests of a single ethnic group. These monoethnic organizations, which exhibit more of the characteristics of pressure groups than those of political parties, reduce compromise between ethnic groups. The examples of Guyana and Trinidad illustrate a progression from multiethnic parties to single ethnic parties, politically polarized. Where two major ethnic parties are pitted against each

Whether and when a secessionist movement will emerge is determined mainly by domestic politics, by the relations of groups and regions within the state.

Whether a secessionist movement will achieve its aims, however, is determined largely by international politics, by the balance of interests and forces that extend beyond the state.

bors are less likely to attempt secession; however, separatist organizations may emerge if such groups are forced out of their jobs in other regions or are required to subsidize the benefits given to ethnic strangers.

Two conditions which are exceptionally conducive to the formation of secessionist movements are mentioned. The first is when a regime is in power

other, these examples show that there is a high incidence of ethnic voting, violence against deviant voters, and high voter turnout leading up to a "census-type" election. Once it appears that a minority group will be permanently shut out of power via the electoral process, it seeks other means of attaining ethnic group preeminence.

The Horowitz description of party politics in such societies leaves no room for theories of class conflict: "Over and over again, socialists intellectuals in the developing world have organized parties intending to do battle on class lines, only to find that their potential followings had rather different ideas about the identity of the enemy." Even popular candidates for office who run on a nonethnic ticket repeatedly lose to those who firmly assert ethnic claims. Ethnic party politicians, too,

Among the most important needs met by ethnicity is the need for familiarity and community, for family-like ties, for emotional support and reciprocal help, and for mediation and dispute resolution —for all the needs served by kinship, but now on a larger canvas.

are said to be aware of the costs of moderating ethnic demands. Rival language or religious unions are likely to accuse them of selling out the group's cause. The consequences for a leader of being labeled an ethnic traitor are that the leader will lose most of his electoral support, find himself unable to diversify his clientele, and be permanently out of office. Thus, ethnic party systems which do not include methods of braking increasingly insistent ethnic group demands are apt to freeze with one group in an electorally unchangeable position of dominance. The author notes that when electoral systems lose their fluidity, they become prone to violent change.

Professor Horowitz suggests that political systems which mandate the formation of multiethnic coalitions are the most durable in severely divided societies. He distinguishes, however, between three types of coalition: (1) The coalition of convenience, created after an election in order to form a government, (2) the coalition of commitment, negotiated before an election in order to form a government and reduce ethnic conflict, and (3) the alliance, constructed before an election in order to form a government, reduce ethnic tensions, and exist as a permanent entity. The author asserts that the first two types of coalitions are liable to

be temporary in nature, easily affected by the slings and arrows of the political climate. The third type of coalition, though difficult to bring into being, is worth the effort. Two steps must be taken to secure such a multiethnic alliance: (1) The "pure contractualism" which characterizes the other two types of coalition must be surmounted, and (2) effective steps must be taken to limit the coalition's vulnerability to centrifugal forces. When centrifugal forces take over and one ethnic group cuts the others off from access to government, the regime in power invites the occurrence of a "seesaw" coup.

An extensive analysis is made of the militarization of ethnic conflict in the fourth part of the book. The formation of armies during the colonial period is first examined to show that current ethnic composition of military groups is typically not the same as the ethnic composition of civilian governments. Rural, backward groups were used by colonial governments to keep urban, advanced groups in check. At independence, when advanced groups obtained positions in civilian government, rural groups sometimes composed most of the officer corps of the military. Alternatively, if backward groups came to power, advanced groups with the educational qualifications for officer training in England or France might dominate the officer corps. Civilian leaders often undertook the thankless task of changing the ethnic composition of the military to reflect the ethnic composition of the regime. For their efforts, they were rewarded by being removed from office by a disgruntled soldiery.

Two types of ethnic coups are described in some detail by Professor Horowitz. The first is the "seesaw" coup: a sudden drastic shift in the balance of ethnic power. It often follows "census-type" elections, which demonstrate that one ethnic group will be permanently in opposition to the government. The minority group changes the electoral outcome via military force. The second type of coup is the coup of attrition: overthrow of the government is achieved by military force, then one group within the military attempts to exclude all others. As a result, a very small ethnic group comes to rule the whole country. For example, the coup conducted by Idi Amin in Uganda led to a series of coups of attrition. Amin's group, the Kakwa, comprise only two or three percent of the Ugandan population.

Military intervention, according to the author, does not solve the problem of ethnic exclusion from government. Rather, as an extension of civilian politics, it retains the same weakness, lack of fluidity, which caused discontent with the civilian government. Civilian regimes attempting to protect against coups may actually bring them about by creating a sense of insecurity within the military, but the author lists five methods of "coup-proofing" which are commonly used: (1) Ethnic homogenization of the army and (2) creating an ethnic balance within the army. Both of these methods are effective, but tampering with patterns of military recruitment and promotion carry high risks. (3) Creat-

ing a balance outside the army by forming or strengthening various ethnically homogeneous elite troops; this causes intermilitia rivalry and mutual suspicion. (4) Reliance on foreign forces. This is rarely an adequate method of coup-proofing in itself, although it may tip the balance of power in a ruling group's favor. (5) Kinship control. This method has limited effectiveness and shows insecurity. When a civilian power attempts to intervene in military affairs, the author cautions, intervention should be either very subtle or very thorough.

Many of the puzzles presented by ethnicity become much less confusing once we abandon the attempt to discover the vital essence of ethnicity and instead regard ethnic affiliations as being located along a continuum of ways in which people organize and categorize themselves. At one end, there is voluntary membership; at the other, membership given at birth.

What can be done to reduce the severity of ethnic conflict and maximize the likelihood of interethnic cooperation? The author says that several barriers to political innovation in severely divided societies must

first be overcome. Among these are the unwillingness of the leaders and their principal supporters themselves to promote ethnic accommodation, and the uncompromising nature of ethnic demands. It is argued that the timing of conciliatory measures is important: a recent experience, painful for all groups, may create a propitious moment for the restructuring of accommodative policies. Two types of measures are analyzed: those which aim to redistribute economic benefits and thereby reduce disparities between ethnic groups, and those which aim to reshape territorial or electoral arrangements and so decrease interethnic competition for the seat of power. The latter measures include (1) proliferating the points of power, for example, by separating institutions as in the United States or by separating territories and creating local bureaucracies, (2) divising electoral inducements for coalition, such as proportional representation, and (3) encouraging alignments based on interests other than ethnicity. Because of their immediate benefits, such structural changes are less risky than redistributive measures. The author notes, however, that policies which attempt to redress the economic imbalance between groups through preferential treatment are often adopted despite their heavy political costs. He describes the dangers inherent in discriminatory measures and hints that long-term investment policy may be a better solution to such economic grievances.

Professor Horowitz concludes that although democracy is exceptional in severely divided societies, it is worth protecting and fostering. Second chances to avoid conflict through democratic institutions may come along, but the obstacles arrayed against such institutions will then be greater than they were earlier. He emphasizes that uncontrolled ethnic conflict is not inevitable, and he closes by noting that "ties of blood do not lead ineluctably to river of blood."

INTERNATIONAL RELATIONS

The Program for International Students

The Law School's program in American law studies for international students has undergone changes in both size and depth in the past five years. In 1981, at the time of Judy Horowitz's arrival as international advisor, the program consisted of ten international students: two candidates for the J.D. and eight for the LL.M. (Master of Laws). Presently, forty-five international students attend the Law School. Last year the Admissions Office received 525 requests for information about the LL.M. program, 115 completed applications, and out of thirty-five offers of admission, seventeen were accepted.

Program manager and catalyst of international developments at the School, Horowitz attributes the growth to a conscious effort on the part of the administration to shift the program "from an *ad hoc* position" to one more prominent in the Law School. Horowitz makes sure that word of the high quality of the international program circulates widely. "Foreign students go back with good reports about the program, and others become interested," explains Horowitz. By connecting potential applicants with Duke alumni in their area, Horowitz furthers the networking process. "Quick responses to student requests for information and more personal contact" are also viewed as factors in the high acceptance rate. Indeed, several international students pinpointed the comprehensive and personal replies to their letters as significant in their decision to apply to, and eventually attend, Duke.

One of Horowitz's primary functions as coordinator of the international program is to evaluate student applications. An obvious precondition for admission is proficiency in English. To determine applicants' English skills, scores on the TOEFL (Test of English as a Foreign Language), as well as personal statements and letters, are considered. Evaluating the academic background of students from overseas is more difficult because grading systems differ from country to country. However, given her familiarity with foreign educational systems, Horowitz is able to assess the record of an international applicant in much the same way as an American's. Relevant factors include the quality of the student's university, class rank, honors and scholarships, and faculty recommendations.

With the arrival of the students, Judy Horowitz's role develops into one of counselor and advisor of each individual international student. Working with International House, an umbrella organization of all the international programs at Duke, Horowitz coordinates the orientation of the student to the Law School, the University, and the United States. She assigns faculty



Judy Horowitz

advisors and discusses course selection with the students. Horowitz also arranges special group sessions as needed on how to take notes, for example, or how to study for exams. On a personal level, she deals with adjustment problems, language difficulties, and practical questions of how to obtain medical care, insurance, and schooling for the student's children.

As more international students are seeking jobs in this country, Horowitz has operated increasingly as a professional counselor as well. The LL.M. entitles the holder to nine months of practical training in the United States. Although American law firms are predictably reluctant to invest in an individual who is to remain with them for only a short time, Horowitz finds that the right amount of persistence will uncover firms receptive to the opportunity of employing a foreign lawyer. Firms with European branches, connections, or clients, of course, have proven to be the most amenable. "Once they understand the needs of foreign students," Horowitz points out, "they are responsive and helpful."

The principal challenge for many international students at Duke is to integrate into the intellectual life of the School and to get to know American students on

a social and personal basis. Horowitz hopes that as the international program becomes more central to the Law School, a greater amount of interchange will occur. The recent revival of the International Law Society, for instance, holds promise "as a major organization for international and American students," says Horowitz. She encourages the students to pursue other interests they have in common with Americans such as participation in intramural soccer and rugby. The big sib program and placing foreign students with American roommates at Central Campus are also conducive to

increasing the level of interaction. Horowitz notes, however, that integration is largely a matter of individual effort—on the part of both the American and the international student.

Horowitz is also involved in the administration of an exciting new Law School program called Duke in Denmark. With Professor Pamela Gann, Horowitz is developing a four-week summer course in Copenhagen. Law students will earn up to six credits taking courses from European professors. In turn, European students will be taught by American law professors.

The Special Comparative and International Legal Studies Program

In 1985-86 the Law School inaugurated for its own students a joint J.D.-LL.M. in Foreign and International Law, with the same residency requirements as in the older J.D.-M.A. joint degree programs. The new program was an instant success, with almost half of the incoming summer students electing to pursue the LL.M. The additional degree requires 20 hours of work in foreign and international law, plus the usual 86 hours for the J.D.

An older companion program, requiring two semesters in residence and 20 hours of course work (which may include courses in American law), is available to non-Americans who have received professional training as lawyers in other countries. Sixteen international students entered this program for 1985-86. Some of these one-year LL.M. students are profiled elsewhere in this issue.

The joint J.D.-LL.M. is meant to broaden and deepen the study and practice of American law, by exposing American students to alternative theories and procedures and by making them more aware of the interaction between law and the social order. Candidates for the joint degree must also eventually demonstrate minimal competence in a modern language by means of a test administered by the Law School.

Each year the course counting toward the LL.M. at the Law School will reflect the interests of visiting international faculty. The School's International Studies Committee has also approved some courses offered elsewhere on the campus. The School's program for 1985-86 includes: Chinese Legal History (Jonathan K.

Ocko), Comparative Administrative Law (Lawrence G. Baxter, University of Natal, South Africa), Comparative Criminal Law (Arnold N. Enker, Bar-Ilan University, Israel), Comparative Family Law: The Status of Children (Nicholas C. Bala, Queen's University, Canada), Comparative Law: Western Legal Traditions (Herbert L. Bernstein, who joined the Duke faculty in 1984 from Hamburg University, Germany), Comparative Public Law & Policy: Ethnic Group Relations (Donald L. Horowitz), English Legal History: Commercial Law (Paul H. Haagen), English Legal History: Criminal Law (Cynthia B. Herrup, Duke Department of History), International Business Transactions (Pamela Gann), International Criminal Law: The Control of "Terrorism" (A. Kenneth Pye), International Law (Horace B. Robertson), International Organizations (Horace B. Robertson), International Taxation (Pamela Gann), Japanese Administrative Law (Percy R. Luney), Japanese Constitutional Law (Koichiro Fujikura, University of Tokyo, Japan, and Percy R. Luney), Jurisprudence (George C. Christie), and Political Philosophy & Law (Guy Haarscher, Free University of Brussels, Belgium). A research tutorial on Freedom of Expression in Switzerland (Beatrice U. Pfister, University of Berne, Switzerland) is also offered. Miss Pfister is a scholar in residence at the Law School this year, along with other visiting international scholars Michael B. Evans (New South Wales Institute of Technology), Peter F. Glavovic (University of Natal, South Africa), and Masahiro Usaki (Tsuru University, Japan).

COMMONWEALTH COUNTRIES

Duke's Symposia on Canadian Constitutional Reform

Even as short a time as a half decade ago, many of the Law School's forays into international subjects came about as cooperative ventures. On November 8, 1981, the School's International and Comparative Law Institute, with thirty-four students on its staff and a Law School Editorial Board of four faculty members, sponsored a "Conference on Canadian Federalism" as its inaugural project. Professor Richard Leach and the Duke Canadian Studies Program, together with Visiting Professor Morris Litman, assisted in the selection of the topic and conference participants. One paper each was delivered by faculty from the University of Ottawa, McGill University, and the University of Saskatchewan. Walter S. Tarnopolsky surveyed the judicial effect given the Canadian Bill of Rights. J.R. Mallory studied problems of distribution of power in conflict management in the Canadian federal system. W.H. McConnell reviewed past and current provincial debate over the constitutional amendment process in Canada. Among the commentators were Duke Law Professors William Van Alstyne and Donald Horowitz. The main articles appeared in the Summer 1981 issue of *Law and Contemporary Problems*.

On April 26 and 27, 1982, Duke University hosted another interdisciplinary symposium on *Reshaping Confederation: The 1982 Reform of the Canadian Constitution*. Organized jointly by Richard Leach, director of the Canadian Studies Center at Duke University, and Paul Davenport, Chairman of the Cana-

dian Studies Program at McGill University, the symposium involved the presentation of twelve papers authored by five Duke and seven McGill academics from the disciplines of political science, economics, history, and law. These papers, published in both the Autumn 1982 issue of *Law and Contemporary Problems* and a 1984 hardback Duke Press version, examine, analyze, and deliberate the constitutional reform process which culminated in the Canada Act of 1982, proclaimed in Canada on April 17, 1982.

Among the five Duke participants were two professors from the School of Law: A. Kenneth Pye and Walter Dellinger. Professor Pye's paper examined the likely impact of the Canadian Charter of Rights and Freedoms on the rights of persons accused of crimes. The Canadian Charter was Part I of the Constitution Act, composed of thirty-four sections. One of the most controversial parts of the Canada Act, the Charter was criticized by the provinces as an unwarranted intrusion upon the provincial jurisdictions over property and civil rights, and by various special interest groups as too weak and vague. Professor Pye, known for his scholarship in the field of criminal procedure, concluded that the Charter represents a significant improvement in legal protection over the Canadian Bill of Rights, which had been a disappointingly ineffectual document. Nonetheless, in many areas the protections afforded by the Canadian Charter appear to be significantly less than those available in similar circum-

stances in the United States. Furthermore, the real impact of the Charter may become clear only as the courts give life to its provisions through judicial interpretation. To a large extent, the responsibility for protecting individual rights and liberties has therefore passed from Parliament and the provincial legislatures to the courts. Pye points out that if this transfer is perceived as successful, Canadians may wish to strengthen the provisions of the Charter itself.

Professor Dellinger's paper examines the amending formula in Schedule B of the Canada Act (i.e., the Constitution Act, 1982), comparing it to the amending process in Article 5 of the United States Constitution. Although many issues arising during the recent Canadian reform efforts parallel those present during the Philadelphia Convention of 1787, Dellinger points to fundamental differences in both circumstances and decisions finally made. The American Constitution was drawn up by a special convention chosen for that purpose and was submitted for ratification to similar special conventions in the states. Conversely, in Canada the existing legislatures have drawn up the constitutional reforms; this creates a problem if the legislatures themselves are in need of reform.

Dellinger also reviews the new Canadian amending formula and praises it for addressing specifically many questions that are not adequately considered in Article 5 of the American Constitution. For instance, the Canadian Constitution clearly indicates how and when those prov-

inces which dissent from amendments may change their dissent to approval. Dellinger does criticize the new Constitution for limiting future constitutional changes to those suggested by the national government or the provinces; such a limitation precludes amendments which might have wide popular support despite opposition from existing legislatures. Finally, Dellinger comments on those provisions that allow provinces to opt out of constitutional amendments with which they disagree and

to override the Charter of Rights. Long opposed by Trudeau as a measure which would lead to a "checkerboard constitution" and foster national disintegration, Dellinger believes that this provision accurately reflects, and will to some degree perpetuate, the current decentralized quality of Canadian society.

The constitutional reform of 1982 and its implications for Canada's future raise numerous questions which twelve papers cannot hope to

address fully. Nonetheless, they do provide an excellent starting point for analysis and answers. As Paul Davenport points out in his introduction to the anthology, the interdisciplinary nature of these papers emphasizes one essential aspect of the process of constitutional reform: the complex interweaving of political, economic, linguistic, and legal issues which make up the fabric of Canadian federalism.

Visiting Professor Nicholas Bala

Visiting professors from Canada are nothing new to Duke Law School. Past appointees have included Gordon Bale from Queen's University in Kingston, Ontario; William Brent Kelly Cotter from Dalhousie University in Halifax, Nova Scotia; Moe Michael Litman from the University of Alberta in Edmonton, Alberta; and Garry D. Watson from the Osgoode Hall Law School of York University in Toronto, Ontario. Bale visited in 1984-85 and offered a research tutorial on Comparative Tax Theory and Policy. Watson taught a small section of the first-year course in Civil Procedure in spring 1984. Cotter came in 1983-84, served as an arbitrator in the Commercial Arbitration Clinic, and taught Lawyers and Clients. Litman visited in 1980-81 under the auspices of the Duke University Canadian Studies Center and taught Trusts and Estates, as well as a seminar on Gratuitous Transfers of Wealth.

The Law School continues its Canadian alliance this semester with

the arrival of Nicholas Charles Matthew Bala, Visiting Professor for the Fall Term, 1985. Born in Montreal, Quebec, Professor Bala received his LL.B. from Queen's University in 1977 and his LL.M. from Harvard Law School in 1980. He joined the Faculty of Law at Queen's University in 1978 as Assistant Professor and Assistant Director of Queen's Legal Aid. Since 1981 Professor Bala has served as a consultant on child welfare and juvenile justice to various groups, including the National Study on the Functioning of Juvenile Courts and Ontario Council of Indian Chiefs; in 1982 he was Visiting Lecturer in Family Law at McGill University in Montreal.

Professor Bala's publications are numerous and cover a broad range of family law and juvenile justice topics; in addition, he is co-editor of Young Offenders Service, a looseleaf service tracking developments in the field of Canadian juvenile justice, and co-producer of videotapes used extensively across Canada for teach-

ing law students, judges, lawyers, and other professionals trial techniques for family law related matters.

When asked to compare Canadian and American law schools, Professor Bala said he found in Canada greater variation in the students' academic ability, career aspirations, and social backgrounds. On the other hand, Canadian law students tend to be less varied geographically. Teaching methods are fairly similar, yet, according to Professor Bala, Duke students typically work harder, and far fewer enter the fields of criminal or family law. Legal aid clinics are more common in Canada, yet Duke offers greater depth in the areas of corporate and commercial law. Overall Professor Bala said he finds Duke law students warm, receptive, and bright, and he feels very fortunate to have this opportunity to teach at Duke. Professor Bala's courses for the fall include Family Law and a Children's Law Seminar.

Commonwealth Students at Duke

In the past and present, Duke Law School has attracted a number of Canadian students who venture south to study law. Some of them come for a year of graduate work; others stay for three years to obtain a juris doctorate degree.

When the LL.M. program still had a relatively small number of foreign students, Veronica Mahanger came to Duke upon receiving her LL.B. from the University of Calgary Faculty of Law in 1979. Veronica anticipated quasi-permanent residence in the United States, and she therefore concentrated on courses in American law, except for Professor Arthur Larson's course in International Organizations. Following her graduation from Duke, Veronica has in fact remained in Durham, since her husband is now a tenured Associate Professor at the Duke Medical School, Department of Anatomy.

While still at the Law School, Veronica worked as Acting Assistant Dean of Student Affairs, beginning in January 1980, and Assistant Dean from May 1980 until May 1983. Having taken the North Carolina bar in the interim, she went into solo practice for about a year and a half. She also had a child in 1982 and another in 1984. From December 1984 to the present she has been the sole attorney in the Outside Plant Engineering Department, handling and negotiating contracts for General Telephone of the Southeast/Kentucky.

Hugh B. Lambe, an attorney in Toronto, Ontario, recently received his LL.M. degree from Duke Law School. When asked his reasons for obtaining this degree, Hugh said he felt it would lend stature and credibility to him in his field, tax planning and real estate, as well as be a rewarding personal experience. Hugh described the professors at Duke as "superb" and noted that two

of the papers he wrote during his course of study have subsequently been published.

Several factors compelled Hugh to select Duke over other schools; among them were Duke's national reputation, its many commercial law course offerings, its well-organized program for international students (both at the law school and undergraduate levels), and its "southern" location.

Hugh described his fellow American students as "more than friendly, more than helpful, and sometimes curious." He claims to have spent a great deal of time discussing differences in the respective legal systems, and he said he would unhesitatingly encourage other international students to attend Duke.

Peter Tobias is a Canadian student currently enrolled in the LL.M. program at Duke. Peter attended Queen's University in Kingston; following his year in Durham, he plans to return and complete his legal studies, examinations, and "articling" requirements. Peter came to Duke



Peter Tobias

not only for its expertise in the areas of banking and financial law, but also because he entertains the idea of teaching law someday. According to

Peter, a "colonial" attitude persists among Canadian legal scholars, and therefore most of them obtain their graduate degrees either in England or the United States.

In addition to its LL.M. students, Duke also has several Canadians enrolled in the J.D. program; currently they include Allen Hanen (class of 1986) and Jonathan Shapiro (class of 1987).

Allen, from Calgary, Alberta, first came to the United States when he and his wife received graduate



Allen Hanen

teaching appointments in philosophy at the University of North Carolina at Chapel Hill. Allen's wife subsequently accepted a position at Duke, while he enrolled in Duke Law School. Allen plans to remain and practice in the States, primarily because returning to Canada would entail further study, and because he feels that legal opportunities are greater here. Allen's interest is in litigation; his Law School honors include Winner and Best Brief awards in the annual Moot Court Competition. Having clerked for a firm in New York City, Allen hopes to return there permanently, for he enjoys the city's mixture and wide

acceptance of many different cultures.

Jonathan Shapiro is from Montreal, Quebec, and studied Political Science at McGill University. Unhappy with the political and economic situation in Montreal, Jonathan decided to study law in the United States. This decision effectively precludes him from returning to Montreal to practice, since the Montreal



Jonathan Shapiro

“bar” requires knowledge of French civil law. Jonathan, however, agrees with Allen that legal opportunities are greater in the States. He worries that, as a Canadian citizen, he cannot qualify to take certain bar exams, and the period of time required to obtain American citizenship is quite lengthy. Fortunately, Jonathan can take the New York bar, and he hopes to eventually practice somewhere in the Northeast.

The English students involved in the international program are both candidates for the J.D. rather than the LL.M. David Allen read law at the University of Exeter and will complete the J.D. course at Duke in two years. Neil Clarke studied History at the University of London and is enrolled in the traditional three-year track.

Allen passed his barrister exams in England but chose to move permanently to America. With a 13.9% unemployment rate in England, Allen was motivated to come over by a need for greater opportunity. In this his second year at Duke, Allen still misses the com-

fort and security of family and friends but feels positive and optimistic about his decision. He clerked in both Orlando and Milwaukee last summer and plans to settle in either Philadelphia or Boston.

Allen describes the Socratic method as “grossly inefficient,” but notes that this observation comes to him after four years of law school. “You are taught to do so much in the dark here. At university (in England) cases were treated only after a general lecture in black letter law,” says Allen. He perceives Duke as quite competitive: “It is more visible and more blatant here.”

Allen describes his first months in Durham as depressing and disappointing. Interaction with Americans was difficult. “(International students) came from a whole different set of values, a whole different set of experiences.” When asked about the tendency of foreign students to spend a great deal of time together, Allen quotes a fellow student: “The only thing that we (international students) have in common is that we have nothing in common with American students.” Allen finds his perspective changing a bit, however. With Judy Horowitz’s encouragement, he became a Resident Assistant on campus. Living and working with the undergraduates, he says, “ensures that I will continue to be enthusiastic and I carry it on through law school.”

As an RA, Allen has perceived what he calls an American way of



David Allen

dealing with people and problems. When students come to him for advice or help, he feels that they have already decided how to deal with the problem and merely want confirmation. Allen sees in many Americans “a combination of confidence and insecurity.” While Americans always seem to be so sure of themselves they are at the same time, says Allen, “utterly terrified of failure.” Asked for an explanation, Allen attributes these characteristics to a lack of history and tradition to fall back on and the “pioneering spirit where weakness would have killed you.”

The major disappointment, Allen feels, is that his experience abroad is not fully utilized here. Although he is not certain that it would be different for an American in England or Europe, he feels the international student’s special qualities and accomplishments should be channeled into the Law School more effectively — perhaps into more organized discussions and presentations.

Neil Clarke holds an undergraduate degree from the University of London and a master’s degree in Economics from the University of Connecticut. Like Allen, Clarke has settled himself in this country in at least partial reaction to the depressed economic conditions of England. He explains that people are very much pigeon-holed at home: institutions like apprenticeships make change from one occupation to another very difficult. Clarke admires the relative flexibility and openness of American society: I love the fact that you can go to law school here when you’re forty.”

Despite government funding of education in England, Clarke explains that not only is a university degree of limited value to most English employers, but also that it takes resources to get started and no loans are available for that purpose. Once a student finishes law school, for instance, another year of training is required to be certified as a barrister; if the individual cannot afford it himself, he cannot go. “There is an almost insurmountable built-in disadvantage against someone who has ability but is poor.” In contrast to

England, Clarke believes America gives everyone a chance: "One of the great things about American capi-



Neil Clarke

talism as opposed to British socialism is that people *do* get a chance."

Clarke carries his idealism about America to his defense of the methods and system of American law school. "Professional school is a test of determination; grades are merely indicators to law firms of how you perform in a competitive situation," says Clarke. Hurdles are set up, he explains, and whether they are true measures of intellectual capacity does not matter. "It's a hazing process really: everyone here has *ability* but *determination* is what makes you succeed." From this point of view, says Clarke, law school is effective.

Compared to Australians, Americans are workaholics, according to Randy Benn. Randy lived in Sydney, Australia, with his family for five years and attended junior high school there; during high school (in New York) and college (at Duke University), he spend many summers there. Randy says there is much greater emphasis on leisure and the outdoors there, and he says Australians tend to be a little bawdy and off-color but very fun-loving people. He claims it is not unusual, for example, to have a repairman come to your home dressed only in his bathing suit. Randy says alternate lifestyles are much more accepted there and "the nightlife is wild. The clubs don't open until late, and they stay

open very late." He claims he saw a lot of then unknown bands in Sydney nightclubs that have since become very famous in the United States.

During his college summers, Randy worked in Sydney at the sixty-attorney branch of a large American law firm. According to Randy, there are about twelve law firms in Sydney with sixty to one hundred lawyers in each one.

The legal education system is very different in Australia. At the University of Sydney, there is no division between the undergraduate and graduate curricula. High school seniors take an exam called the HSC; the top fifteen percent are admitted to college. A student's score determines what curriculum he or she can pursue in the college. For example, one must score at least 390 out of 500 points to study law there. Randy says it takes a minimum of two years at the college for an LL.B. degree, followed by six months in the college of law, which is "like an extended bar exam."

Once finished with law school, when one might be as young as twenty-one years old, a young lawyer starts out as a solicitor or counsellor. The starting salaries are much lower than in the United States; however, law school is free and provided by the government, so there are no loans to repay.



Randy Benn

While Randy enjoys Australia's lifestyle and climate, he very definitely plans to live in the United States. He is a second-year student

and will graduate with a J.D. degree in 1987.

Robert Baxt: *Australia*

Another visitor to the Law School this fall was Robert Baxt, Dean of the Law School at Monash University in Victoria, Australia. Baxt presented a lecture to the faculty concerning "Recent Australian Decisions on Corporate Oppression," highlighting the evolution of key corporate statutes in Commonwealth countries. Such statutes give shareholders increased rights and remedies. At common law, Australia courts required oppression suits to be brought by the directors of the corporation rather than by the minority shareholders (*Foss v. Harbottle* announces this rule.) However, over time and after 1945, a statutory right for shareholders developed. The first enactment of such a remedy came in 1948 and the corporation statutes are repeatedly amended. These statutory innovations, Australian corporate statute sections 320, 574, and 542, are designed to aid the shareholder, although cost rules continue to act as a disincentive; and changes to fee regulation have thus far been resisted.

Section 320, which has so far been narrowly read and infrequently applied, was originally 210 of the English Companies Act. The English Companies Act was adopted in 1948 and followed in Australia in the 1950's. Shareholders seeking on oppression remedy faced many hurdles under 210: the shareholder had to show continuous oppression, that the shareholder was being hurt in his capacity as a shareholder, and that he had suffered financial detriment. Furthermore, the executor of a shareholder could not sue under 210. In the 1960's, an Australian court interpreted the oppression statute narrowly, stating that Parliament had not really intended the section as written. Other courts also found that a case's facts frequently did not support an oppression finding but rather merely a finding of dissatisfaction with the corporation's actions.

The 1961 Report of the English Jenkins Committee suggested widening the base of 210, and similar initiatives were proposed in other countries, with no result. Sections of the corporate code were then redrafted by the Australian legislature, however. Section 210 became 320, 542 was revised to permit the court to hold directors and ex-directors personally liable, and 574 permits the shareholder or "any other interested person" to seek an injunction and damages.

After several decades of statutory amendment and conservative judicial interpretation of shareholder rights and remedies, the present grounds in Australia for bringing an oppression remedy suit are very broad. The conduct of the corporation must be oppressive, discriminatory, and contrary to the interest of the members as a whole. Professor Baxt finds the inclusion of "members as a whole" significant because it encompasses more than the company itself. Remedies are also more expansive than in the past, when the only available remedies were winding up and an order to regulate corporate

affairs and to purchase shares. Now the court will appoint a receiver and will either direct that proceedings be brought against directors or that the members themselves bring such an action.

Cases cited by Professor Baxt were *Don Keith Investments*, *Thomas v. H.W. Thomas* (a 1984 New Zealand case), and *Western Suburbs Football* (now to the Australian high court on appeal). In *Don Keith*, a shareholder who sought a winding up because the partnership was fractured was granted an oppression remedy and received the fair purchase price of his shares. In *Thomas*, a shareholder, who received few dividends from a company that turned profits back into itself at a four percent return, unsuccessfully tried to get the corporation to change its policy. He then asked to be bought out but was offered too low a price. Although the shareholder lost below and on appeal, one Justice interpreted the new New Zealand provision more expansively and as excluding old cases. Justice Richardson further stated that a court will intervene given an absence of fair dealing and

will balance competing interests. However, in *Western Suburbs Football*, the court refused to adopt a liberal view. A thirteen-team Rugby League decided to exclude the Western Suburbs club without compensation. Western Suburbs applied for an injunction under 300, and the lower court agreed that the League's financial interests were overriding interest in the Western Suburbs club. The Court of Appeals reversed, though, because it found that courts should not substitute their decisions for that of management concerning the best interests of the corporation.

While it appears that Australian and New Zealand corporate oppression remedy statutes are more expansive than in the past and provide greater rights to shareholders, courts do not seem to uniformly apply the broader view that would make it easier for a shareholder to successfully bring an oppression remedy suit. As more cases are brought under the revised statutes, a clearer pattern of the courts' applications will emerge.

EUROPE

Visiting Professors from Western Europe

The internationalization of the Law School has not been confined to the student body: visiting professors from Western Europe have enhanced the faculty in the past year. Mr. Guy Haarscher from Belgium and Ms. Beatrice Pfister from Switzerland came to Duke both to conduct courses in their respective specialties and to use the resources of the Law School to continue their own scholarship.

Guy Haarscher spent the fall at Duke on an informal leave from the University of Brussels. Because sabbaticals are not allowed at Brussels, Haarscher was on an abbreviated stint at Duke to enable him to return to Belgium to fulfill his lecturing duties there. Holding doctorates in both law and philosophy, Haarscher offered a seminar this fall entitled "Political Philosophy and the Law." He is writing a book in English on the same topic and in fact explained, "The course is really my book." Through both the articulation of his position and the feedback from class discussion, Haarscher says, "[The seminar] helped me to work things out and reconsider my approach."

Haarscher was invited to Duke by Professor George Christie after a lecture Haarscher gave here last spring. Christie's work in jurisprudence attracted him, and Dean Carrington expressed interest in setting up a seminar in Haarscher's field. Haarscher also saw the visit as a means "to capitalize on [his] English speaking abilities" and to strengthen the American contacts he had made

while teaching at Queens College in New York. The chance to work in the States, Haarscher explains, was tempting too because of what he described as "the provincialism at home." "The intellectual life in France is a bit in decline," he says. America, apparently, is still the land of opportunity in the eyes of many Europeans.

Haarscher's reactions to the Duke environment are mixed. "The University of Brussels," he says, "is in the center of the city. There is an interrelation between city and university that doesn't exist here." Still, he is delighted by the amount of work he was able to get done here. Without the administrative burdens and family demands of home, Haarscher estimated that he completed work in the twelve weeks here that would have taken a year in Brussels. "There is nothing to do in Durham," he says only half-jokingly, "so you work."

Haarscher contrasts law school in Belgium with that in the States. "In Brussels," he explains, "more of a selection process takes place in the course of the program: two-thirds fail out. Here students seem very serious and committed [from the start]—you ask them to read something and they do it." Haarscher noticed a definite evolution in the dynamics of his seminar: "It was more academic and one-sided at first. I needed to lay the basis, I think. Then the classes became much more discussion-oriented."

Overall, Haarscher says, "The students in America aren't that different

from European students. Each may know certain things the other doesn't, but it comes to much the same thing. It's not like teaching in Thailand or somewhere—it's the same world."

Beatrice Pfister graduated in 1981 from the University of Berne in Switzerland, and then obtained her LL.M. at UCLA in 1982. She returned to Berne to teach in the areas of jurisprudence and constitutional law. She is at Duke for the 1985-86 academic year as a Fellow on the American Council of Learned Society. In connection with her fellowship, Pfister is working on an article for a Swiss law journal on U.S. constitutional limitations and requirements of procedural protections. Pfister plans to offer a research tutorial in the spring on freedom of speech in the U.S. and Switzerland.

Pfister chose Duke for her fellowship primarily because of the faculty's reputation, particularly in the area of constitutional law. She also admits that the climate was a consideration (the Universities of Chicago and Pennsylvania were also on her list). Pfister finds the academic atmosphere pleasant and states that she was "impressed with the reception [she] was given and happy with the professional interaction going on."

Like Haarscher, Pfister notes the difference between law school at home and in America. But while Haarscher spoke of the connection between university and city in Brussels, Pfister emphasizes that law

school in Switzerland was more like a university itself. "The faculty with one specialization," she explains, "would be grouped in one building, other law faculty would be in other buildings. It's an entirely different

atmosphere—the interaction between faculty is more narrow at home."

Pfister has discovered a difference in the legal systems of Switzerland and America as well. Lamenting

the difficulty of finding anything quickly, she says, "Research is harder here because the American legal system is less systematic than civil law."

Switzerland and Belgium

Four of the students in this year's LL.M. class are from Switzerland. Barbara Schaerer and Marcel Schmocker received their law degrees from the University of Berne. Olivier Peclard graduated in law from the University of Geneva. Adrian Steinbeisser received his law degree and the doctorate from the University of Basel.

Schaerer has a background in both the teaching and practice of law. For a year and a half after taking the bar exam in 1981, she was an assistant professor at Berne. Subsequently she was employed by the Swiss Department of Justice, working primarily in the Legislation Division. There her time was divided between analyzing drafts of administrative regulations for their constitutionality and writing opinions on problems and questions independently submitted to the Department. The decision to enroll in an American master's program, says Schaerer, "was mainly personal but I see its usefulness professionally, too." Wanting to avoid the frenzy of a big city and the competition of too big a University, Schaerer chose Duke in particular because of its size and atmosphere. While she still finds the Law School more competitive than she would like, Schaerer "appreciates North Carolina's friendliness and openness." Like most of the other international students, Schaerer praises the smooth administration of the program and complements Judy Horowitz on her helpfulness and competence.

Schaerer was surprised by the

high school-like atmosphere of classes and the number and length of assignments. "I spend so much time with the reading," says Schaerer. "At home, law students are much more independent in their work." Of the American legal system in general Schaerer observes that the problem is "to put the system together." Unlike civil law, American law "starts from the facts and you try to get the rules out of the facts."

Schaerer spends most of her free time with other international students, although she is beginning to develop some friendships with Americans. She mentions that a great amount of effort is sometimes involved, and she sometimes finds American students a bit difficult to approach. "International students

seem to have much more time to socialize," says Schaerer. The American law student's lack of free time is indicative to Schaerer of their competitiveness and of what at times appears to her as an obsession with money. "Here, you want good grades so you can get with a firm and make a lot of money." Schaerer observes. "At home there is more emphasis on law to help social problems." The narrowness of the typical American student, Schaerer notes, "makes other aspects of the personality suffer. (American law students) never experience the academic freedom I had. They go into the profession so quickly."

Marcel Schmocker graduated from Berne in 1983. After university, he joined a law firm with a strong business orientation. At seven lawyers, it's one of the largest in Berne. Schmocker also worked for a government organization, the Secretary of the Police Physician Association. His work there involved explaining new regulations and proposals to doctors and collecting their feedback. He also participated in arbitration proceedings and prepared advisory opinions on questions submitted by doctors to the association. Working for the government as a young lawyer, explains Schmocker, "is very good professionally (although) it just pays expenses."

Although his firm is not sponsoring his study, Schmocker was encouraged by the firm to come to the States. He has two goals in mind: "To learn the basis and basics of



Barbara Schaerer

American law and to master the language." "Languages are very important to work as a lawyer, and Switzerland is so small," explains Schmocker, "that you need international connections." Duke was recommended to him as a top school by members of his firm, and he was attracted by its small size.

Like other international students, Schmocker finds American law school quite different from law school at home. In Berne, one written exam is given after four semesters, along with six oral exams. "Most students don't go to class much and then study everything the last half year," says Schmocker. "Even professors say don't come to lectures—study." Noting the difference between the rule-based system at



Marcel Schmocker

home and the case method here, Schmocker believes the Socratic style of teaching is appropriate if time-consuming. Its shortcomings, says Schmocker, are that "you learn only how to analyze a case, not how to put rules together and support your client's position."

Schmocker finds American students easy to "just chat with" but difficult to get to know on a deeper level. He feels more comfortable socializing with international students but at the same time, says Schmocker, "I see the danger of it." His wife is here with him. She is a

dentist and was able to find a research job in Chapel Hill.

Schmocker finds that professors here are generally more approachable than at home: "Professors (in Berne) are like gods and the average student can't really talk with them."

What Schmocker misses most about home is the social life. In Berne, he explains, "there are always restaurants you can just drop into and find friends there. There's always a place to go."

Adrian Steinbeisser has spent the last six years in Brugg as a business lawyer and a notary public. His decision to enroll in the LL.M. program was primarily personal, rather than professionally motivated. The firm in which he worked was so small as to make partnership unlikely and tired of his status as an associate, he had two options: to open his own firm or go into government. Before taking such a drastic step, and while still unmarried, he says, "I wanted to experience the United States and broaden my horizons."

Duke was recommended as one of ten top schools to Steinbeisser by a colleague in Basel. As with many students, the Law School's size was an asset. "I wanted to be a member of a community and not only a number," explains Steinbeisser.

Steinbeisser is reluctant to judge the efficiency of the Socratic method of teaching but he does find himself a bit burdened by the daily assignments. He points out, however, that the amount of work may be due to the fact that law school is three years here and four to five years at home.

Socially, he wishes there was more interaction with the American students but, Steinbeisser says, "I feel I'm partly at fault and need to make a greater effort." He adds, "Among international students there is a special group status—common courses, International House events—that deepens the connection."

What most impresses Steinbeisser about Durham and North Carolina is the amount of open space and land. "In Switzerland, four universities would have been built on (the area) of this one campus," he explains.



Adrian Steinbeisser

Olivier Peclard, after graduating from the University of Geneva in 1980, practiced law in a Geneva firm. To improve his English, he arranged to come to the States several months before he was due to start the LL.M. program. With the help of family friends in Charlotte he was able to obtain a summer position in a Charlotte law firm. It was there that he heard about Duke's program, and he eventually changed his original plan of attending George Washington.

Peclard contrasts the constant day-to-day work required at American law schools to the freedom and independence of studying law at home. "My time at university was holiday," he says. "It was personal self-control to follow courses, and then you'd work very hard for two months before exams. Here you are obliged to keep up every day by classes." Peclard does find a difference between first-year classes and upperclass courses in the decreased use of the Socratic method, which he sees as "time-consuming and inefficient."

Unlike many other foreign students, Peclard is finding integration rather easy. "One can always find things to do," says Peclard who plays soccer on the Law School's intramural team. He finds his fellow students quite open and friendly, attributing it in part to the national character of Duke. "Becoming



Olivier Peclard

friends (with Americans) is not difficult, especially at Duke where people come from all over and live near each other here. It may be different in a big city." He adds, "making good friends anywhere, of course, is not so easy."

Among the things Peclard misses most about Switzerland is the lively atmosphere of downtown Geneva. Observing that Charlotte is about the same size as Geneva, he explains, "the downtown is dead. The city has no spirit."

Peclard finds the Law School's environment much more competitive than at home. In Switzerland, he says, "It is course selection that is important, not numbers." He also notes that the two-year practice requirement in Switzerland helps employers sort out what you are good at, so grades become less determinative.

Two LL.M. candidates are from Belgium. Marie Evrard graduated in law from the University of Liège. Paul Tulcinsky earned both his law degree and his master's in taxation at the University of Brussels.

The ordinary period to complete the law program at university in Belgium is five years. Evrard notes, "It's easier to get in (law school) in Belgium, but it's harder to get out." The cumulative exam for each year is given for the first time in the spring. Since usually less than a quarter of

the class passes it, most must re-take it in the fall after studying through the summer. After the September re-take, says Evrard, "no one wants to start classes right away so they take a break for a few weeks. Then you begin already behind and (it becomes a circle)." In addition to the university study, three years of practice are required to open a private firm.

The lectures in Belgium, as in Switzerland, are rule-oriented and class attendance is comparatively low. Hornbooks or published notes are used to prepare for exams. Both Evrard and Tulcinsky agree that the daily burdens of assignments and class preparation here contrast with the independence of the Belgium law student's experience. Evrard, however, explains that she did study on a day-to-day basis at home and in fact expected the courses at Duke to



Marie Evrard

be more challenging. The chief difference in studying is one of approach, says Evrard. "Here, memory is used less and instead problem-solving skills are stressed."

Evrard came to America for a mix of personal and professional reasons. Having spent a year in Connecticut during high school, she wanted to expand her experience with the United States. As with other international students, Evrard wanted to refine her English language skills,

and she also believes there is a professional advantage attached to an American law degree. She plans to work in this country for at least a year. Ideally Evrard would like to connect with an American law firm with a branch in Brussels practice. "I need opportunity fast," says Evrard.

When questioned about her perception of Americans Evrard answers, "I think the European opinion of American freedom is wrong." Her experience in Connecticut led her to the conclusion that American teen-agers tend to be "overprotected and naive," rather than independent and worldly. Evrard also mentions her initial resentment of America's self-obsession and the degree of arrogance about its democratic ideals. "You are so big in this country," says Evrard, "that you don't have to look outside like you need to in Belgium. I am proud in both knowing Belgium well and being able to look outside it." She continues that although America is a powerful and important country, Americans should take care to recognize their limits. "Arrogance in power," Evrard observes, "leads to neglect of other civilizations."

Paul Tulcinsky, working on his third law degree, is being sponsored by his law firm in Brussels. At fifty-seven lawyers, the firm is huge by European standards. Tulcinsky explains that the firm is unusually similar to an American firm because it is organized by American- or English-educated lawyers. In fact, Tulcinsky is one of six associates sent this year by the firm to study law in America. Although he is not formally committed to the firm, he does plan to return to it.

Duke was recommended to him by a 1979 LL.M. graduate who is an associate with Tulcinsky's firm. He describes his reception here as "wonderful" and mentions that he was provided with useful information from the time of his application to present-day counselling. Tulcinsky was surprised with the degree of organization of the program and the warmth of the faculty and International House. "I think it would be very different for an American going

to Belgium," he says.

While he is enjoying the new perspective offered by American law school, and finds the cases "amusing" to read, Tulcinsky is a bit disappointed in how classes are conducted. He thinks the Socratic method is employed ineffectively: "It is often used just for the facts, not the analysis of a case." He finds a similar lack of depth in the Legal Writing Course. "(The course) is not challenging for someone who is already a lawyer." Tulcinsky continues, "There isn't enough criticism and comment on the style." He is finding, however, that the work is very time-consuming. He is, in a way, grateful for the work



Paul Tulcinsky

since his wife could not practicably accompany him to the States. "Sometimes I need to bury myself in all the books," says Tulcinsky.

Tulcinsky, like Evrard, is somewhat disturbed by the ignorance of many Americans about world events. "Americans see the world only in terms of America. It's simply amazing," Tulcinsky says. He sees the media promoting this attitude, commenting on the small amount of time the news devotes to world politics and foreign countries.

Michael Gyongynosi: West Germany

It is a long way from Munich, Germany, to Durham, North Carolina, but so far graduate student Michael Gyongynosi ("Mishi") has had little trouble adapting to life at Duke Law School. Formerly a practicing attorney, Mishi characterizes his LL.M. study at Duke as a "professional benefit"; he plans to return to Munich eventually but would like to work with an American firm.

According to Mishi, the study of law at Duke is much different from his previous legal studies. In Germany there are no assigned readings, students receive an option of many texts, and professors lecture on the "best" theoretical solution. Classes are extremely nonauthoritarian, with students wandering in and out as they please, and classmates often meet in local coffeehouses for legal discussions and debates. Although he praises the American system as more efficient, Mishi nonetheless feels that students here are sometimes too close-minded and reluctant to go beyond assigned readings.

Mishi's decision to come to Duke was based on both Duke's reputation and its "environment," and he is extremely happy with his choice. He finds the students friendly and curious, yet sometimes too busy for more than hurried "hellos" exchanged in the Law School halls. Life in the States has required some adjustments for Mishi; initially he tried to eat, as many Duke students do, from the downstairs vending machines. His stomach, accustomed to leisurely Continental dining, immediately rebelled. Mishi also expresses a desire to find somewhere in Durham which serves what he describes as "good coffee"; apparently the DBA foodstore does not qualify as such a place.

The adjustments are not so different from those that Mishi has made during international experiences elsewhere: at the Central Institute of Nationalities, Beijing,

PRC; and in further legal programs at the University of Geneva, Switzerland; Leyden, Netherlands; London School of Economics, England; Strasbourg, France; Coimbra, Portugal; and Urbino, Italy. He has worked as a law trainee in international subjects for both German and American law firms, served as an ad hoc intern at the UN Secretariat of the Law of the



Michael Gyongynosi

Sea, and was a law clerk for a civil and penal law judge in Bavaria. For two summers he worked on a kibbutz in Israel. After graduation from Duke he plans to specialize in an American law firm performing legal work in the Far East.

Beata Iracka-Jostmeier: Poland

What are the major differences between the legal systems of Poland and the United States? I would have said it's not a common law system. In the European tradition it's codified, you don't look as much to caselaw. But, what is happening in Poland now is that law and its interpretation is being adapted and changed to fulfill the present desires and trends of the regime.

Beata Iracka-Jostmeier is from Warsaw, Poland. She attended high school in England along with Bharat Dube, also now a Duke Law student

from India. Afterward, Beata "wanted to try another country" for undergraduate school and the States were a top choice. Duke University offered her a full scholarship. She decided to come here, majoring in Political Science and Spanish.

Duke Law School was a logical continuation of her college interests and objectives. As well, she knew Durham, and felt the school was top quality. Had Beata returned to Poland for legal training, she "would have had to start again. There is no such thing as college, then law school. It's just law school for four or five years after you decide you're going to be a lawyer at age 18 or 19."



Beata Iracka-Jostmeier

Law students in Poland have a summer break, but "do other things instead" of clerking with a firm. Once they complete their studies, law students do not have further examinations, unless they wish to become judges.

Private firms are usually composed of solo practitioners. Larger firms are "usually a parent with a child or close relatives." The bulk of attorneys, however, work for the government.

The Polish are not as litigious as Americans, Beata thinks, perhaps because "private industry is minimal." Also, "the system is not geared to this sort of problem-solving approach."

Interestingly, Beata reports that "more women than men enter law" in Poland.

Beata met her husband, Eckhard Jostmeier, in undergraduate school. They were married in July 1984. He currently is in Herford, West Germany, working on computer data bases, but plans to come to the United States soon.

Beata learned our language mostly by living in English-speaking countries, although she had a few years' study in Poland too. She also speaks Russian, Spanish, German, and, of course, Polish.

Her travels have taken Beata throughout Europe, the USSR, Iran, Kuwait, Venezuela, and Mexico. In the U.S., Beata has visited the West Coast, the South, New England, and New York City.

The size of America's big cities surprised Beata: "You know the data, but you have to see it to know what so many people put together means." She likes the great open spaces of the U.S. and our relaxed lifestyle.

On the down side, Beata missed Polish food until a new Polish/French restaurant opened in Chapel Hill. She keeps up with her homeland by reading Polish newspapers in Perkins Library as well.

Once she gets her J.D. in May 1987, Beata plans to settle permanently in the States. She has no geographical preference, although she has worked in Durham during school, and for law firms in Riverside and Palm Springs, California.

Commercial Writing is Beata's favorite course because "it allows you to use your ingenuity. It's as close as you're going to get to real practice while still in school."

Bozena Sarnecka: *Poland*

Bozena Sarnecka originally came to the United States for a six-month visit with relatives in Clarksville, Virginia, to study English. Now, six years later, she has a master of law degree from Tulane, will receive her

J.D. from Duke in May 1986 and plans to practice law with a firm in the United States.

Bozena's involvement with law began long before her studies in the



Bozena Sarnecka

United States. Right after high school, she entered one of Poland's eleven law schools and for five years studied law along with several undergraduate courses. After law school, she spent two years as a judicial clerk for an appellate court. In Poland, one clerk for a court, not for any particular judge. Judicial clerkships there are a type of extended study program with daily classes and lectures. After the clerkship, Bozena passed the state judicial exam, which qualified her to be a judge; but she claims she never wanted to be a judge. Instead, she became an assistant professor of labor law at an institute in Poland and spent most of her eleven years there writing and publishing. In addition, she was part-time general counsel for the Agriculture Cooperative in Blonie and part-time worker's counsel of labor law and social security benefits for the Warsaw branch of trade unions.

Bozena spent time with relatives in Virginia and in Portland, Maine, before moving to Boston. She lived in Cambridge for two and one-half years with ninety-six year old Helene Deutsch, who was also from Poland

and was a student of Sigmund Freud and author of "Psychology of Women." Bozena also lived on Cape Cod for nearly a year before entering Tulane's masters of law program in New Orleans. The following year, Bozena entered the J.D. program at Duke as a second-year student.

She says she was "shocked that Duke was so nice," because she had not liked either Tulane or Boston. She wanted to come to Duke because it is a "great school" and is "very famous in Poland." Bozena

claims that she "loves Duke. It is almost like my family." She thinks Duke's small size and "wonderful administrators and professors" make it particularly good for foreigners, believing it provides "motherly care" to students who are far from home and unfamiliar with the area.

Last summer, Bozena clerked for a small firm in Houston, Texas, and she is now interviewing for an associate position following graduation in May. She feels very strongly that she does not want to return to labor

law. She believes that American labor laws are "not very human" and are inefficient, providing either too much or too little protection for workers. She claims she has no ties with any particular area of the country. However, since she is fluent in Polish, English, Russian, French, German, and Italian, and since she plans to practice corporate law, she is concentrating on larger metropolitan areas where there is international business.

Past Graduates from Germany

In recent years West Germany has been represented by several other graduate students. Beata Czerwenka received her LL.M. in 1981 and then went on to Hamburg to practice law. Susanne Haas came to Duke with an R.A. from Johann Wolfgang University. She received her LL.M. in 1985 and will receive the J.D. in 1987.

Torsten Lange finished his S.J.D. thesis in 1985 on "Labor Conflicts and the Role of Lockouts from a Comparative Perspective: A Legal Study of American and German Approaches." Before coming to Duke, Torsten served as legal advisor to the German Chamber of Commerce and Industry in London, and,



Torsten Lange

later, as secretary and manager of the Indo-German Chamber of Commerce in Calcutta. After receiving his LL.M. at the University of Pennsylvania, he came to Duke because of the pleasant climate, Duke's strong reputation, and the positive impression made on him by Judy Horowitz, director of the international student program. His career goal is work either with private industry or an international agency in the areas of international business transactions and economic cooperation with developing countries.

Book Review

Guide to Foreign Legal Materials: French

By Wallace R. Baker¹

Charles Szladits, a well-known scholar at Columbia in the field of comparative law and library science, and Claire Germain, Law Librarian and Senior Lecturer in Comparative Law at Duke University School of Law, have prepared a second revised edition of a *Guide to Foreign Legal Materials*, relating to French law.² The purpose of this volume is to help the common law lawyer use French legal materials.

This book is unique for two reasons. There is no book like it in France,³ and there is a great deal of information about French law—a difficult and fascinating subject—packed into this small volume.

It is an important book for common law lawyers who wish to study French law. Perhaps the biggest problem a common law lawyer must overcome in researching French law is to locate the best books, articles, and cases on the subject of his interest, whether in English or in French. Claire Germain's Part Two of this book, in only a hundred pages of text, leads the researcher immediately to the major works on each subject and provides brief descriptions and an evaluation of each work listed.

I verified and had reviewed by several friends who are distinguished French legal scholars, who were impressed and interested in the volume, the entries on Civil Procedure and Commercial Law and other subjects in which they specialize. We have no found any major omissions of importance but an intelligent common sense selection of the best authors and materials in these fields.

The first two chapters in Part II entitled "Bibliographies" (VI) and "Legislative Materials" (VII) are complete. The latter chapter contains much practical information to help understand the more confusing older French legal materials. For a common law student of French law, the explanation of the organization of the French Codes and the listing of major French legislation given in this chapter is helpful in ordering a mass of laws that is not easy to systematize. The reading of this chapter is made appetizing by her instruction of the reader on the historical genesis of the laws and relationship of one to the other. An excellent detailed explanation of the numbering systems used in some of the codes is included and the chapter ends with a nice dessert—an explanation of the French revolutionary



Claire Germain

calendar with lovely sounding, seasonably significant months such as *germinal*, *floreale*, and *prairial*. The new calendar was instituted when the revolutionaries decided to start all over again which, according to Mr. Romme, was for the purpose of getting rid of Sundays.⁴ Whatever the French revolution did for France, it created turbulence for those interested in French legal history, which Claire Germain has smoothed out nicely.

Chapter VIII deals with case law in France and starts with the statement that "the importance of case law in France cannot be overemphasized in spite of persistent doctrinal statements that judicial decisions do not make law." (See below for a discussion by Szladits in his

chapter entitled "Case Law".) Claire Germain outlines how case law is organized, and gives a short explanation of the form of decisions. She also includes most useful sections on computerized legal research and a description of the data bases available in France, which will now be coordinated to a great extent.

Chapter X relating to Doctrinal Writings lists the best legal treatises in a good selection of subjects which concludes Claire Germain's contribution to the volume. Exchange Control and Foreign Investment Control are the only additional subjects which seem appropriate to add to the list of subjects. If the next edition of this work could be expanded to be more exhaustive rather than selective, it would be useful for scholars to have listed some other unique works which do not fall into the selected subjects, such as "Liberty of Information and Opinion in International Law" by Roger Pinto, published by *Economica* in 1984.

Charles Szladits's contribution starts with Part I, where he explains the role of legislation and custom as "sources" of French law. For a practitioner in France, the importance given to custom as a source of law may seem excessive, although in certain limited domains it is important (labor law) and when it is manifested in the case law, courts do pay important attention to custom. The traditional French legal scholar believes the "law" is the real source while custom is secondary, existing only by implicit permission of the legislative power.

The section entitled "Judicial Review" helps to explain the totally different position of the courts of general jurisdiction in France. They have no role in deciding constitutional questions. Even the special "court" which is called the "Constitutional Council" acts more like an advisory, administrative, or legislative body than a court in ruling on the constitutionality of a law *prior to the time* it is promulgated. It needs to be emphasized that the use of the words "Judicial Review" in this context is very different than in the United States.

He then goes on to state, with reason, that French scholars do not consider cases as a source of law but practitioners do. In Chapter IV, he notes that opinions expressed by legal scholars (doctrine) are not considered a formal source of law but they are influential with the courts (like case law). Chapter V explains the importance of general principles in the hands of judges and how they "form the bedrock" of the legal system—the "tradition of the spirit of its law" which corrects legislative abuses when sanctioned by the highest administrative court or the constitutional council. There is also reference to equity as a limited source of French law (not in the common law sense but as the equivalent to moral principles) which has an impact when embodied in case law and the writing of legal scholars. Some French legal theorists do not think of equity as a source of law.

By the time the next edition is published it will be appropriate to place more emphasis on the important development occurring in French law as a result of EEC

regulations and case decisions applying EEC rules. Although progress in making Europe a political entity seems slow, the European legal fabric is constantly being woven into the national legal structure. A short reference to this development can be found at the beginning of Part I.

In his conclusion, Szladits gives us some final advice on how to proceed in researching French materials, explains how classifications of legal materials differ in the two systems in the more important subject matter, and returns to deal with the role of case law in the French system.

He rightly comments that great reliance in France is placed on case law to know the present state of the "living law." Case law, as in the United States, is important where there is no statutory law or an interpretation is needed. He then proceeds to explain the differences in mental processes in reading an English or an American case and a French case and notes that a French lawyer focuses less on facts than on legal principles in the decision, which gives a theoretical answer to a more or less abstract question. The civil lawyer is also said to be more interested in the reasoning than his common law counterpart, who tries to extract a "narrow holding as in common law case," which could be futile for a civil lawyer.

Szladits then points out that a French judge is not bound by higher court decisions decided in similar cases between different parties, cannot lay down general rules which will be binding in future cases,⁵ and cannot cite a previous case as the reason for his decision without invalidating the decision.⁶ But he adds that despite these rules, which are strange to a common law lawyer, "precedents are of great persuasive authority and are *de facto* usually followed by the courts." He attributes this result to several factors, which include the hierarchy of the courts and the resulting tendency for lower courts to follow prior decisions of higher courts in order to avoid being reversed. Second, since a decision must contain reasons, a court tends to follow another court's decision if it is well reasoned. This tendency has the advantage of providing predictability.

The case law is often reinforced by favorable annotations of a distinguished scholar; or if general principles of law are cited, it becomes even more "persuasive," even if it is not binding. Important decisions (*decisions de principe*) are sometimes printed with the opinions of the government lawyer representing the public interest (*conclusions du ministere publique*), which usually have many citations of cases and explain in more detail the reasons for the decision. It is indeed difficult to perceive how much difference, if any in practice, results from the different theory in French law that decisions are not binding, since case law does have a persuasive influence on decisions of judges. If a common law judge does not wish to follow a precedent, he often distinguishes the case on a factual basis. The result does not seem as different in the two

systems as the differences in theory would lead us to believe.

I have recently had occasion to study French legal history and examine the historical role of judges in France. I was struck by how the legal profession, and in particular the judges (like the nobles), got themselves into a bad spot with Louis XV and Louis XVI, and blocked reforms which the king and the business interests (*bourgeoisie*) wanted. In addition, the judges in the high courts, which were called "*Parlements*," started to exercise political power, and issued general rules as though they were legislative bodies.

Some scholars claim that the revolution was made more violent because the lawyers and the judges in general resisted reform rather than helping to make the adjustments in institutions which were inevitable. When the revolutionaries came to power, they wanted no interference from judges.

In France today, there is no separate judicial "power" under the Constitution, only a judicial "authority." Judges, although they have an independent status and cannot be removed easily, are more like civil servants, and their work—the case law—is considered in theory less authoritative than in the United States. But despite these limitations on judicial power in theory, the judicial function is still such an important one in

French society that it seems to be functioning almost as if it officially had the power to make law in areas of doubt or where the parlement has not legislated.

In conclusion, Charles Szladits's and Claire Germain's introduction and guide to the French legal system, French legal literature, and to some of the most interesting problems in French law is a noteworthy achievement. Legal scholars and practitioners alike should be most grateful to them for their excellent book.

1. Partner, Baker & McKenzie, *Conseil Juridique*, Paris, France; *Licence*, University of Paris; *Docteur en Droit*, Free University of Brussels; A.B., LL.B., Harvard.

2. Published for the Parker School of Foreign and Comparative Law, Columbia University, by Oceana Publications, Inc., 1985. The first edition was written by Szladits in 1959.

3. There is, however, a book published in 1977 entitled *Legal Materials, Documentation Juridique*, by Andre Dunes, Editor in Chief of the *Recueil Dalloz Sirey*, who with Bernard Desche has another book in preparation called *Legal Research Recherche Documentaire en Droit*. The former volume is a theoretical work with a first part entitled "General Nature of Legal Documentation." A second part outlines the different types of documentation available.

4. F. Furet & D. Richet, *La Revolution* 330 (1965).

5. Article 5 of the Civil Code (the result of the hostility of the revolutionaries).

6. Footnote 58 cites cases for this proposition.

FAR EAST

Students from the Far East

In the fall of 1982, Duke Law School began a program offering J.D. degrees to students from the People's Republic of China. The program has grown rapidly: since its commencement, ten more students—from both the People's Republic and Taiwan—have been admitted. Korea is also increasingly represented. Eight students from the People's Republic of China are enrolled this year in the J.D. program. First-year students include Lai Fang, Tien Hui, Wu Yan-lei, Xia Yuan-Tao, and Zhao Jiusu.

Lai Fang had taught English for seven years at People's University in Beijing. Prior to teaching, she had acted as a tour guide in a travel service in Beijing. Fang learned of Duke Law School through Yuan Ping, now a second-year student, when Ping visited People's University during the Duke China Study tour con-

ducted last May. After being a student of literature for many years, Fang has found, to her surprise, that she has many more ideas when studying law than literature. She plans, upon her return to Beijing, to practice in a municipal law firm or use her degree in the area of international business.

Tien Hui received a degree in English from Peking Normal University in 1976, and taught English at People's University for seven years. In studying American law, Hui finds that her greatest difficulties are in understanding the political culture and social policies that are a part of judge-made law. Hui learned of Duke Law School when interviewed by Dean Carrington in China.

Wu Yan-lei received a law degree from Fudan University in Shanghai in 1982, where he specialized in international relations. He has taught

Public International Law and Maritime Law at Fudan, and hopes to teach American law and work in a firm that deals with international business transactions upon his return. Striking to him, in his study of American law at Duke, is the flexibility of judge-made law. Yan-lei believes that the varied interpretations of certain rules reflects the diversity of American society. As a law teacher in China, Yan-lei has felt an urgent need to understand American law because of the growing cultural and economic relations between the two countries. Like other Chinese students at Duke, Yan-lei emphasizes that the differences in culture create difficulties in understanding the policies that form American law.

Xia received a degree in business law from the Peking University of International Economics and Business. Since graduation, he has taught



Lai Fang



Tien Hui



Wu Yan-lei

business law there. Xia was acquainted with Duke Law School through a colleague who is now a third-year student here, Gao Xi-Qing. Like several of the Chinese students, Xia works part-time at the Center for Study of Sino-American Investment. The Center, founded by Gao Xi-Qing, provides translation services for those in need—for example, the Chinese Embassy in Washington, D.C., and law firms dealing in international business transactions.

Zhao Jiusu received both an undergraduate and master's degree in international relations at Fudan University, Shanghai. Before enrolling in the J.D. program at Duke, Jiusu organized training classes on international business transactions at Fudan. He was attracted to Duke because of its national reputation and the fact that the student body was said to be "friendly, open-minded, and active." Jiusu wants to study American law in order to teach law at Fudan. Because the Chinese legal system is now evolving rapidly, Jiusu would like to compare and evaluate the two different systems. Additionally, knowledge of American law will be helpful to him should he be involved in establishing business transactions between the United States and China.

Second-year students enrolled in the J.D. program include Jia An Ling,

Xuan Yan, and Yuan Ping. Jia An had studied English for four years as an undergraduate, and was attracted to the study of law because of its great importance not only in foreign trade and international transactions but also in the reform of internal politics. The cultural differences between China and the United States create difficulties for Jia An in studying American law. As Jia An puts it, "... there is something above law in China and it's really hard to say everyone is equal in front of the law, but here one can feel confident in saying Law is above everything."

Yuan Ping, prior to her enrollment at Duke, taught English at People's University.

Akira Taguchi, a graduate of the University of Tokyo, is enrolled in the Master of Legal Studies program. Taguchi, who majored in American studies, is now employed by Chiyoda Chemical Engineering & Construction Company, Ltd., and has worked in the Legal Department there for five years. He is particularly interested in contracts relating to construction or engineering. Because Akira had not studied law in Japan, he was interested in the M.L.S. now offered at Duke as a one-year program. He is sponsored by Chiyoda and plans to use his education in contract law here at Duke when entering contract negotiations

with Americans. Akira has been especially surprised to find that while law students here at Duke work very hard, most of them seem to enjoy it.

Enrolled in the LL.M. program is Lin Yi-Ho from Taiwan, and two Japanese students, Junko Nishibatake and Nobuo Simakawa. Yi-Ho received an LL.B. from National Taiwan University in 1982, and has worked as a senior assistant in a Taiwanese firm. Duke, she says, is well-known in Taiwan and has established a reputation for taking very good care of its foreign students. Because she studied law in Taiwan, she had always had an interest in learning about American law. As Taiwan is a civil law country, she has found the case-law method difficult to grasp, and comments that "only relying on one final exam to evaluate the whole course seems not quite reasonable." Although she finds the student body at the Law School helpful, she, like other foreign students, finds them to be "too busy and serious."

Junko is a graduate of the University of Tokyo. After completion of his legal training, Junko worked for a law firm in Japan, specializing in international finance. Upon completion of his master's here at Duke, he hopes to work for at least one year for a law firm in the United States. Because he has worked with clients that have many transactions in the United



Xia Yuan-Tao



Zhao Jiusu



Jia An Ling

States, his firm in Japan has encouraged him to gain international experience. Because of the large number of cases he is reading, he finds the study of American law to be "more technical and specialized work than in Japan."

Nobuo received an LL.B from Kyoto University in 1978. Since 1978, he has been employed by Nippon Steel Corporation. In 1981, he was assigned to the legal department, and has been involved in legal matters concerning overseas onshore/offshore construction business, including consortium/joint-venture agreements, shipbuilding contracts, project management at construction sites, research of foreign laws, and registration and establishment of Nippon Steel's branch in Singapore. Nobuo was attracted to the LL.M. program at Duke because of the law school's construction law and commercial arbitration courses. Nobuo is not so much interested in the degree as in acquiring knowledge of law relating to international construction contracts that will be helpful in his work. Nobuo is sponsored through Nippon's overseas study fund, and hopes, after receiving his LL.M., to gain practical training by working in the legal department of a construction company in the United States.

Two students from Taiwan, James Chen and Huei-Huang Lin, are

enrolled in the S.J.D. program. James Chen received his LL.B. and LL.M. from National Central Police College in Taipei, Taiwan. Additionally, he has studied law and criminology at Vienna University, Austria, for one year. After teaching at the College for three years, he worked at the Coordination Council for North American Affairs, in Taipei, as a government specialist dealing with economic and legal matters. James Chen was awarded a government fellowship to study at Duke after vigorous competition. Last May, he received another LL.M. from Duke. He was attracted to Duke because of its reputation in Taiwan, and the freedom given to international students in choosing courses from a great number of offerings. He has noticed, in observing Duke Law students, that "some students seem to pay no attention to what's going on outside the Law School."

His academic focus is on international law, international business transactions, and American laws and regulations relating to foreign trade. He admits that, "Some of these courses are also available in my country, but while studying here, I can study them from a different angle (an American's point of view and practice), and I can have direct access to the updated materials."

James enjoys studying at Duke

and cites the first-class faculty and good facilities as well as the climate, environment, and lack of distractions outside the campus as reasons for his satisfaction here.

James is eager to return to his homeland after finishing his studies and says he has never been inclined to practice law in the United States. A condition of his fellowship is that he must return to work for his government for a period double the time of his fellowship. While he has the option of refunding the money to the government if he decides to go into private practice, James does not object to the time commitment imposed by the government. "This (arrangement) seems like a fair deal to me. There is no free lunch anyway," he says. After all, according to him, government employees enjoy an above-average social status in Taiwan; and when he returns to the government, he will receive a promotion. But he says, "Most of all, I can contribute what I learn from here to the further development and progress of my country." He adds that, "Should I decide to enter into private practice in the future, I would choose to practice law in my country" rather than return to the United States.

Huei-Huang Lin received his LL.B. from National Chungshin University in Taiwan. From 1976 to 1979,



Xuan Yan



Yuan Ping



Akira Taguchi

he held a judgeship in Keelung District Court. Judgeships are attained only by passing a very strict and highly competitive examination. Those who pass are required to be trained as professional judges, and enroll in a mandatory two-year program at the Judge-Prosecutor Training Institute before commencing their judicial careers. Additionally, Huei-Huang has served as a prosecutor in both Chunghua and Taichung district courts. From 1979 to 1981, he served as a judge advocate in Taiwan Garrison Command, and from 1978 to 1984 lectured at National Chunghua Educational College.

His government sent him to Duke to do research in comparative law for the purpose of reforming the legal system in Taiwan. Huei-Huang received his LL.M. degree from Duke in May 1985 and is spending two more years at Duke to earn an S.J.D. degree. He believes the advanced degrees will be "very beneficial" to him when he returns to Taiwan as a government counsel after finishing his studies.

While at Duke, Huei-Huang is taking a very broad range of courses; however, his concentration is in the criminal area. He is currently enrolled in Trial Practice, Federal Criminal Law, and Civil Procedure and is also working on his master's thesis.

The subject of his thesis involves the use of civil remedies to give restitution to criminal victims. This joint civil/criminal legal action, called the "continental system" because of its wide use in Europe, allows criminal victims or their survivors to sue for damages in the same action in which the defendant is prosecuted. This system is already working in Taiwan. However, Taiwan is a civil law jurisdiction, and there are no jury trials. Part of Huei-Huang's work is addressed to the feasibility of adapting this restitutionary device to a system using jury trials.

Twenty-eight year old Suk-Ho Bang had never visited the United States before last year when he entered Duke Law School. Suk-Ho is from Korea. According to him, studying law in the United States is a fairly recent phenomenon for Koreans, although they have been studying in Germany for years. Suk-Ho chose to come to the United States rather than to Germany because the time commitment is shorter (three to four years versus seven to eight years in Germany) and he will have more career flexibility when he finishes. Had he pursued a German degree, he would teach law when returning to Korea; with an American degree, he can teach or practice law. Suk-Ho also has a sister

and brother-in-law who live in Dallas.

Suk-Ho graduated from a college of law in Korea and came to Duke to pursue a LL.M. degree. After completing his master's work and getting his degree in May, he entered the J.D. program as a second-year student and will graduate in 1987. Several of the classes he took for the master's degree count toward the J.D. but he is also taking a couple of first-year classes.

Suk-Ho suggests that Duke allows foreign students in his position who have completed a master's degree to forego the first year of the J.D. program to encourage more international students to come to Duke. He believes it is much easier for foreign students to be admitted to Duke than it is for American students.

He says that twenty-five years ago, Harvard had the same policy of allowing international students to enroll directly into the second-year class but that the program became so popular that it has become very difficult to be accepted there now. He believes that, similarly, Duke will become very much more competitive for international students in the near future.

Suk-Ho spent the past summer in the United States, working in the legal department of a company for six weeks. He is now taking a very



Lin Yi-Ho



Junko Nishibatake



Nobuo Shimakawa



Huei-Huang Lin



James C. Chen



Suk-Ho Bang

heavy course load (sixteen credit hours) and interviewing for a summer clerkship with law firms for 1986. He originally concentrated his efforts on California firms because of the high Asian population there, but

he is also interested in Washington, D.C. A problem, he says, is that most firms' programs for international lawyers are for six months to one year, and Suk-Ho wants to stay and practice law in the United States for at

least three to four years. He may also pursue a two-year S.J.D. degree in the United States after practicing law in an American firm, but he plans eventually to return to Korea.

Instruction in Japanese Law

In 1985-86 two special courses in foreign law were featured in the curriculum. A seminar on Japanese Public Law was offered in the fall, directed by Professor Koichiro Fujikura and assisted by Percy R. Luney, Jr., and Masahiro Usaki. Fujikura, a native of Tokyo, was a Visiting Professor in residence for part of the fall term. He is a graduate of Doshisha University, where he later served as dean, and Amherst; he also holds graduate law degrees from Northwestern and Harvard. Presently Professor of Law at the University of Tokyo, he has also taught at California, Emory, Harvard, Hawaii,

and Yale. His major work in English is *Environmental Law in Japan*, published in 1981. He teaches Japanese civil procedure and constitutional law. His research specialty is comparative torts and compensation in Anglo-American law. Usaki, also a native of Tokyo, was trained at Waseda University. He is now a professor at Tsuru University in Tokyo, and will spend 1985-86 as Scholar in Residence at Duke.

Luney, who came to Duke in 1985 as Martha Price Research Fellow for two years while he continues to study Japanese law, also offers a research tutorial in the spring in

Japanese Administrative Law. Luney's work is partially supported by the Duke Pacific Studies Program. A graduate of Hamilton College and Harvard Law School, Luney practiced law in the Department of the Interior and with a private firm in Washington. He has taught at Antioch and North Carolina Central University, where he is now a tenured professor. In 1983, he was a Faculty Fellow of the North Carolina Japan Center and a visiting scholar at the University of Tokyo, a position which he renewed in 1985.

Xi-Qing Gao: People's Republic of China

"Attitudes toward different races is what surprised me the most about America. In China, we thought the Civil Rights movement had changed things dramatically, . . . slavery was just in museums. Still, I believe the U.S. is probably one of the few nations which treats minorities comparatively fairly under the law. It is better than other countries here."

Xi-Qing Gao is from Xian, the ancient Chinese capital. He is married to Shu-ya Zhang (women retain their surnames upon marriage in China). Shu-ya works at Duke Law Library. They have a three-year-old son, Da-Qian Gao, who is staying with Xi-Qing's parents in Xian.

Xi-Qing went to college at the Beijing Institute of Foreign Trade (now called the University of International Business and Economics). There, he majored in English and International Trade. He went on to law school in the same university.

After law school, an American law firm invited him to be a foreign legal consultant to them for one year. Xi-Qing spent six months in San Francisco (there, he was amazed at how cold June could be!), three months each in Washington, D.C., and Los Angeles, and brief periods in Atlanta, Houston, and New York.

Once here, Xi-Qing was in a position to realize a long-held desire to study American law. He audited classes at Hastings and Golden Gate Law Schools, but soon concluded that this method of legal training was inadequate. To really grasp American law, he felt he needed to enter a program of regular study. Attorneys at his firm advised Xi-Qing to pursue a full J.D. so he would have greater understanding of the whole American legal system.

Duke Law School admitted Xi-Qing first. He had heard Durham was a nice place to live from a Chinese friend, Xi-Min Shi, who was in school here. Xi-Qing thus became the second Nixon Scholar from the



Xi-Qing Gao

Peoples' Republic of China (PRC) at Duke Law School.

Xi-Qing has several favorite classes. Jurisprudence is one because he always has "been interested in philosophy and history." Two others are Constitutional Law and Criminal Law because they demonstrate the wide differences between the underlying American and Chinese cultural philosophies.

For instance, "it was surprising that a fundamental right here is the protection of individual rights, even if the individual is wrong in comparison to the interests of society as a whole. In China the individual interests can be sacrificed for those of society at large. There are less procedural protections. The Chinese would regard Americans as over-protective."

Xi-Qing feels his international background has cut both ways for him in law school. At first, he used a tape recorder in classes. He soon gave it up, though, because it took too much time to re-play the recordings. His Chinese legal training hindered him "a lot" in Constitutional Law.

On the other hand, in his courses on Ethnic Group Relations, Jurisprudence, and International Business Transactions his "wider view and different perspective" complemented those courses' international orientation.

In China law degrees can be achieved several ways: a four-year undergraduate program or two years of technical training are the most usual paths. Ordinarily at his school, law students go for five years because time is spent on mastering English. Xi-Qing, however, went for three years' "advanced study for specialized knowledge in international subjects" because he already had an undergraduate degree.

"You do not need to go to school to be an attorney in China. Anyone with two years or the equivalent [e.g., self-study] can become one. In China, you can't choose your job. The market is not that mobile; there is only a small range to pick from both as far as location and trade. Peasants study law to elevate themselves. Chinese law is not so complex that they can't do it."

The bar examination is only for those without formal classroom training. For regular law students, "a law degree is enough. You are assigned to work in legal areas, or you apply and are approved to be a lawyer. The committee looks at your background (and test scores if you have no legal education)."

Summer vacations for PRC law students are now two months long. Most students go home because there is "no real chance to work until they graduate in law. Some will do volunteer work/study in a company, but it is not legal work for the most part."

In China, colleges are affiliated with another institution such as a court, law firm, or company. His school was affiliated with a foreign trade company. "Students are usually required to work for these institutions during their last year. That's more like an American clerkship, although they aren't paid."

After Xi-Qing receives his J.D. in May 1986, he plans to work in an American firm, probably in New York or Washington, D. C. Jeantet in Paris, France, has invited him to work for them in late 1987. Thereafter, he will return to Beijing to teach at his university.

China has "nearly no private

practice. In the past few years we started getting law firms not affiliated with any government instrumentality, trying to work in as neutral a manner as possible. Almost everyone works for the government one way or another."

Xi-Qing is currently a part-time lawyer with a thirty-member firm affiliated with the China Council for the Promotion of International Trade, a civilian organization. "It is more neutral than other firms. Beijing municipal firms are a lot larger; they have former Bureau of Justice people." This past summer, Xi-Qing worked for a branch of a New York firm in Hong Kong, giving him a chance to visit Japan and his hometown.

His mom's cooking and "friends with whom I can talk deeply" are things Xi-Qing says he most misses from China. (Now Shu-Ya, his wife, is here and serves him "Chinese food at every meal.") Otherwise, Xi-Qing keeps up with Chinese culture through a free subscription to the *Peoples' Daily* (the Communist Party newspaper), as well as records and tapes of Chinese music.

Several differences between Americans and the Chinese are apparent to Xi-Qing. For one thing, the Chinese legal system is more like civil law in that it is mostly codified, except in a few areas in commercial law where it most closely resembles a common law system.

"We are just developing the law; it's very crude comparatively. China has had laws for thousands of years, but the law was very different. It was feudal until early in this century.

Chinese law is more equitable in nature. The question is whether a result is 'fair' in the common sense of the word. The Chinese system is much less doctrinal than common law.

"Chinese laws are patterned after the Japanese, which, in turn, are patterned after the French and German systems. During the 1949 Revolution, we got some things from the Soviet system which we still have.

"China has no formal civil code yet. The criminal code and rules of civil procedure are complete, however. It's trial-and-error basically. Our system is thirty years old, compared to six or seven hundred years of deliberations for the common law system. U.S. law is much more complex, sometimes unnecessarily so."

Judges are appointed in the PRC. There is one four-tiered court system: the trial court, an intermediate court, the High Court of a Province, and the Supreme Court. The High Courts "usually have about every right of the Supreme Court." The Supreme Court "does not have arguments in front of them. It is more a reviewing panel. For instance, death penalty cases must get Supreme Court approval now.

"You can't appeal all the way up in China; you can only appeal once. Only litigants in the intermediate court can appeal as of right. For others, the *parens patriae* idea exists. They must go to the provincial governor, the Party Chairman, or petition the court for certiorari.

"Once the court gets a petition, from either regular channels or from the Party, etc., it will look into the matter and decide whether to

refuse it or not. People are sent out to investigate. The court may remand the case to the lower court for retrial according to what is found, both as to factual findings and legal reasoning. The decisions become law immediately when they are handed down."

Cultural differences also strike Xi-Qing. For example, Americans are more concerned about money, personal property, and material things—"although that is changing in China too." More pro bono work is expected of the PRC lawyers.

"The Chinese traditionally do not have much, so they don't mind giving things up. Here it is difficult to ask people to give up anything for another. For example at a store if you forget your money, people do not want to lend things. You think three times before borrowing."

Moreover, Americans "are not afraid to voice their views at all. If people do not agree, they will argue strongly. This is not only from the social system, but your cultural background. The Chinese do not want to contradict someone bluntly and embarrass them. It is social etiquette. American lawyers in China, I have noticed, get frustrated with Chinese indirect answers. 'Say yes or no!' they insist."

Xi-Qing says he will miss the wide variety of opinions and views expressed in U.S. news and literature, as well as "driving a car on a highway. In the U.S. you can go anywhere by car—that is just impossible in China." Xi-Qing, a modern-day cowboy in his mustard-colored Pinto, has driven off into the sunset all over America.

Duke Students in China

Five Americans, past and present Duke Law students, left September 10, 1985, for eleven months' law study at the People's University in Beijing, China. They are: Allison Rottmann, Daniel Scheinman (rising second-years), Ross Katchman (a rising third-year), and Gerald Lee and Don Gotcher (graduates).

Duke Law School has had Chinese Nixon Scholars for several years. These five Americans are the first to complete the exchange between Duke and the People's University, as well as the first Americans ever to study at People's University.

The Chinese academic year runs from September to early July. Their first semester is devoted to learning the Chinese language. This training will continue in the second semester, along with basic law classes in Chinese. They will have a translator available.

The American students will have the option to take English-language courses on Trade Law, Economics, or International Business at the Foreign Trade Institute of the University of International Business and Economics.

Tuition and housing in Beijing is free for the Americans. As well, they receive a generous stipend from the Chinese government of 200 yuan/month (approximately \$100.00) for food. The students pay Duke Law School a fee to hold their places in their class and they purchased their own plane tickets.

At George Washington University, Allison Rottmann majored in International Affairs, with a specialty in East Asian studies. She has "always been fascinated by Communism."

"It was a toss up for me between a Ph.D. program and law school," Allison explains. "I do not like Law School all that much. I really missed my Chinese studies." Upon her return to Duke, Allison hopes to pursue a LL.M. degree in Interna-



Allison Rottman

tional Law.

She believes "it will be easier to break into practicing International Law after studying in China." Once at a firm, Allison expects to be "less a lawyer and more a diplomat. In business joint ventures, for instance, I would know how the Chinese think and approach law. I can speak the language and deal with them. I could both explain the contracts and show them around." After her loans are paid off, Allison hopes to work for the United Nations or the State Department.

While most of the other Americans going on this exchange program do not speak any Chinese, Allison has had college language training in Mandarin. "I am confident," she said, "that I will regain my fluency once I am in China. My ability to speak Chinese will be most helpful because we will have much free time. The big barriers will be reading and speaking the language."

The Chinese Nixon Scholars at Duke Law School are sending packages via Allison to their families and friends. Delivering them should create many visits to fill up her free time.

Her previous travels have taken Allison to London, Canada, and throughout the U.S. She is originally from Long Island, New York, but her family home is in Rhode Island now.

As a politics major at Brandeis University, Daniel Scheinman had studied and written about reform in communist systems. Another first-year student at Duke told Dan about an opportunity to go to the People's Republic as an exchange student from Duke Law School. Professor [Jonathan] Ocko "was also very encouraging and helpful. The chance to go to China permitted me to broaden my experience and pursue my interests before I got caught up in the college-to-law-school-to-firm grind."

International Law was always an interest of his. He was hoping to get involved in China trade issues some day: increasing Chinese access to American goods and providing Chinese market contacts for American companies.

"Lawyers have an opportunity to bring about vast changes in the products and technology available to this country. Law can be a very positive



Daniel Scheinman

force in this environment." Dan is clearly enthusiastic about the prospect of being "a pioneer in many respects."

Last summer was a busy time for Dan. He is from California, but worked for Boston's Special Strike Force on Organized Crime. In addition, he hired a tutor and took Mandarin Chinese classes at night.

When he left for China, Dan could read and write 300 characters, as well as speak simple sentences in basic grammar. Once there, "I just have to build my vocabulary and memorize words. Knowledge of 3,000 characters is necessary to read a newspaper."

Other than Mandarin and English, Dan speaks Hebrew and "butchers" Spanish. He has backpacked throughout Europe and the Middle East.

Perhaps Dan will be awarded a LL.M. degree for his schooling in PRC; but "I love Duke Law School," he explains, "I anticipate remaining there for my last two years toward a J.D."

"It's hard to say my reasons for going [on the People's Republic of China exchange program]," says Ross Katchman. "I have always been fascinated by China. It will be a unique experience, to be immersed in a society which only recently became accessible to Americans. China itself is undergoing a number of changes and Westernizing influences. This trip will be really exciting and adventurous for us.

"The chance to be in China now is the opportunity of a lifetime. The social and economic complexion of the country is changing dramatically. Generations of Chinese who were force-fed Maoist doctrine are now being told that much of what they learned was wrong; the managers of Chinese business have become profit maximizers; foreign corporations are employing Chinese workers; and there is serious talk of forming a Chinese stock market.

"People's University is the best law school in China. During the Cul-

tural Revolution, many lawyers were thrown in jail. Now reforms are being introduced. The government sees a need for law in the business and commercial areas, for example. Every day, much law is codified. Professor Chao at the People's University drafted the Commercial Code which has only recently come out."

Ross had taken a Chinese Law course from Professor Jonathan



Ross Katchman

Ocko at Duke. He saw a notice in the *Herald* about an English-teaching position at Fudan University in China. He approached Dean Carrington about that opportunity, but decided to shift gears when he learned that the Dean and Professor Ocko were setting up this exchange program with the People's University. Ross is "pleased with the way the program is taking shape. I am really excited and very much appreciate all that the Dean has done.

"The Dean set up a meeting with past Georgia Governor George Bugsbee, who is presently in China trade law practice. There is a lot of opportunity in the area. Perhaps I can work for a Chinese law firm, or in Hong Kong, for six weeks before I come back to Duke."

Upon his return, Ross feels his

"experiences will be largely marketable. The Chinese language I will have learned will help in Chinese trade law practice, or in joint ventures with the Chinese government and American businesses.

"What differentiates me from the other applicants is my undergraduate degree in Quantitative Business Analysis and the practical experience I gained in the use of statistical methods while working as a technician in a General Electric quality control laboratory. Many of the topics that I have studied—linear programming, time series analysis, computer simulation, statistical analysis, as well as basic financial, marketing, accounting, and management concepts—are of interest and value to China.

"One important problem that China will face in its attempt to industrialize is the waste of resources. Although I make no pretensions of being an expert, I believe that my background in computer modeling, fundamental business concepts, and American commercial law provides me with something useful to offer the Chinese."

Ross speaks "only a little Spanish, some Hebrew, and English." To prepare for this trip, Ross studied Chinese language on his own in the summer. "Mandarin," Ross explains, "is a tonal language. The same word can be said four ways, giving it four meanings." When he left for China, Ross could not read or write Chinese characters, only English phonetic representations of Chinese words.

Once back at Duke, Ross plans to "work on my Chinese language some more." He plans to finish his third year toward a J.D. "Since this is the first year of the American half of the exchange, it's not clear what credit we'll come back with. There may be an option for a LL.M. in International Law."

"We have a couple breaks and will have a chance to travel in China then," Ross expects. He has never travelled outside the U.S. before, except to Canada.

Anna Shereen Chacko: *Malaysia*

"In Malaysia, there is an ethnic power struggle, strife, and preferential treatment for the Malay indigenous people. I greatly appreciate the degree of integration in America. It's the ultimate melting pot and could, in this regard, serve as an example."

Anna Shereen Chacko is from Penang, Malaysia. She left home at age sixteen for England, where she spent two years in pre-university, three years at Aston University in Birmingham, and then one year in the Inns of Court School of Law.

After she qualified as a barrister, Anne worked in London for a short time, then returned to Penang. She practiced there for two years in a small firm gaining "good base-level experience."

A master's degree was her next goal. "I wanted to try a new educational system. I wanted to try the U.S. instead." Anna's sister and brother were already here, in Austin, Texas, and Lawrence, Kansas, respectively.

The American Bar Association sent Anna a list of law schools. She talked with people to arrive at her top ten choices. Duke was the first law school to admit Anna. She got "a very good response from the administrators: very warm, welcoming, and prompt. The program sounded attractive because the international students were not isolated; they were graded with everyone else and mixed in with Americans for classes. It was a small school; that was important. When I got here, the pretty campus was an added bonus."

Intellectual Property was one of Anna's favorite courses at Law School. She considered it a "fun, unusual subject." Another favorite was her Seminar in Child Practice because she "had trained as a barrister. It was a chance to study litigation instead of doing it. The class was easy and enjoyable."

Anna received her LL.M. degree in May 1985. She is working at present in Cleveland, Ohio, for a firm which has a public bond financing, litigation, labor, and corporate law



Anna Chacko

practice. She is rotating through the latter department now.

"I like Cleveland because it's old. It has lots of history and some really lovely buildings. I recently got a car and so I've seen more of the city."

"It was awful in the beginning because I didn't know anyone. I knew of people in Cleveland through friends, who coincidentally were also Indian. I did not consciously go looking for them, yet now I have many Indian friends here."

Anna speaks Tamil, Malay, English, and Malayalam (her parents' mother tongue; they are originally from Kerala, India). English was the medium of instruction while Anna was in school in Malaysia.

Nowadays, Malay is the language of instruction. "Malay is a limited language because it is relatively new. They often take words from English and just re-spell them to expand the vocabulary."

Anna really misses the food, her home, and family in Malaysia. She cooks Indian food here in the States and remains in "close touch with family and friends who are Indian. I use my mother tongue often."

Her travels have taken Anna to India, Sri Lanka, and Europe. In the U.S.A., she has seen most of the East Coast and has driven from the Midwest to California by car.

The American standard of living falls short in comparison to that of Britain in Anna's eyes. "There is no minimum standard here. For the

world's richest country, this is sad and wrong. The category of people who rely on public transportation are the same ones who fall through the cracks for medical treatment. I never knew there would be such extremes here.

"Comparing the States to Asia is like comparing black to white. It is different altogether; there are no worries about basic comforts here. The complaints in Asia concern much more basic needs. Economically, Malaysia is relatively well-off. It has its own brand of capitalism, yet things taken for granted here are not even available in Malaysia."

Anna appreciates the "level of sophisticated practice" she has experienced in America. Malaysia basically follows the British common law system. Anna found less difference between the American and Malaysian systems than she expected.

Judges are appointed to serve. "There is no political angle. Either they are selected from among the best practitioners after years of watching or they work their way up from lower-level courts. The caliber of judges is high, as is their integrity and independence. They are very good, especially those handpicked after many years' consideration."

The Malaysian court system has four levels: Magistrate, Sessions Court, High Court, and, finally, Federal Court. Subject matter jurisdiction is different in the various courts, "so sometimes you skip to a higher level straight away."

Law school in Malaysia is a four-year undergraduate degree. Over summer months, students do not clerk for a law firm. "That is peculiar to the U.S. However, when you finish your law degree, you have twelve months' pupillage with a practitioner. It's like an apprenticeship, pupil and master. You become like a shadow. You are not admitted to practice in Malaysia until after this pupillage period." The largest Malaysian firms are in Kuala Lumpur, the capital. They have about sixty lawyers. Most attorneys are in private practice. "People in government are the local graduates. If they have studied in England, they almost always go to private

practice.

"While some male local graduates enter private practice, women almost exclusively enter government service. They become magistrates and Senior Assistant Registrars [sim-

ilar to judicial clerks]. They have some rights and duties of their own. They can take and hear certain matters and minor motions."

Her British training was Anna's "basis of understanding. Without it I

would have been sunk [here at work] with just one year's exposure to the U.S. system. England was my foundation; I see the U.S. system through that experience."

Alumni Tour China

Last May, the Duke Law Alumni Study Delegation travelled for two weeks in the People's Republic, visiting Beijing, Xian, and Shanghai. The delegation, comprised of Jonathan Ocko, Associate Professor of Chinese Legal History at Duke Law School, Yuan Ping, a second-year law student at Duke from the People's Republic of China, and thirteen alumni, was organized to increase alumni's understanding of the growing exchange program between Duke and legal institutions in the People's Republic. In Beijing, the delegation met with legal advisors of the Chinese Law Society Legal Advisory Center, an institution that functions as a referral and advisory body for public and private firms in the People's Republic. The delegation also met with the law faculty at People's University. Ocko interviewed students at People's for the exchange program here at Duke. In Shanghai, the group met with one

of the founders of one of the first "private" law firms in China. Both alumni and David Peterson, an adjunct faculty member of the Law School, interviewed students at the Fudan University Law School.

In the alumni tour planned for May 9-26, 1986, twenty-two alumni will have the opportunity to become acquainted with the rapidly developing contemporary legal system in the People's Republic. The delegation, during its two-week excursion to Beijing, Xian, Shanghai, Wuxi, and Suzhou will meet with judges, law professors, prosecutors, police, and lawyers. The group will be led by Duke faculty, including Jonathan Ocko, and Chinese students enrolled in Duke Law School.

In Beijing, a Supreme Court justice of the People's Republic will address the delegation. Additionally, a five-day series of morning lectures regarding investment and economic law will be

given by the faculty of the University of International Business and Trade. The group will also meet with members of China's new "law firms," arbitrators and other officials of the Counsel to Promote International Trade, and legal scholars. In Shanghai, the delegation will observe the mediation process and civil court trials. Meetings will be held with the staff of the Legal Advisory Offices and the newly established "law firms." In the rural areas, the group will meet with legal officials. In Xian, a city which contains some of the richest archaeological sites in China, the alumni will meet with Chinese prosecutors and police.

The group will also spend two nights in Narita, Japan—one prior to arrival in Beijing and another immediately after departure from Shanghai at the end of the two-week tour.

The Duke Center for Studies of Law on Investment and Trade in China

The Center is an activity of the Law School chartered by its faculty. The members of the Center are students at the School from China and other students, faculty members, and alumni retaining an interest in the development of the legal system and profession in the People's Republic of China. The mission of the Center is to engage its members in a shared intellectual exercise which will be of service to persons and firms outside the Law School who are likewise interested in legal developments in China.

The President of the Center is appointed by the Dean of the Law School, and is responsible for the distribution of work assignments and for assuring effective quality control in the services provided by the Center. The appointment will normally be made in April of each year for a one-year term. The President will be assisted by an Executive Committee also appointed by the Dean at the same time. These appointments will be made on the advice of the continuing members of the Center, and with the consent of the International Studies Committee of the Law School.

The services provided by the Center will draw on the special expertise of Chinese students who are pursuing the J.D. degree in the Law School, and of American students who have studied Chinese law and language in China. The services will include research on the law of China; translation of legal documents from Chinese to English, or from English to Chinese; and interpretation for Chinese business visitors to the United States, or American visitors to China whose travel can be scheduled at times when members

are available. The qualifications of Duke Law students to perform these services are exceptional. The Duke Law Library maintains a growing collection of working materials and, through the contacts of the School, can secure any necessary materials that may be available in China.

The Center will charge appropriately for its services. All of its income will be paid to the Duke China Law Fund to be used for the support of students coming from the People's Republic of China to the Law School to study in the J.D. program. Firms having needs for the kind of services which the Center can provide are invited to become patrons of the Center for an annual fee of one thousand dollars; patrons will be given a preference in making services available, and will not be charged for services received until their value exceeds the patron's fee. For 1985-86, the standard fee charged by the Center is eighteen dollars an hour for each hour of a member's time invested in the task assigned; an additional fee is charged by the Law School for secretarial services, postage, and toll calls.

The current members of the Center, some of whom are discussed elsewhere in this issue of *Duke Law Magazine*, are:

MEMBERSHIP LIST

Gao Xi-Qing, President of the Center, holds a master's degree from the University of International Business and Economics in Beijing. He has been a lecturer in the law department of that university. He has been employed by the CCPIT Arbitration Commission, the Canton Trade Fair, and the China Global Law Office; also by Graham & James in

California offices; Mudge, Rose, Guthrie, Alexander & Ferdon in New York; and Coudert Brothers in Hong Kong. He has published several articles in China on American law, and has translated articles on electronic computers, technology transfer, leverage leasing, and joint ventures in China. He is a member of the Duke J.D. Class of 1986.

Ross Katchman is a native of New York and a graduate of Pennsylvania State University. He has completed two years of law study at Duke, and is studying in 1985-86 at People's University in Beijing.

Lai Fang earned her bachelor's degree in English at the China University of Foreign Studies. She has served as a lecturer in English at People's University in Beijing, and has translated a number of articles, including one for the *Readers' Digest*. She is a member of the Duke Law Class of 1988.

Ling Jia-An earned her bachelor's degree from Peking University in English literature. She taught English, first at High School 138 in Beijing, and then at Peking University. She is a member of the Duke Law Class of 1987, and trained during the summer of 1985 with King & Spalding in Atlanta.

William G. Maddox is a native of Louisville and a graduate of Harvard. He also holds a master's degree from the Union Theological Seminary. He has completed one year of law school at Duke and is teaching English at Fudan University in Shanghai in 1985-86, while pursuing his study of Chinese law and language.

Jonathan K. Ocko is a professional historian holding a secondary appointment in Law at the Law

School; his field is Chinese Legal History. His Ph.D. was earned at Yale, but he trained with Professor Jerome Cohen at Harvard Law School for a year in 1979-80. His major work to date is *Bureaucratic Reform in China in the Nineteenth Century*; published by Harvard in 1983, and reviewed in this issue. He is the President of the Chinese Legal History Association. His present interests extend to the contemporary development of legal institutions in China.

Allison Rottmann is a native of New York and a graduate of George Washington University. She has completed one year of law study at Duke and is studying at People's University in Beijing during the academic year 1985-86.

A. Daniel Scheinman is a native of California and holds a bachelor's degree from Brandeis. He has completed one year of study at the Law School, where he will graduate in 1988; he is devoting the 1985-86 year to study at People's University in Beijing.

Shi Xi-Min holds a master's degree from the University of International Business and Economics in Beijing. He has been employed in the Chinese Ministry of Foreign Economic Relations and Trade, working with both American and Japanese firms. He was a co-editor of a Chinese quarterly which widely circulated his translations of American literature, including work of Faulk-

ner, Vonnegut, and Cheever. He received his J.D. degree from Duke in 1985, and is continuing his training with Mudge, Rose, Guthrie, Alexander & Ferdon. He has performed legal services for the Embassy of the People's Republic of China and has also been employed by Covington & Burling.

Tian Hui earned a bachelor's degree in English at Peking Normal University. She taught English at High School 196 in Beijing and as a member of the English Department at People's University. She is a member of the Duke Law class of 1988.

Wu Yan-Lei holds degrees from Fudan University and the East China Institute of Law and Politics, both in Shanghai. He has been employed with the United Law Firm of Shanghai, First Branch, and has served as an administrator and as a teacher in the Law School at Fudan University. He is a member of the Duke Law class of 1988.

Xia Yuan-Tao holds a bachelor's degree in English and a Master of Laws degree from the University of International Business and Economics in Beijing. He has taught law in that university and has served as a legal adviser to an import unit in China. He has also served as an interpreter for a UN Conference on Technology Registration; for Visiting Justice Brennan of the High Court of Justice of Australia; for two major American law firm representatives working in Beijing; for an agricul-

tural delegation from Wisconsin; and for the Tsingtao Commodity Inspection Bureau. He is a member of the Duke Law class of 1988.

Yan Xuan holds a degree in English and International Affairs from the China University of Foreign Studies. He has taught in the law department of People's University and has translated articles in law and in business. He is a member of the Duke Law class of 1987 and trained during the summer of 1985 with Dechert, Price & Rhoads in Philadelphia.

Yuan Ping holds a degree in English from the China University of Foreign Studies. She served as a professional interpreter in China for several years preceding her appointment to teach English at People's University in Beijing. She is a member of the Duke Law class of 1987 and trained during the summer of 1985 with McDermott, Will & Emery in Washington, D.C.

Zhao Jiu-Su holds a Master of Jurisprudence degree from Fudan University in Shanghai. He has also trained in the design and production of thermoinstrumentation, and has published a book on Italian history. He has taught law at Fudan, organized and taught a public training class in Shanghai on international business transactions, and has served as legal consultant and translator of legal documents to Chinese units. He is a member of the Duke Law class of 1988.

Book Review

Bureaucratic Reform in Nineteenth-Century China

Jonathan K. Ocko's *Bureaucratic Reform in Provincial China: Ting Jih-ch'ang in Restoration Kiangsu, 1867-1870* is significant in that it offers an entirely different approach to the critical study of the T'ung-chih Restoration. There have been a number of studies focusing on China's post-Taiping Rebellion period under the Ch'ing dynasty, perhaps none so widely recognized as the late Mary Wright's *The Last Stand of Chinese Conservatism: The T'ung-chih Restoration, 1862-1874*. In *The Last Stand of Chinese Conservatism*, Wright examined China's central government and the major goals of the Restoration program: the re-establishment of the network of local control, the rehabilitation of the economy, the reform of local government, and the resoration of a system of superior civil officials. In *Bureaucratic Reform in Provincial China*, Ocko, a former student of Wright's, tests Wright's view that the Ch'ing dynasty enjoyed a revitalization and restoration of health and power after the Taiping Rebellion, and concludes that "viewed in terms of its own goals, there was not T'ung-chin Restoration." Ocko maintains that the Ch'ing dynasty's "inability to restore a system of rule by superior civil officials and its consequent patent failure to reform local government impeded and attenuated every element of the Restoration agenda."

Recognizing that the T'ung-chih Restoration must be analyzed in terms of the local, provincial governments' achievements and failures in the Restoration effort, Ocko chooses to examine the career of Ting Jih-ch'ang, who served as the chief financial supervisor and governor of the Kiangsu province during the years 1867 to 1870. As Ocko notes, this study is not a biography but is rather a "detailed examination of three basic aspects of provincial administration—law and society, fiscal affairs, and personnel—in which Ting is merely a device that affords us a singular insight into the process of the Ch'ing bureaucratic machine." Ocko chose Ting as the "model official" for a number of reasons, perhaps the foremost being that Ting was viewed by his colleagues as "one of the ablest provincial officials of his time." Simply stated, if anyone were to succeed in implementing the Restoration program, it would have been Ting.

Ocko examines Ting's efforts in social, judicial, and administrative reform, and arrives at the inescapable conclusion that Ting's administrative achievements fell far short of his self-pronounced goals and policies.



Jonathan Ocko

Ocko cites a number of reasons for Ting's failure, and, by extension, the failure of other provincial leaders. The most crucial reasons were the central government's lack of support and direction and the poor quality of local officials. The local officials were by and large individuals unable to administer effectively because they came into office through an examination system which gave them very little in the way of practical knowledge. The provincial leaders essentially had no control over the local officials, and, without support from the central government, were simply unable to build a competent and effective local bureaucracy.

Aside from providing important new insights into the Chinese bureaucratic system during the Restoration program, *Bureaucratic Reform in Provincial China* also gives the layman a sense of how a provincial government functioned during this critical period in China's history. Ocko, an Associate Professor of History at North Carolina State University and Adjunct Associate Professor of Chinese Legal History at Duke Law School, is currently working on his second book, which examines the concept of justice in traditional China.

AFRICA AND MIDDLE EAST

Professor Visits South Africa

Duke Law Professor Donald L. Horowitz recently returned from a two-week trip to South Africa where he attended a conference sponsored by the Human Sciences Research Council (HSRC) to discuss a recent HSRC report on intergroup relations. The subject of the paper he delivered there was techniques to reduce interethnic conflict in Asia and Africa.

According to Professor Horowitz, the source of South Africa's problem is racial subordination. Beyond that, however, there are obstacles to a settlement. One obstacle is that some blacks and some whites do not admit the legitimacy of the other side in the country. Some blacks, including "certain leaders" of the banned African National Congress (ANC) and the United Democratic Front (UDF), claim they are the indigenous people and that the whites are the colonists. This premise leads to uncertainty and conflict as to the respective rights of the groups.

Horowitz states that in the past few months the government has made many concessions to black demands, but "the government has not really given anything that is a strong step to becoming multiracial." He cites three specific areas in which there has been virtually no movement by the government: the Group Areas Act, the government's refusal to accord citizenship to all South Africans, and the continuing absence of universal suffrage.

In his paper on South Africa, "After Apartheid," presented to a packed lecture room at the Law School and then published in excerpts in the November 4, 1985, issue of *The New Republic* magazine,

Mr. Horowitz says the Group Areas Act, the "pillar of apartheid,"¹ results in the severe "restriction of blacks' spatial mobility." Under the Act, all land in the country is controlled by the government. "It requires a permit from a government officer to change the color of ownership of any parcel of land, even if the land is not allocated to a specific group area. In most cities, blacks are relegated, as they are in Pietermaritzburg, to the township, bedroom developments generally lacking the amenities to sustain a genuine community life."² The unrest of the blacks is not due to discontent with material circumstances but rather with the social inequality that the restrictions promote and reflect. But while the government has made some promises and concessions over the past several months regarding various aspects of apartheid, "[w]hen it comes to group areas, the regime has dug in its heels."³

Second, the government recognizes many blacks as citizens of the so-called homelands, but it does not recognize the homelands as part of the country. Thus, many blacks are not recognized as citizens of South Africa. To achieve the equal status they are seeking, it is clear that blacks must have South African citizenship.

Finally, blacks have been completely left out of political representation in the South African government despite the fact that a new constitution provides a legislative house for Indians and one for Coloureds. More importantly, blacks have no voting rights. Horowitz sees the voting issue as one of the most

problematic. Initially, the problem is to make the government understand that to achieve a multiracial society, there must be universal suffrage. Beyond that is the problem of what type of voting arrangement to establish. The blacks want a fully democratic system, which they see as achieved only by a one person-one vote regime. On the other hand, "the leadership has said repeatedly that it wants negotiations and participation at all levels but that this cannot include one person-one vote."⁴ The government equates such a system with majority rule, that is, black majority rule. "The illusions on both sides will be hard to dispel. If white leadership thinks it can settle on the basis of less than universal suffrage, it is fooling itself. Surveys of black opinion show an acute sense of political deprivation. Similarly, it will be difficult to persuade the UDF of the utility of unfamiliar electoral systems or political arrangements."⁵

While he was in South Africa, Horowitz spoke with many black and white leaders and interviewed people with different perspectives on the current issues. He spoke with several UDF members, although they were often difficult to find. He met with government people, Indians, Coloureds, Afrikaners, and members of the white opposition Progressive Federal party. Generally, people were "eager to talk and have a sounding board in the form of an outside party," he says.

In addition to participating in the HSRC conference, Horowitz travelled around the country speaking on the rights of minorities in the United States and on policies to reduce eth-

nic tensions in Asia and Africa. He gave a speech at the annual meeting of the Institute of International Relations in Pietermaritzburg. He also spoke at Vista University, a black university in Soweto, at the University of Durban-Westville, which is an Indian university, at the University of Natal, a mostly white university with some blacks and Indians, and at the United States Information Service cultural center in Johannesburg.

Why did Horowitz go to South Africa? He explains, "I am very interested in what mechanisms could be devised to make South Africa a peaceful, multiracial society." South Africa's ethnic and racial problems have a lot in common with other

countries that Horowitz has visited. Over the past twenty years Horowitz has studied ethnic conflict in Malaysia, Sri Lanka, India, Guyana, Trinidad, Nigeria, and the United States. In his new book, reviewed in this issue of the *Magazine*, Horowitz addresses the sources and patterns of ethnic and racial conflict and suggests what policymakers can do to achieve democratic, multiracial politics in a society prone to conflict.

Horowitz contends that in South Africa neither side is ready to make the changes necessary to achieve a multiracial society. The government has made only incremental, relatively insignificant reforms and so far has refused to touch the issues that are

central and important, such as segregated living and political power. Thus, for the time being, Horowitz contends that the violence will probably continue. While there has been violence already, what has happened is minor compared to what can potentially occur. "There is, unfortunately, room on both sides for escalation."⁶

1. *The New Republic*, Nov. 4, 1985, at 20. Reprinted with permission of the publisher.

2. *Id.*

3. *Id.* at 22.

4. *Id.*

5. *Id.* at 23.

6. *Id.*

Visiting Professors Lawrence Baxter, P. D. Glavovic

Professor Lawrence Baxter of South Africa will be a Visiting Professor at the Law School in the spring of 1986. Mr. Baxter will be teaching American administrative law. Currently, Mr. Baxter is a professor of law at the University of Natal School of Law in Pietermaritzburg.

Mr. Baxter was born in Pietermaritzburg and earned his bachelor of commerce and bachelor of law degrees at the university there. He also received a bachelor of law degree from the University of Cambridge, after studies in the areas of jurisprudence, administrative and comparative law, and civil liberties.

In 1985, Mr. Baxter received his Ph.D. degree from the University of Natal. His doctoral thesis was entitled "Administrative Law: Legal Control of Administrative Action in South Africa."

Mr. Baxter's interest in South African administrative law led to studies of administrative law in Europe, England, and the United States. He is the author of a leading book on administrative law in South Africa and is a well-respected authority on the subject. In addition to his admin-

istrative law endeavors, Mr. Baxter is very widely published in South Africa in the area of constitutional law. Further, he has a strong interest in jurisprudence and social theory. At the University of Natal, he now teaches administrative law, comparative law, and jurisprudence.

P. D. Glavovic, a leading expert on wildlife law, will be a Visiting Professor at the Law School in the spring of 1986, teaching a seminar on Comparative Environmental Law. Mr. Glavovic is currently a senior lecturer in private law at the University of Natal in Durban and a part-time consultant to some law firms.

Mr. Glavovic is originally from Zimbabwe (then Rhodesia) and received his undergraduate and law degrees at Rhodes University there. Mr. Glavovic practiced law in partnerships in Salisbury and in Durban, South Africa, for nearly twenty years. Since 1980, he has taught several law courses in property, estates, legal aspects of town planning, and environmental law. Mr. Glavovic researched and introduced the latter two courses; the environmental law

course was the first such course offered at a South African university.

In addition to his research and teaching involvement, Mr. Glavovic has much practical experience related to town and regional planning, property law, and environmental law. He serves as a member of two town councils, the World Wilderness Congress and the Wildlife Society of Southern Africa, and is an ad hoc legal advisor to the Wildlife Society and to the Durban Metropolitan Open Space System. He is also actively involved in making representations to the Council for the Environment, which makes recommendations to the Minister for Environmental Affairs with regard to the introduction of legislation.

Mr. Glavovic is currently pursuing a doctoral degree at the University of Natal; his thesis is on the subject of legal protection of natural habitats or areas, with a comparative perspective and particular reference to the conservation laws of the United States. While he is at Duke, he will be researching such laws in the United States.

George C. Christie: South Africa

In 1980 Professor George C. Christie lectured at several law schools in South Africa. At the invitation of John Dugard, a leading civil rights lawyer in South Africa and a former visiting professor at Duke, Mr. Christie was a visiting professor at the University of Witwatersrand in Johannesburg. He also lectured on torts and jurisprudence at the University of Capetown, the University of the Western Cape, and the University of Stellenbosch, all in or near Capetown.

Mr. Christie went to South Africa partly out of curiosity and partly because of his friend John Dugard's encouragement. Mr. Dugard had expressed concern about the increasing isolation of the South African intellectuals and felt it was important to keep them in touch with the rest of the world. Mr. Christie provided such a link.

The political situation was less tense when Mr. Christie was in South Africa, and he had hoped that there would be enough goodwill among the South African people to enable them to reach a settlement. He is less optimistic now, however, and believes there is likely to be a lot more violence there.

Kwasi Nyamekye: Ghana

Kwasi Nyamekye, a native of Ghana, is in his first year of the J.D. program at Duke. For the past ten years, he has been a Professor of Political Science at the University of Papua, New Guinea, where he taught courses on international relations and foreign policy. Prior to that, he was a Research Fellow at the Center for Foreign Policy Studies at Dalhousie University in Halifax, Nova Scotia. He has done graduate work at McMaster University in Hamilton, Ontario, as well.

Kwasi's interest in law was strengthened by his work in international politics and foreign policy. He

decided to study law in the United States, because he would like to work in a firm with an international practice and a J.D. from a prestigious American university is well regarded throughout the world.

Kwasi lives in Durham with his wife, Jeanette, who is originally from the island of Jamaica, and their two school-age daughters, Abena and Ama. Their teenage son Paakwasi attends boarding school in Ghana. Kwasi has found the adjustment to life as a first-year law student to be very draining. He and Jeanette have had to set up house and to balance familial responsibilities in addition to their work outside the home. Kwasi regrets his studies prevent him from spending as much time with his family as he would like.

Kwasi has been especially pleased by Duke University's helpful attitude towards international students. The staff of Duke's International House on Campus Drive has helped ease the transition to life in an American university by organizing orientation programs and providing advice and counselling. In the Law School, Judy Horowitz, the International Student Advisor, and the offices of Deans Carrington and Swinson have contributed to the success of the international program. The Law School's size and supportive administration encourages all the law students to interact with one another, both in and out of the classrooms.

In Ghana, students generally attend law school directly after high school. They must complete three years of study and one year of apprenticeship in order to qualify as attorneys. There are now a few programs available for students who have received undergraduate degrees in other fields and would like to practice law.

The Ghanaian legal system is based upon the British common law inherited from its colonial past. Differing historical, cultural, and political influences have produced modifications unlike those in the American legal system. Kwasi has been most surprised at the American retention of medieval property rights notions.



Kwasi Nyamekye

Kwasi has tried to maintain his cultural heritage by cooking local dishes, listening to Ghanaian music, and speaking Twi, his native tongue, whenever possible. After a thorough search, he has found a shop in Raleigh which carries canned palm nuts, the essential ingredient for his delicious palm nut soup. Kwasi would like to form an association of African students at Duke and to organize an African Cultural Festival in order to share traditional music, costumes, and dance with the Duke community.

Bharat Dube: India

"In India, few people talk about the weather. Rarely does one talk about salaries or which law firms are going to hire us. Americans usually do not discuss life and death issues, the purposes in life, where we are going. Broadly, Indians think in terms of millenia while Americans focus on day-to-day existence."

Bharat Dube is from Calcutta, India. He competed for a national scholarship to attend high school in Wales. (That is the same school where Beata Iracka-Jostmeier, a current Duke Law student from Poland, went.) Bharat intended to pursue an

undergraduate education in Britain, but Harvard University recruited him and offered "a good financial deal" to come stateside. He majored in Social Studies there.

Duke Law School also offered Bharat an attractive financial aid package—and a pleasant climate. It was an offer Bharat could not refuse: "Indian lawyers say the best legal training is here in the U.S., not only as a living, but also as far as academic rigor."

Law practice in India is more closely related to the British common law system than to U.S. practice. Judges are appointed after taking competitive civil service examinations. India has one three-tiered court system: trial courts are at the lowest level, then each state has a High Court, and finally New Delhi houses the Indian Supreme Court.

Despite similarities to the British system in other respects, law school in India is a three-year post-graduate degree as in America. However, "no one works on summer breaks. Students relax, there is no emphasis on jobs. Students may become apprentices with big law firms if they wish."

The legal profession does not have the same reputation and prestige as in the States. Indians joke, "If you're not a success in other fields, become a lawyer." Foreign service, business, and medical careers all enjoy higher respect. To add insult to injury, attorneys are not well-paid there.

"No comparison" exists between the size and scope of U.S. law firms and those of India, Bharat believes. Few firms of more than 100 attorneys exist. Solo practitioners comprise the great majority of firms. Many lawyers are hired by the government.

When asked how he has coped with American law school, Bharat smiled broadly and said, "Just dandy." He thinks his international perspective "has helped with International Law but hindered" him in job hunting. He has also been hindered in classes because of his lack of familiarity of the U.S. government and legal systems. International Law



Bharat Dube

is Bharat's favorite subject because he finds the issues interesting.

Bharat will receive his J.D. in May 1986. He wishes to practice in international law, an organization devoted to development and trade, or diplomacy. Understandably, the Bhopal-Union Carbide incident is a case of special concern to him.

In the short run, Bharat will probably stay in the States, but he will eventually return to India. Bharat has no geographical preference as to where he will settle, but he "loves Boston." In the past, Bharat has worked for the NAACP in Washington, D.C., the Nielsen Corp. in Chicago, the United Nations in New York, and also as "both a dishwasher and cop at Harvard University in Cambridge."

Bharat had been taught English in India since the age of four or five. He also speaks Hindi and Spanish, but confesses that English is the language he feels "most comfortable with." In addition to his journeys in twenty-seven states here ("all east of Minnesota"), Bharat has travelled in India and Canada.

The possibilities for "material indulgence" is what Bharat will miss the most about the U.S. upon his return to India. Here in the States, he mostly misses his family and "Indian food and delicacies." Bharat keeps up with his homeland culture

by listening to tapes of Indian music, playing sitar, teaching and practicing yoga, and reading novels and newspapers. He also spends time with an Indian student group and his brother, a journalist in Minneapolis, Minnesota.

Bharat was very surprised by many Americans' ignorance about the rest of the world. Some people, he feels, are too "ultra-conservative and xenophobic." He is "glad Dean [Paul] Carrington and Professor and Mrs. [Donald] Horowitz have increased the numbers of foreign students at Duke Law School. International students have a lot to contribute with their different perspectives on law, life, political situations, and culture. This is the perfect opportunity to cash in on an insider's perspective," Bharat adds. "The foreign students often possess untapped musical, dancing, and speaking talents." (Bharat himself has performed sitar concerts several times for the Law School community.)

Bharat wishes that "Americans would endeavor to accept foreign students for what they are and try not to impose their view of the world. Americans can learn a lot in informal give-and-take too. Just because foreign students can't talk football or basketball, or drink as many beers, does not mean that they can't offer a good conversation! Likewise, foreign students have much to learn from Americans."

Tahir Khilji: *Pakistan*

Tahir Khilji received his LL.M. degree in 1985 from Duke. He is originally from Pakistan, where he studied at the University Law College in Lahore. As in the United States, students in Pakistan must receive an undergraduate degree before attending law school. After a two-year course of study at the law school and a six-month internship, law students are eligible to take the Low Court Bar. After two years of practice, they are eligible for the High Court Bar. Tahir had passed both bar exams and

was a practicing attorney in Pakistan when he became interested in traveling to the United States to study law.

At present, the Pakistani legal system is in a state of flux. The country is under martial law and the judicial system is torn between the often competing concerns of traditional Islamic law and the common law legacy of the British colonialists. Tahir wished to learn more about the American legal system which had evolved as well from the British common law. His study at Duke has provided him with insights into both the American and the Pakistani adaptations upon the British model. He believes Pakistan could benefit from a Constitution like that of the U.S. Tahir's ambition is to return to Pakistan after a few years of practice in the United States and to teach law at his alma mater.

At Duke, Tahir was most fascinated by the administration of exams. Unsupervised exams, which most U.S. students take for granted, are unknown in Pakistan. The system at Duke communicates the faculty's



Tahir Khilji

trust in the students and encourages personal and professional responsibility.

Tahir lives in Durham with his mother, father, and three sisters, so he has had ample opportunity to speak his native Urdu, to eat traditional Pakistani food, and to practice Islam. Tahir is working now as a Home Teacher at a Durham County

Group Home for mentally retarded and autistic adults. He finds his work especially rewarding, and would like to find a job which would utilize his law background as well. His favorite class last year was a seminar in forensic psychiatry which prompted his present interest in psychology-related matters. He would most like a job connected in some way with psychiatry.

David Goren: *Israel*

David Goren was born in Jerusalem, Israel, and studied law at the Faculty of Law, Tel Aviv University. The law program in Israel is a four-year undergraduate course of study. During the fourth year, students work at firms in the daytime and attend classes in the evening. After graduation, they must complete an apprenticeship of six months to a year in order to qualify for the bar. The bar is a brief oral examination in contrast to the grueling two-day ordeal common in the United States. In Israel, the primary emphasis for bar membership is placed upon field work.

David has always wanted to study law in the United States. Israel's common law system is based upon many of the same principles and policies as that of the U.S. Israeli judges frequently rely on British and American legal developments, and a knowledge of American law can be very useful. David is in his first year of the two years he will study at Duke for his J.D. He would like to work in an American law firm after his graduation from Duke and to concentrate upon tax and international trade matters.

In Israel, students learn a body of substantive law. Since the United States is comprised of many different jurisdictions, each with its own body of law, American law schools stress general concepts much more than specific statutes. David finds this approach more conducive to the discussion of policy questions.



David Goren

David's exposure to two different societies and ways of life tends to make him sensitive to policy implications.

David was surprised to note the politicalization of the judicial appointment system in the United States. In Israel, Supreme Court Justices are selected by a committee comprised of judges, members of the Bar, and members of the Ministry of Justice. Their first consideration is the judges' prior professional records rather than their political affiliations. Other factors such as sex and religious beliefs are considered secondarily in order to achieve a diversified and balanced judicial system.

David believes it is very important for law students to gain practical experience before becoming members of the Bar. In the U.S., the more common theoretical lecture courses can be supplemented by elective clinical programs and summer or part-time employment. Legal educators may find the American legal system lacking an emphasis on practical experience; however, the institution of an internship program such as that in Israel can result in "enforced servitude." Because of the economic benefits to practicing attorneys, David does not foresee any radical reform of the Israeli system in the near future.

SOUTH AND CENTRAL AMERICA

Alvaro Aleman: *Panama*

Alvaro Aleman is an LL.M. candidate from Panama City, Panama. He received his undergraduate law degree from Catholic University in Panama. Panamanian law firms often work with clients from the United States, and like many of his colleagues in Panama, Alvaro believed a basic knowledge of the American legal system would benefit him professionally. Alvaro learned of the Duke program from his brother Jaime, who received his J.D. from Duke in 1978. He was impressed with the flexibility of course selection afforded the LL.M. students at Duke. They are required to take a few stipulated courses such as Legal Writing and Advocacy, but for the most part are free to choose from upper level course offerings, in contrast to LL.M. programs at other American law schools. Alvaro would like to remain in the United States for six to nine months after he graduates, to gain practical experience by working in an American law firm.

In Panama, law is a five-year undergraduate course of study. During the first two years, students take "cultural" courses, such as history, political science, and economics, in addition to law. A large number of students work part-time while they attend law school. There is a very high rate of attrition (at least 50%), which Alvaro attributes to the youth and inexperience of the students. Often seventeen- and eighteen-year-olds choose law before they have had an opportunity to explore other options.

Law firms in Panama are smaller than those in the United States. Twenty lawyers is considered a large firm. Generally, firms are composed of five to ten attorneys. Because of Panama's geographical and historical

situation, fields such as admiralty and banking are especially important.

Alvaro notes that the legal systems of Panama and the United States approach problems very differently. In a civil law country, such as Panama, one moves from general principles to a particular fact situation, whereas in a common law country, such as the United States, one moves from the particular to the general. Panamanian students do not learn by the case method, but study broad legal concepts as embodied in statutes and restatements. Alvaro has found that law students in the United States are necessarily more analytical than their Panamanian counterparts.

Alvaro is enjoying his studies at Duke. He has found Duke's small size conducive to interaction with the law faculty and American students. He does miss Panama's tropical climate, lovely beaches, and delicious seafood dishes, such as ceviche. His family sends local newspapers each week so that he can keep up with developments in Panama. Alvaro meets other Hispanic students with whom he can speak Spanish at parties given by SALSA, Duke's Spanish American Latin Students Association.



Alvaro Aleman

Maria Eugenia Arosemena: *Panama*

Imagine a country where law firms frown on rotating young people in and out for short durations. That means no summer associates—and no interviewing, business suits, or tube letters!

Panama is such a wonderland. Law firms there use law students during the school year as *pasantes* to handle title searches, court filings, and other clerical tasks. *Pasantes* do not research legal questions, nor are they employed just for summers.

Maria Eugenia Arosemena, better known as "Maruja," is from Panama City, Panama. Her family felt a better college education was available here, so she came to the States in high school to learn English. Now she speaks fluent Spanish, English, and French because she graduated from Wellesley College with degrees in Political Science and French.

Maruja thought about a legal career after she saw what her father's law firm did in its banking, corporate, trademark, and admiralty practices. Duke Law School was a logical choice because her brother-in-law had attended here and it was well-recommended at Wellesley College.

American friendliness favorably impressed Maruja upon her arrival. She feels, though, that Panamanians have a stronger sense of family and roots. Although she misses her family while she is here, Maruja manages to keep up with her homeland culture through Latin friends in the area and Panamanian newspapers sent from home. She also vacations there, and worked last summer as an American-style summer associate in her father's law firm.

Her international perspective has



Maria Arosemena

helped her legal studies by providing "more flexibility and broader understanding." Maruja has travelled throughout Europe, South America, and the West Coast of Canada. She has also seen much of the Eastern Seaboard.

Comparative Law is Maruja's favorite course at Duke Law School because she finds it "interesting to learn about different legal systems." For instance, she explains, Panama is a civil law country. All judges are appointed. The Supreme Court is divided into three chambers: penal, administrative, and civil. The Notary Public plays a much more important role than in the United States.

All attorneys go to law school, a five-year program. (There is no opportunity to "read law" and then take a qualifying examination.) Studies begin after high school. In Panama, law graduates do not have to take a separate bar exam; their diplomas are enough. Since Maruja is a graduate of a foreign law school, however, she would have to pass a proficiency test which consists of five oral examinations before a panel of professors.

"It is not that easy to find jobs in law, especially nowadays. Many graduates end up in entirely different areas," Maruja says. The biggest Panamanian law firms have about eighteen attorneys. Solo practitioners,

and firms with fewer than five lawyers, are very common.

May 1986 will be a big month for Maruja. She will receive both her Juris Doctor diploma and a marriage certificate. After law school, Maruja may stay in the United States for a few years to gain experience, but eventually she will return to Panama to work for her father's law firm.

What will she miss the most about the States? "My friends—that's easy!"

Antonio Ramirez: Venezuela

Antonio Ramirez is a second-year J.D. candidate from Caracas, Venezuela. He received his undergraduate law degree from the prestigious Catholic University in Caracas. Antonio worked for six years as Deputy Attorney in the State Advisory Section of the Republic of Venezuela Attorney General's Office. He undertook the legal representation of the Republic before all courts, including the Supreme Court of Justice, most often in cases involving public law (constitutional law, administrative law, labor law, and taxation). He helped draft opinions advising the various ministries on the legal implications of their policies. He also worked as Secretary of the Legal Advisory Committee for the Public Administration, a group comprised of the legal counselors of all the ministries and presided over by the Attorney General. The Committee examines all legal government projects before their submission to the Council of Ministers. Antonio left his post in 1981 to work in the Legal Affairs Division of the Banco La Guaira Internacional, where he specialized in the negotiation of collective agreements.

Many Venezuelan attorneys study abroad, primarily in other civil law countries such as France, Italy, and Spain. There are many multi-national corporations in Venezuela that need well-educated attorneys. A number of American law firms have branches in Venezuela and desire bilingual

attorneys with a background in the American legal system. The American legal system has been very influential and Venezuelan attorneys often use American statutes for models when drafting regulations, particularly in those fields which have originated in the United States, such as securities and industrial property. Antonio believed he would expand his job opportunities in both the private and public sectors by studying in the United States.

Antonio first came to Duke to pursue his LL.M. degree. He had wanted a small school with accessible professors, a relaxed atmosphere, and an excellent reputation. Antonio has enjoyed his study here, but finds the workload very demanding and wishes he had more time to travel, socialize, and relax. He decided to pursue his J.D. because he would like to practice law in a U.S. firm for a few years before he eventually returns to Venezuela. Antonio will have to take law courses next summer in order to make up the extra credits required for the J.D. degree.

Antonio's favorite course has been Comparative Law with Professor Bernstein. In addition to learning about the differing laws of various countries, such as Germany, France, and Poland, the students learn about the cultural contexts of those countries by studying their history and political systems. Antonio finds this approach a refreshing departure from that of the traditional law curriculum.



Antonio Ramirez

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THE DOCKET

Alumnus Profile

Richard J. Salem, class of '72, was listed in the December 1984 *Esquire Register* as one of "The Best of the New Generation." Mr. Salem was selected as one of 272 "Men and Women Under Forty Who Are Changing America," and was one of 42 honorees in the field of politics and law. The honorees were discovered and selected during a two-year search. The idea of the search, writes Philip Moffitt, the Editor-in-Chief and President of *Esquire*, was "to seek out and recognize the best of the new generation, those who exemplify, in their professional lives, the qualities of courage and ingenuity, high standards and strong ideas, that are at the heart of the new generation's contribution to American life."

Born in North Carolina in 1947, Mr. Salem was blinded by a degenerative disease at age 16. He went on to graduate cum laude from Belmont Abbey College in 1969 and he received his J.D. with distinction from Duke in 1972. After graduation, Mr. Salem entered private practice in Tampa. Four years ago he founded his own general civil practice law firm which deals with corporate business planning, and administrative and civil litigation.

Mr. Salem is an active community volunteer and has been involved extensively in the political arena. He serves on the board of directors of the Tampa Lighthouse for the Blind. In 1978, Governor Bob Graham appointed him as chairman of the board of trustees of the Florida



Richard Salem

School for the Deaf and the Blind. He is an Eagle Scout and is on the regional council of Boy Scouts of America. He is also a member of Tampa's Chamber of Commerce and the Committee of 100, a city economic-development group.

Mr. Salem was county chairman of the Democratic party from 1975 to 1977, when he put together one of the most successful campaigns in

Florida for Carter's 1976 presidential bid. In 1979, the Carter Administration offered him a high-level position in the Department of Education which he declined.

Currently, Mr. Salem is focusing his attention on the restoration of Ybor City, a century-old, Spanish-settler section of Tampa. He is working with the Ybor City Chamber of Commerce.

SPECIALLY NOTED

Alumni Activities

CLASS OF 1953

Calvin E. Smith

Calvin E. Smith, '53, was elected to a newly created judgeship in the Berks County Court of Common Pleas in Pennsylvania, on November 5, 1985. Smith, a Republican, ran against Democratic District Attorney George C. Yatron for the seat. The race was described by the *Reading Times* as one of the hardest-fought campaigns in recent memory for a seat on the Berks County bench. Smith is a senior partner in the Reading law firm of Stevens & Lee.

CLASS OF 1963

J. Thomas Menaker

J. Thomas Menaker, '63, took office May 10 as the new chairman of the Pennsylvania Bar Association's House of Delegates. The House of Delegates is composed of over 300 members and is the policy-making body of the Pennsylvania Bar Association, the statewide organization of 24,500 lawyers. Menaker will serve as chairman for two years.

Menaker is a partner in the Harrisburg law firm of McNees, Wallace & Nurick and has been very active in the Pennsylvania Bar Association. He has served as chairman of the PBA's Aeronautics and Space Law Section, its Labor Relations Section, and its Long-Range Planning Committee.

Menaker is also a member of the national board of the American Civil Liberties Union and has served as vice president of the Pennsylvania affiliate and president of the Harrisburg chapter. In addition, Menaker serves on the national board of Family Service America and has acted as president of Family and Children's Service of Harrisburg. He is a former president of the Harrisburg

Human Relations Council and a former director of the Harrisburg Urban Coalition.

CLASS OF 1966

Jonathan T. Howe

Jonathan T. Howe, '66, heads a nine-lawyer section handling trade association practice for the Chicago firm of Jenner & Block Under Howe, the section has tripled its clients to more than 200 in the last five years. Howe offers his clients general corporate and tax advice and helps with legislative problems. He has also handled a number of unusual matters, ranging from helping the Monument Builders of North America sue cemeteries to overturn restrictions on which company's headstones a customer had to purchase, to prodding the Reagan administration to cajole Japan into allowing sales of American-made aluminum baseball bats. Howe enjoys his job because it is people-oriented and his work is extraordinarily diverse.

Howe characterizes the growth in trade groups as beneficial because they lead to a more informed society and government. He has a similar view of the importance of professional groups in devising standards for membership, especially in medicine. He does, however, see the possibility of unfair restriction in gaining entry to some fields.

Douglas P. Wheeler

Douglas P. Wheeler '66, in July became the third person to serve as an executive director of the Sierra Club. The Sierra Club, founded in 1892, is a non-profit organization devoted to protecting environmental quality. It has grown to 358,000 mem-

bers and is headquartered in San Francisco.

Wheeler's career has been devoted to the protection of America's natural resources. After graduating from law school, Wheeler worked in private practice before serving in a series of posts in the United States Department of the Interior. From 1972 to 1977, Wheeler was Deputy Assistant Secretary of the Interior.

Wheeler also served as Executive Vice President of the National Trust for Historic Preservation. The preservation of America's historic and architectural heritage is a similar issue to that of protecting America's wilderness. Wheeler is a committed preservationist.

In 1980, the American Farmland Trust, a leader in farmland conservation issues, was founded under Wheeler's guidance. Wheeler served as President and Chief Executive Officer of that organization until becoming executive director of the Sierra Club.

CLASS OF 1971

Christine M. Durham

The Honorable Christine M. Durham, '71, was elected in October 1985 to the Board of Directors of the American Judicative Society. The Society is a national organization founded in 1913 for improvement of the courts. The Society addresses concerns related to the selection and retention of judges, court management and the public's understanding of the judicial system through research, educational programs, and publications.

Justice Durham is a justice of the Utah Supreme Court. She is vice-president of the National Association of Women Judges and is a member of the American Law Institute. She also

serves as a member of the Governor's Task Force on Implementation of Utah Judicial Article Revisions and the Education Committee of the American Bar Association's Appellate Judges' Conferences.

CLASS OF 1972

Tom Triplett

Tom Triplett, '72, is state planning director and top policy adviser to Minnesota's Governor Rudy Perpich. Triplett has worked for Governor Perpich since 1978. Prior to that, he served as Senate Counsel for the Minnesota Senate. In 1983, Triplett developed the Minnesota Employment and Economic Development Program to provide unemployed Minnesotans with jobs. In a January 1985 article in the *Minneapolis Star and Tribune*, Triplett was described as one of the most influential figures in state government. Triplett has been credited as one of the chief architects of the governor's 1985-87 budget.

CLASS OF 1973

Larry J. Rosen

Larry J. Rosen, '73, was elected Albany, New York, City Court Judge on November 5, 1985. Rosen will serve a six-year term.

Daniel Blue

Daniel Blue, '73, was honored in June 1985 by the North Carolina



Daniel Blue

Academy of Trial Lawyers. Blue serves in the North Carolina House of Representatives and was named the Academy's Outstanding Legislator of the Year for 1984-85. Blue was honored for his work in sponsoring legislation to support the rights of defendants in criminal cases. He has also co-chaired the legislative study commission on the revision of the Criminal Code of North Carolina.

Since 1976, Blue has been a managing partner in the law firm of Thigpen, Blue, Stephens & Fellers in Durham. Before his election to the North Carolina House of Represen-

tatives, Blue was involved in state Democratic politics, serving as Precinct Chairman and Precinct Committee person.

CLASS OF 1975

Gary Lynch

Gary Lynch, '75, was appointed in March to be the acting director of the Securities and Exchange Commission's enforcement division. Lynch joined the SEC in 1976. Lynch has been an associate director of enforcement since June 1983. In 1984, Lynch received the SEC's Distinguished Service Award.

CLASS OF 1979

Michael R. Blaha

Michael R. Blaha, '79 was promoted in July to assistant general counsel of Columbia Pictures Industries, Inc. Blaha was an associate at the Los Angeles firm of Lillick, McHose & Charles before joining Columbia as an attorney in January 1982. He was promoted to senior counsel in March 1983. Blaha works in Columbia's West Coast facility at the Burbank Studios, Burbank, California. In addition to his position at Columbia, Blaha is also an adjunct associate professor of law at Southwestern University School of Law in Los Angeles.

Obituary

Murray R. Garber, class of '40, died June 3, 1985, in Bradford, Pennsylvania after practicing law for over 40 years in Pennsylvania's McKean County.

Mr. Garber was born in Bradford in 1916. He was a graduate of Duke University as well as the Law School. He was also a U.S. Army Air Corps veteran of World War II. Mr. Garber practiced law independently for 40 years before joining the law firm of

Pecora and Duke in 1983. The firm then became Garber, Pecora and Duke.

Mr. Garber was active in various community and government organizations. He was a member of Temple Beth El and was on the Temple's board. During his career, Mr. Garber had been associated with the McKean County Planning Commission; the advisory board of the University of Pittsburgh at Bradford; and

the board of directors of Carnegie Public Library, Bradford Parking Authority, and the Emery Nursing Home. At the time of his death, he chaired the Bradford District Flood Control Authority.

Mr. Garber was also involved with the Boys Scouts of America. He was the first McKean County resident ever to receive their Silver Antelope, the highest award given at regional level.

Urban Property Development Conference 1986

A new group, the Duke Urban Property Development Council, will present a conference entitled "Building and Rebuilding the City" on the afternoon of February 28th and the morning of March 1st. The program will include:

Friday

Mr. Richard F Babcock will make a presentation on zoning and its impact on building and rebuilding

the city. Mr. Babcock, who teaches land use planning at the Law School, practiced planning law in Chicago for thirty years and is also a distinguished scholar in the field.

Mr. Barrington Branch will discuss the practical problems of urban development. Mr. Branch is executive vice-president of Vantage Corporation, a large developer.

There will be a reception and dinner that evening for speakers and

conference attendees.

Saturday

Professor Richard L. Schmalbeck will explore the role of tax policy in financing and regulating city renewal.

Mr. Richard R. Goldberg, vice-president and associate general counsel of the Rouse Company, will present a case study of the renewal of Boston.

Letter

Recently in the *Duke Law Magazine*, with deep regret, I read of the passing of a former illustrious professor of mine, namely, Dr. John S. Bradway, whose name brings back so many pleasant memories while a student under his tutelage.

Also, it was my distinct pleasure to serve as a student assistant to Dr. Bradway which experience I shall always treasure, for it gave me the rare opportunity of associating with this brilliant and extremely hard-working scholar whose patience, organizational ability, creative mind, legal knowledge, good humor, and gentlemanly bearing greatly impressed me. If I may say so, lessons learned from this association have

stood me in good stead throughout the years.

Somehow, in this rather fluid society with emphasis on haste, one gets the impression that the wheel is being invented for the first time. Sight, at times, appears to be obscured concerning the distinguished men who served as professors and who laid the groundwork for the noted law school and attendant nationwide reputation it enjoys today.

Dr. Bradway was, without doubt, a brilliant diamond among the diadem of distinguished professors who served so well the law school long ago. In my mind, at least, his memory has not faded.

Sincerely yours,

Hubert K. Arnold
J.D., 1939

*Agenda***Law Alumni Weekend, September 26–27, 1986***Friday, September 26, 1986*

- 2:00 p.m. Registration Desk Opens—Lobby,
Law School
- 3:00 p.m. Law Alumni Council Meeting—
Room 201, Law School
- 5:00 p.m. Cocktails, Lobby, Paul M. Gross
Chemical Laboratory
- 6:30 p.m. Dinner on your own

Saturday, September 27, 1986

- 9:00 a.m. Coffee–Danish, Hallway, adjacent to
Moot Courtroom
- 9:15 a.m. Professional Program—Moot Courtroom
- 11:00 a.m. Pig Pickin' BBQ Luncheon, Back Lawn,
Law School

(If rain, Portico of Gross Chem.)

To be catered by Bullock's Barbecue

- 1:30 p.m. Football Game

REUNION CLASS PARTIES (1936–37, 1941, 1946, etc.)

- 7:00 p.m.* Cocktails, Sheraton University Center
(each reunion class will have its own party)
- 8:00 p.m.* Dinner, Sheraton University Center
(each reunion class will have its own party)

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

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Position, firm _____

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Office phone _____

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

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Person to contact _____

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

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