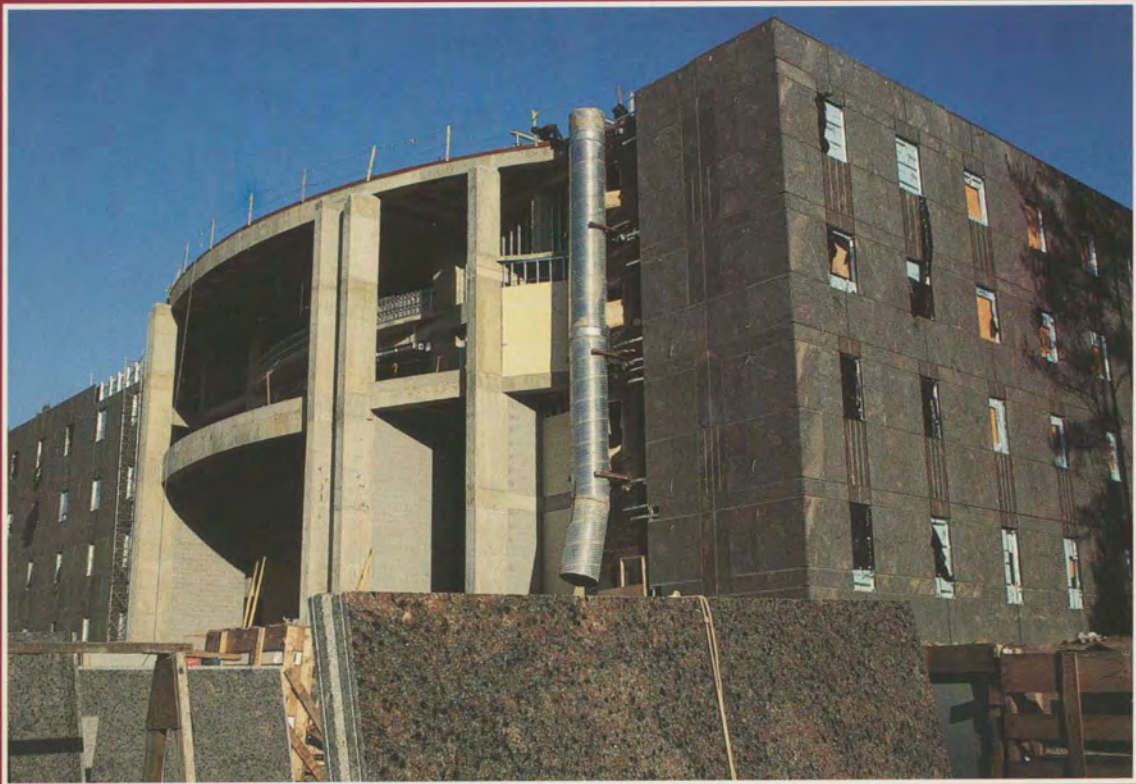


Duke Law Magazine

WINTER 1994



Duke Law Magazine

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About the Cover

The cover depicts the construction of the new addition to the Law School, as shown from the current parking area. The granite used on the new exterior is shown in the foreground. The photograph is by Dan Crawford of Chapel Hill.

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From the Dean

These pages contain several photographs of the Law School's construction project. When completed, the Law School's building will increase by 84,000 gross square feet, which is about 70 percent of the current building size. This significantly-expanded physical facility will make a tremendous difference in the daily lives of students, staff, and faculty.

Students

Law School students will benefit most directly in three areas: library and academic computing, the new career services suite, and outdoor space.

The library seating capacity will increase by 150 new seats to a total of 400 spread over all four levels of the new library addition. This new seating will provide 158 carrels wired for computers. Next academic year, the Law School will provide computer workstations for 86 of these carrels, all connected to the library's Student Research Network. Another 46 carrels will be activated on the Network for laptop computers provided by students. The Law Library will then determine whether this number satisfies student demand for computer carrel space. If the demand is higher, an additional 22 carrels can be activated for student computer use as well. All of the expanded Student Research Network will be housed in the new additional space and will enable Duke to continue to provide one of the very best academic computing environments in any law school.

The space currently occupied by faculty on their lower level corridor will become part of the Law Library. The faculty offices will be converted into rooms for student academic use, including team projects, small sections, videotaping, and interactive video.

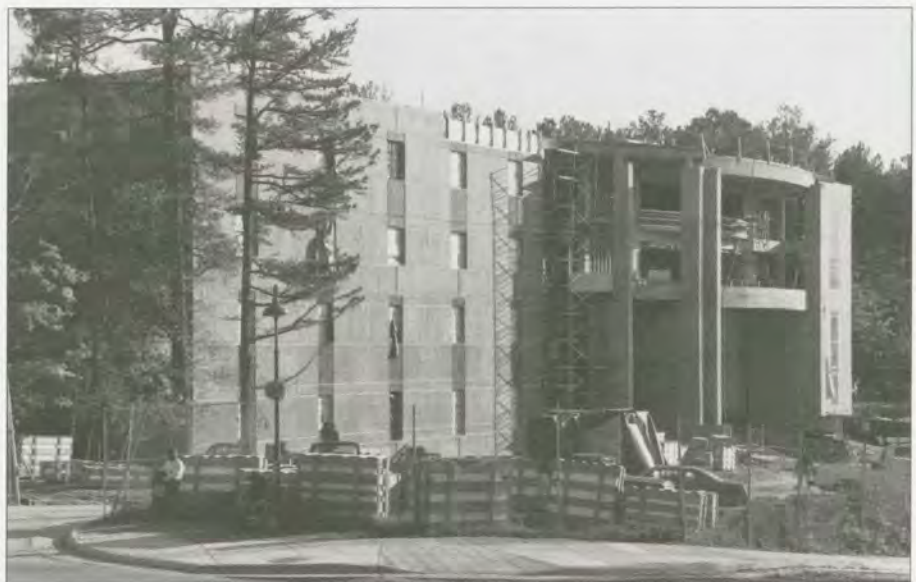
Student services will be located in the new building addition. The greatest impact for students will be the opening of the new Career Services Suite, which will contain a substantial library, eight computer workstations, and soft seating for reading and browsing materials.

Law School students will also be able to take advantage of our excellent climate through improved outdoor arrangements. The new courtyard cre-

ation, except for the areas dedicated to student organizations and locker space. Improvements in these areas must be postponed to the summer of 1995, because too much renovation work will be underway this summer as a part of the completion of Phase 2.

Administration

The Law School's administrative staff is scattered over all parts of the



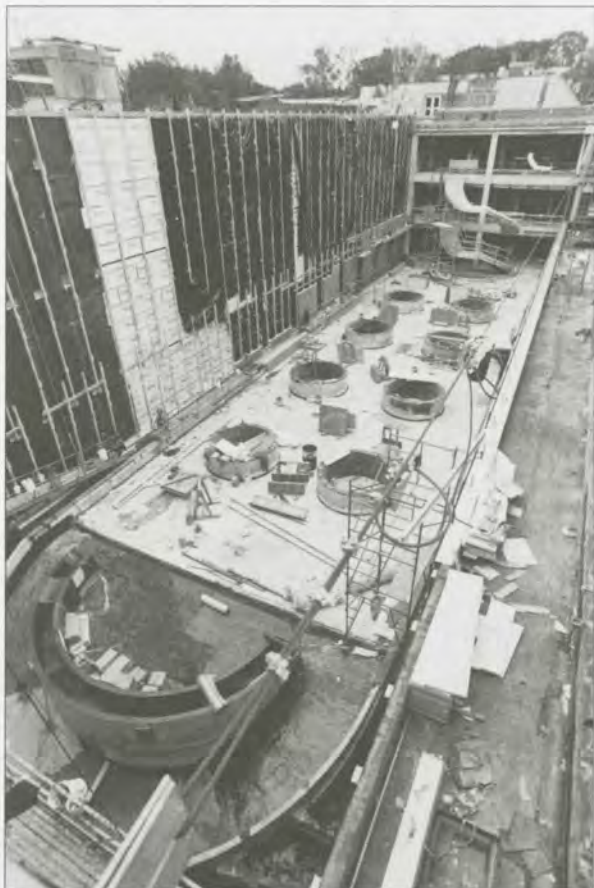
View of the rear of the new addition from Towerview Road.

Dan Crawford

ated by the building addition will provide an attractive outdoor gathering location for students, with seats surrounding planters in the courtyard area. This summer the Law School will also complete a volleyball court and picnic table area between the Law School and the Fuqua School of Business. This new space will enable students to resume their Friday afternoon and weekend social activities on the Law School's premises.

All of these changes will greatly improve the Law School students' envi-

ronment, and the 15 employees that work in the Office of Admissions and the Office of Alumni Relations and Development are located in rented space off campus. The new building addition will permit the entire Law School administration to be housed together, in a series of office suites on two floors of the new addition. This space provides an opportunity to support all administrative units through the main Law School computer network and will permit the entire staff to be housed in pleasant surroundings after



The courtyard is formed by the space between the existing building (left) and the addition (right).

Dan Crawford

more substantial colleagues of the full-time faculty. Duke will also be able to invite American and foreign scholars to be in residence during their research leaves, thereby creating a deepened intellectual and scholarly community. Duke would also welcome visits from practitioners and judges who would like to spend short periods with the faculty and students.

Teaching

As described above, students will greatly benefit from the expanded Student Research Network in the library. This network is used for many teaching functions. The new addition will also house five new teaching areas. One is a

sized seminar room that will contain moveable furnishings to permit arrangements for different-sized classes and teaching methods. A third, small seminar room is also included. The new space includes two conference rooms that are designed for both meetings and seminars. All of these teaching areas are wired for computers and other types of technology to be incorporated into teaching methodologies.

Several teaching areas located in the present building will be scheduled for renovation over the next few summers. These renovations are part of Phase 3 of the building program, and include the addition of a small classroom and courtroom on the top floor, the enlargement of the Latty Moot Courtroom, and the renovation of the three big lecture halls. The Law School will not be able to complete the modernization of the teaching spaces for the use of computers and other technology until these renovations are undertaken.

The Move

Every faculty member and employee of the Law School will move in the next few months to a different location in the existing building or to a new location in the Phase 2 space. We have put up with a great deal of noise and inconvenience as a result of the determination to add a new, integrated addition to our physical plant. We all eagerly await, however, the opportunity presented by this new addition to create a better educational community for faculty, students, and staff.

I look forward to welcoming many of our alumni back to campus to celebrate together this beautiful and serviceable new addition to Duke University's campus.

Pamela B. Gann
Dean

many years of performing their work in crowded and unpleasant offices.

Faculty

The full-time faculty will be housed on two levels of the new addition. The primary benefit to the faculty will be the opportunity to be located entirely together. Now faculty are scattered throughout the building on three different floors.

The new offices will also permit Duke's joint appointment and adjunct faculty to work in the Law School and become

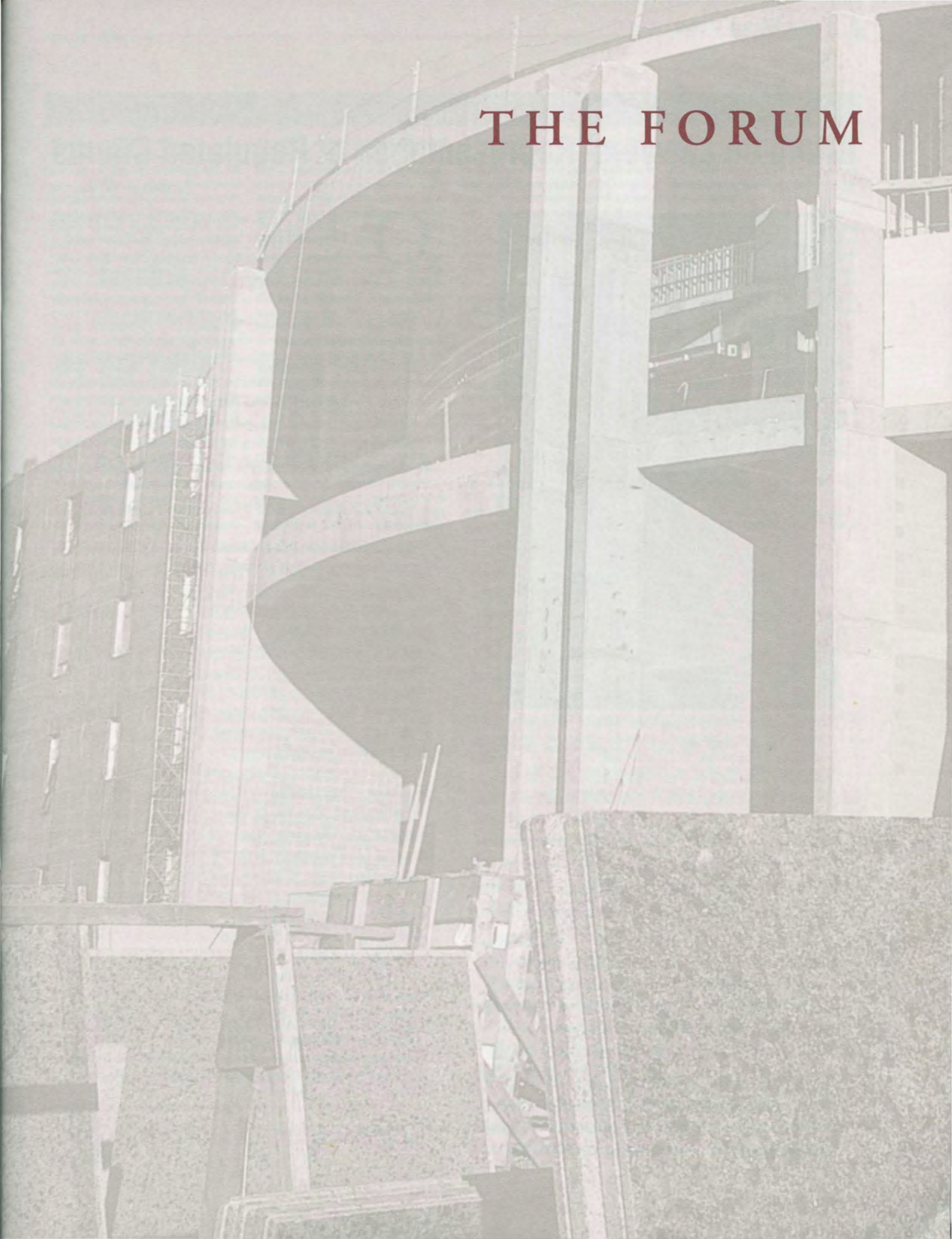


Paul Levinsohn '95, far right, leads alumni on a tour of the building addition. In the background is the concourse connecting the existing building with the addition.

Dan Crawford

classroom for 30 students in which many of the first-year small sections will be located. Another is a medium-

THE FORUM



Laborers in Different Vineyards: The ABA Working Group on Lawyers' Representation of Regulated Clients

Lawrence G. Baxter



Duke University Photographers

Lawrence Baxter is Professor of Law, Duke University. He joined the Duke Law School faculty in 1985, after having taught and practiced law in his native South Africa. He has served as special counsel to the staff of the U.S. Senate Committee on Banking, Housing and Urban Affairs and as a consultant to the Administrative Conference of the United States and the American Association of Bank Directors. Professor Baxter was a member of and reporter to the American Bar Association's Working Group on Lawyers' Representation of Regulated Clients. As Reporter, he prepared the Working Group's Discussion Draft Report and the Working Group's Report, *Laborers in Different Vineyards: The Banking Regulators and the Legal Profession, and Recommendations to the ABA House of Delegates*. The Recommendations were adopted unanimously by the House at the ABA Annual Meeting in New York in August. Edited extracts from the Working Group's Report to the House of Delegates and the Recommendations adopted by the House are reproduced as part of this article by Professor Baxter. While the resolutions adopted by the House of Delegates constitute formal ABA policy, the extracts from the Report are for background information only. Professor Baxter writes strictly in his personal capacity and not as a representative of either the Working Group or the ABA itself.

On March 10, 1992, accompanied by wide publicity, the Office of Thrift Supervision (OTS) imposed an asset freeze order on the leading New York law firm of Kaye, Scholer, Fierman, Hays and Handler ["Kaye, Scholer"]. The OTS, which is one of the four main federal banking agencies, simultaneously filed very substantial administrative enforcement charges against the firm and three of its individual partners.¹ The charges were based on allegations regarding the manner in which the firm had represented Lincoln Savings and Loan Association, which had been indirectly owned by Charles Keating and was by then in federal receivership, having inflicted well over \$1 billion in losses on the federal deposit insurance funds. Kaye, Scholer settled the case within a few days, without admitting or denying the allegations charged. The firm agreed to pay a sum of \$41 million in "restitution" and undertook to comply with a series of controversial rules of conduct in its future representation of federally insured depository institutions (banks, savings associations and credit unions).

Talbot D'Alemberte, who was president of the American Bar Association at the time, appointed the Working Group on Lawyers' Representation of Regulated Clients in response to ensuing controversy. The Working Group was chaired by former ABA president John J. Curtin, Jr. and comprised thirty members (including Robert B. Pringle, Duke Law '69) drawn from across the entire spectrum of ABA membership and almost all of the ABA's sections. President D'Alemberte charged the Working Group with four tasks: (1) to develop an inventory of the legal, procedural, ethical and other issues related to the practice of law that arise from the *Kaye, Scholer* proceeding and other similar cases; (2) to assess the potential impact of such proceedings on the practice of law and the legal system; (3) to determine whether any policy resolutions should be presented to the House of Delegates; and (4) to recommend a public response by the American Bar Association with respect to these issues.

The Working Group held a series of meetings during the course of 1992. Public comments were invited, and lawyers for all the federal banking agencies, members of the private bar, and bank counsel discussed the issues within the Working Group's charge. Numerous memoranda were prepared as part of the Working Group's efforts to identify and

¹ *In re Fishbein, Katzman, Fisher & Kaye, Scholer, Fierman, Hays & Handler*, OTS AP-92-19 (1992).

The Statutory Framework

Under subsections 8(b) and (c) of the Federal Deposit Insurance Act, 12 U.S.C. 1818(b) and (c), the federal banking agencies are empowered to enter temporary and final cease-and-desist orders against federally insured depository institutions and their "institution-affiliated parties." Institution-affiliated parties are persons defined in section 3(u) of the Act and, in addition to persons such as directors, officers, employees and stockholders of insured institutions, include any person "participat[ing] in the conduct of the affairs of" such institutions and "any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in (A) any violation of any law or regulation[,] (B) any breach of fiduciary duty[,] or (C) any unsafe or unsound practice, which caused or is likely to cause more than minimal financial loss to, or a significant adverse effect on, the insured depository institution."

Section 8(b) authorizes the appropriate banking agency to enter a final cease-and-desist order where the institution or party is engaging, has engaged, or

the agency reasonably believes is about to engage, in an unsafe or unsound practice in conducting the business of the institution, or is violating, has violated, or the agency reasonably believes is about to violate, a law, rule, regulation, written condition imposed by the agency, or written agreement enter into with the agency. The agency is required to give formal written notice of the charges upon which the order is to be based, and the respondent is entitled to a formal hearing before an administrative law judge. After the hearing, or if the hearing is waived, the agency may issue against the institution or party a final order to cease and desist from the violation or practice complained of. The final order is subject to judicial review in a circuit court of appeals.

Section 8(c) permits the agency to issue a temporary cease-and-desist order pending completion of proceedings under section 8(b). The temporary order may be issued whenever the agency "shall determine that the violation or threatened violation or...practice..., or the continuation thereof, is likely to cause insolvency or significant dissipation of assets or earnings

of the depository institution, or is likely to weaken the condition of the depository institution or otherwise prejudice the interests of its depositors prior to the completion of" the proceedings under section 8(b). The order may be issued ex parte and is effective upon service, but it may be challenged within ten days in a federal district court, whereupon the court may issue an injunction "setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order...." The subsection does not indicate the standard of review that the court should apply. If the temporary order is not challenged but is also violated, the agency may seek enforcement of the order in a federal district court and the court is obliged to grant enforcement if the violation is proved.

Both final and temporary orders may require the institution or institution-affiliated party "to take affirmative action to correct the conditions resulting from" the violation or practice with respect to which the cease-and-desist order is issued. This includes the authority to require the institution or party to "make restitution or provide reimbursement, indemnification, or guarantee

against loss" if the institution or party was "unjustly enriched" or the violation or practice complained of "involved a reckless disregard for the law or any applicable regulations or prior order of the...agency."

The banking agencies are also empowered to take other forms of enforcement action against insured depository institutions and their institution-affiliated parties. Such enforcement powers include entering prohibition, suspension and removal orders against institution-affiliated parties and imposing substantial civil money penalties against an institution or institution-affiliated party. In certain circumstances, an agency may have standing to bring a civil suit for damages against an institution or institution-affiliated party. Finally, the United States Attorney General has standing to seek substantial civil penalties against institutions and institution-affiliated parties where certain provisions of Title 18 of the U.S. Code have been violated.

In the Crime Control Act of 1990, Congress amended the banking laws to provide for judicial prejudgment-attachment orders. It did so in two ways. First, a

¹ Most parallel citations and references to the fuller analyses in the *Discussion Draft* are omitted.

analyze the legal issues involved. The practices and expectations of other agencies, such as the Securities and Exchange Commission ["SEC"], were reviewed. In an endeavor to identify common ground between the government regulators and the bar, the Working Group devised a series of detailed, real-life hypotheticals and discussed these at considerable length with the general counsel of the four federal banking agencies and the SEC, and their staff. At all stages, the Working Group scrupulously avoided taking a position on the facts underlying the actual dispute between the OTS and Kaye, Scholer: the OTS allegations were never put to the proof, either in court or before an administrative law judge, and the Working Group merely proceeded upon the basis that they might be true.² A number of other enforcement actions taken by the OTS against lawyers and accountants and their firms, and against bank directors and officers, were also carefully examined in order to identify all the applicable legal and ethical principles and regulatory policies.³

By the end of the process, we were able to prepare a 294-page Discussion Draft, entitled *Laborers in Different Vineyards: The Banking Regulators and the Legal Profession* ["Discussion Draft"], which was published in January 1993. The *Discussion Draft* was the subject of various ABA panels, and it was distributed widely among the legal profession.

The Working Group met once more in May and then submitted a formal report and recommendations for consideration by the ABA House of Delegates at the ABA Annual Meeting in August. [See Box.] The report and recommendations secured the joint sponsorship of a number of sections and committees of the ABA, including the sections of Administrative Law and Regulatory Practice, Business Law, Antitrust Law, Litigation, and Real Property, Probate and Trust Law, and the Standing Committee on Ethics and Professional Responsibility. The House of Delegates ultimately adopted unanimously all the Working Group's recommendations.

Basic Precepts

The approach of the Working Group was informed by a number of general precepts. First, we wanted to engage in a sincere and constructive inquiry, involving dialogue with the government lawyers, in order both to learn the difficulties facing the government agencies and to convey to the regulators the concerns of the bar. Second, the Working Group tried to remind itself that the regulators must be able to take expeditious and effective action to recover as much as possible of the losses suffered by insured depository institutions in recent years, and that the regulators were clearly

² In fact, the Kaye Scholer partners who had been the primary targets of complaint in the OTS Notice of Charges, have subsequently been exonerated by the New York Departmental Disciplinary Committee. The Committee consisting of 45 members, including nonlawyers, is appointed by the intermediate state appellate court and has subpoena powers. The Committee, which had complete access to the OTS documents, is reported to have investigated the three most serious allegations and found them to have no basis. See Amy Stevens, *Kaye Scholer Partner Cleared by Law Board in Lincoln S&L Case*, Wall St. J., Nov. 19, 1993, at B3.

³ A substantial volume of news reports, scholarly literature, legislative history and speeches by government lawyers were also reviewed.

paragraph was added to section 11(d) of the Federal Deposit Insurance Act to permit the Federal Deposit Insurance Corporation and the Resolution Trust Corporation, in their capacities as conservators and receivers for banks and savings associations and with respect to any asset acquired or liability assumed" to seek from any court of competent jurisdiction an order "placing the assets of any person designated by the Corporation...under the control of the court and appointing a trustee to hold such assets." Congress stipulated that Rule 65 of the Federal Rules of Civil Procedure should apply, without regard to the requirement that the applicant show that the injury, loss, or damage is irreparable and immediate.

Second, Congress added a new paragraph to section 8(i) of the Act permitting an appropriate banking agency "in any action brought...pursuant to [section 8], or in actions brought in aid of, or to enforce an order in, any administrative or other civil action for money damages, restitution, or civil money penalties brought by such agency to apply to "the court" for a restraining order that "(i) prohibits any person subject to the proceeding from withdrawing, transferring, removing, dissi-

patating, or disposing of any funds, assets or other property; and (ii) appoints a temporary receiver to administer the restraining order." Congress stipulated that the order "shall be granted without bond upon a prima facie showing that money damages, restitution, or civil money penalties, as sought by such agency, is appropriate."

The Federal Banking Agencies' Use of Ex Parte Asset Preservation Orders

The federal banking agencies frequently use their cease-and-desist powers against insured depository institutions and institution-affiliated parties.⁷ The OTS has also used this cease-and-desist power against a number of attorneys and law firms whom it has deemed to be institution-affiliated parties. In addition, the banking agencies (and the OTS in particular) often issue temporary cease-and-desist orders designed to restrict the use by respondents of assets under their control pending completion of the main cease-and-desist proceedings. Only rarely, however, has an agency issued such an order against outside counsel to an insured depository institution or a law firm. The example that received wide publicity in 1992 involved

the New York firm of Kaye, Scholer, Fierman, Hays and Handler, and three of its partners.

The use by the banking agencies of temporary and final cease-and-desist powers against institution-affiliated parties has generated concern in the legal community. The Working Group...is of the view that these cease-and-desist powers, as they have been used in practice against institution-affiliated parties, are objectionable for a number of reasons.

First, an agency's ability to reinforce the commencement of final cease-and-desist proceedings under 12 U.S.C. 1818(b) by the simultaneous imposition of an ex parte, administratively imposed temporary asset freeze, without prior judicial supervision, tends to create a situation in which the respondent may have little choice but to settle the principal claim on the agency's terms in order to survive financially. As a result, the availability of ex post judicial relief is an inadequate protection to respondents. By the time the agency has imposed an asset freeze and issued a press release (which will usually attract considerable publicity) substantial damage will already have been done to the respondent.

The Working Group recognizes that it might be appropriate for a banking agency to exercise this kind of intensive control over a depository institution itself. The Working Group also recognizes that lawyers who dissipate the assets of depository institution clients are and ought to be subject to the same liability as any other institution-affiliated party, and that lawyers are entitled to no immunity from discipline by the appropriate authorities where they have breached applicable standards of professional conduct. However, the potential injustice to respondents begins to increase when the agency asserts claims over assets in the possession of third parties, whether lawyers or not, and especially over assets (as in the *Kaye, Scholer* case) that are obviously not those of the depository institution involved. The statutory conditions under which institution-affiliated parties are liable to enforcement action are complex and should not be subject to the unilateral evaluation of the agency acting alone. The Working Group believes that prior independent judicial scrutiny is essential in such situations to ensure that an asset freeze order only be issued where the

⁷ See *Discussion Draft* at 18039, and the Appendix accompanying this Recommendation and Report.

and appropriately commanded by Congress to take action to prevent further loss to banks and savings associations ["S&Ls"] through abusive, reckless and even criminal behavior by those involved with the industry, including professionals such as lawyers and accountants. The Working Group emphatically acknowledged that lawyers are entitled to no immunity from the consequences of criminal or tortious behavior, and that they ought to be held to standards that are the same as, or even higher than, those to which any member of the public is subject. Indeed, all the recommendations for legislative reform that were ultimately made by the Working Group and adopted by the ABA House of Delegates would apply equally to nonlawyers, including accountants, appraisers and other persons involved with banking institutions.

On the other hand, additional principles were also thought to be extremely important. The Working Group strongly believed that in one respect lawyers *do and should* play a special role in providing to all individuals and organizations the service of independent, loyal, vigorous and confidential legal representation. In the context of the representation of clients who are subject to government regulation, this implies that the lawyer who represents the client should not be placed in a position in which he or she may fear reprisals for zealous representation or advocacy. The danger of reprisal is relatively insignificant where the lawyer is "laboring in the vineyard"—documenting loans, preparing securities, or writing opinions—but it becomes much more relevant where the lawyer is dealing directly with the

agency on behalf of the client—for example, during the exit interview in a bank examination, where tough, face-to-face representation and advocacy is not unusual. In such circumstances, there are seldom easy rules that might dictate the proper responsibilities of the lawyer and he or she is required to make delicate judgments. As the *Discussion Draft* put it,

the role of the lawyer is usually a complex one, and the contours of her relationship with her client and vis à vis the regulator cannot be categorized, as some have suggested, into a simple distinction between advocacy and representation.... [W]hen a lawyer is dealing directly with the agency (particularly in face-to-face meetings, perhaps with an examiner) the nature of the meeting can often change without the lawyer being able to control the scope of the engagement. Within the bounds of one meeting, a lawyer may find herself having to move from counsellor to representative to advocate to defender, as the relationship between her client and the regulators changes. The standards she must observe may be the subject of good faith disagreement among responsible lawyers. In such circumstances, it would not be possible for her to provide the effective representation her client deserves and to which he is entitled if she were continually to be concerned about the possibility of sanctions being imposed by a regulator who might view her as overstepping the bounds of "responsible lawyering."

⁴ *Discussion Draft* 6.

underlying claim by the agency justifies its imposition.

Second, it is by no means clear that the agencies possess the power to issue asset freeze orders without first going to court. As already described, Congress in 1990 conferred on the agencies the power to seek prejudgment judicial attachment orders. 12 U.S.C. 1818(i)(4). The statutory provision under which the agencies purport to act is subsection 1818(c). If this provision is interpreted to confer the *ex parte* power claimed by the agencies there would be no reason for subsection 1818(i)(4). The Working Group doubts that Congress intended to confer *ex parte* asset-freeze powers on the banking agencies, and the Working Group notes that such a power might well run afoul of the impartiality requirement of the Due Process Clause of the Fifth Amendment to the United States Constitution.

Third, the banking agencies justify their imposition of large-scale asset freezes against institution-affiliated parties such as lawyers and accountants (whose assets have never belonged to the depository institutions involved), by reference to their power to order "restitution" and "affirmative action" under section 1818(b)(6).

Hence the OTS styles large settlements based on money damages claims (e.g., \$41 million in the case of Kaye, Scholer, \$400 million in the case of Ernst & Young, and \$51 million in the case of Jones, Day, Reavis & Pogue) as "restitution." The Working Group doubts whether Congress intended "restitution," as used in section 1818(b)(6) to encompass traditional claims for money damages. Restitution traditionally connotes tangible property that belongs to a third person (in this case, an insured depository institution) and property the ownership of which can be traced directly to the third person (institution). If Congress did not intend "restitution" to cover awards for money damages, the Working Group believes that the power thus conferred may violate the provisions of Article III and the Seventh Amendment of the United States Constitution.

The Working Group accordingly believes that the federal banking agencies should be required to seek prior judicial approval for the imposition of any asset freeze orders they might wish to impose on institution-affiliated parties, and that the agencies should not be permitted to use their cease-and-desist powers to secure the payment of money damages

claims that are otherwise ordinarily only available through the prosecution of damages suits in Article III and state courts. The Working Group believes that these restrictions are consistent with Congress' intention when it conferred cease-and-desist powers on the banking agencies but also believes that clarifying legislation is required because the agencies have interpreted their powers differently.

The standard of proof required when an agency does seek a prejudgment judicial attachment order is also troubling... Section 1818(i)(4)(B) requires a judge to issue the order "upon a prima facie showing that money damages, restitution, or civil money penalties, as sought by [the] agency, is appropriate." The Working Group believes that this language may not preclude the equitable judicial requirement that an agency must demonstrate that an asset freeze order is *necessary* (in addition to showing that the claim for money damages, restitution, or civil money penalties is "appropriate"). But the statutory language does not make this clear, and the Working Group believes that some independent judicial assessment as to whether the attachment order is necessary should be required. The Working Group

accordingly recommends that Congress be urged to amend section 1818(i)(4)(B) to require the banking agencies to demonstrate that the respondent is likely to dissipate or otherwise improperly transfer assets of the insured depository institution involved.

Recommendation (4) is prompted by a special concern which the Working Group believes to be so important that it should be the subject of an independent resolution. Clients must have effective assistance of counsel to deal with regulators. It is a fundamental principle of our system of justice that lawyers, in order to provide effective counsel to their clients, do occupy a special role distinct from that of any other professions. However, so long as a lawyer is subject to the likelihood of a freeze order issued *ex parte* and on its own motion by the very agency with whom the lawyer is interacting and even though there is no danger of the assets of the depository institution being dissipated, client rights to effective assistance of counsel may be compromised. The chilling effect of dealing with an agency that can exercise this extraordinary power was the subject of testimony to and extensive discussion within the Working Group.

The Working Group also took it to be a fundamental principle that the means used by the government should be based firmly in the law. A good deal of the controversy surrounding the enforcement action against Kaye, Scholer and other lawyers, accountants and their firms, stemmed from disputes concerning the precise scope and constitutionality of the agencies' statutory powers. Much of our activities involved analyzing these powers and evaluating their underlying policies. Related to the concern that regulators should act within the strict confines of the law was our assumption that liability for the losses suffered by the bank and thrift industries should be attributed fairly and not according to "deep-pocket" principles. In an effort to determine whether the regulators were improperly deploying their restitutionary powers as a means of recovering damages that are more appropriately sought through civil suits in tort and contract, the Working Group paid some attention to the bases according to which the regulators had assessed the sums of "restitution" that they had sought in their enforcement cases.

Finally, the Working Group proceeded on the assumption that anyone who is liable to enforcement action should have advance notice of the standards according to which that action will be taken. One source of the grievance felt by many lawyers in the wake of the Kaye, Scholer affair was the sense that the OTS had, with retroactive effect, applied novel interpretations of the rules of professional responsibility that the lawyers involved were expected to observe. The Working Group believed that it was important to focus on

the process by which the agencies devised their expectations and communicated these expectations to those most affected.

Aftermath

The OTS seems to have been unimpressed by the unanimity of the ABA resolutions. OTS Acting Chief Counsel, Carolyn Lieberman was reported as stating that she was "not really surprised by that ... I think this whole thing is driven by their own self-interest."⁵ Since August the OTS, acting together with the Resolution Trust Corporation ["RTC"], was able to secure an agreement by another major New York law firm, Paul, Weiss, Rifkind, Wharton & Garrison ["Paul Weiss"], to pay a sum of \$45 million in "restitution" for losses allegedly resulting from the firm's representation of Centrust Bank of Florida and its predecessor, Dade Savings and Loan Association.⁶ Although an asset freeze order was not used in this case, the OTS once again relied on its cease-and-desist power to assert the RTC's claim, as receiver for Centrust, against Paul Weiss for damages. The firm settled without admitting or denying the charges.

Despite the negative response from the OTS and continuing pressure in Congress to secure redress for losses suffered as a result of the S&L Crisis, the ABA resolutions recommending legislative action to amend the asset-freeze

⁵ Quoted by Karen Donovan, *Feud Between Bar and Thrift Officials Continues at ABA*, Nat'l L.J., Aug. 23, 1993, at 17.

⁶ *In the matter of Peter R. Haje and Paul, Weiss, Rifkind, Wharton & Garrison*, OTS AP No. 93-75 (Sept. 27, 1993).

Balancing the need not to exempt lawyers from action against them in appropriate cases and the wish not unnecessarily to chill the willingness of lawyers to represent their clients zealously, the Working Group concluded that agency *ex parte* action should not be taken against a lawyer solely for conduct in representing a client before the agency. The Working Group therefore recommends that the ABA adopt Recommendation (4) urging restraint by the regulators when proceeding against the very lawyers with whom they are dealing on the other side.

The Federal Banking Agencies' Interpretations of the Model Rules of Professional Conduct

A number of other procedural and interpretive issues have arisen out of civil and administrative enforcement actions by the federal banking agencies against lawyers and law firms....

Two separate sets of issues present themselves. First, the Working Group believes that the process by which the federal banking agencies have arrived at their conclusions regarding lawyer responsibility is unfair. Second, the Working Group believes that the agencies have misinter-

preted a number of the provisions of the American Bar Association's Model Rules of Professional Conduct and improperly relied upon these misinterpretations in civil suits and enforcement actions against lawyers.

As far as process is concerned, the agency appears to have relied upon novel theories of professional responsibility in their charges against lawyers and law firms. While there is a possibility that these theories might prove justifiable, the fact that they have been asserted for the first time in enforcement proceedings involving very severe consequences for respondents seems profoundly unfair since respondents are faced with liability contrary to their reasonable prior expectations. The Working Group actually experienced significant difficulties in establishing exactly what principles were being relied upon by the agencies.

The Working Group recognizes that agencies must often develop regulatory principles as they gather experience and through the process of case-by-case adjudication, but the Working Group believes that the retrospective imposition of new principles of liability is inappropriate. The Working Group also notes that the Admini-

strative Procedure Act (APA) requires agencies to make available to the public *all* their policy positions, and to engage in notice-and-comment, prospective rule-making whenever they formulate binding new policies. The Working Group therefore recommends that the American Bar Association urge the federal banking agencies to make available to the public all the policies upon which they rely in implementing their enforcement powers, and to use the APA notice-and-comment procedures in developing new policies with binding effect, whenever this procedure is feasible. The Working Group also recommends that the Association urge that when a notice-and-comment procedure is not feasible, and an agency finds that it must announce through the process of an enforcement adjudication a principle of liability that departs substantially from widely understood expectations, the agency should only announce this departure...with prospective effect. This is the practice of the Securities and Exchange Commission³ and, the Working Group believes, it would be both fair and conducive to healthy public scrutiny and dissemination.

Recommendations (5)-(7) are designed to remedy the unfairness the banking agencies' have produced by their methods of proceeding.

Turning to the rules of professional conduct, many of the charges brought against lawyers by the OTS, in particular, have been based on alleged violations of the Model Rules. To use the Model Rules as a basis for liability directly contradicts one of the fundamental principles of the Rules.⁴ This problem is compounded by the fact that in many specific instances, the agency's interpretation of what these Rules require has differed substantially from the principles generally accepted by the legal profession. Recommendations (8) and (9) address these concerns. The five clearest examples are the following:

The Lawyer's Duty of Candor. A number of Rules are relevant in determining the scope of a lawyer's duty of candor. These include Rules 1.2(d), 1.6, 8.4(c), 3.3, 4.1, and 3.9. See *Discussion Draft* at 161-69. The OTS' charge, in the *Kaye, Scholer* case, that the firm's lawyers had failed to disclose certain client information rests, in the view of the Working Group, on a misunderstanding of the way in which these Rules mesh together. While

³ See *Discussion Draft* 217-20.

⁴ See *Discussion Draft* at 145 n.385.

and cease-and-desist powers of the banking agencies have met with some success in Congress. Congress recently amended these powers to require the banking agencies to make a proper determination that an asset freeze order is essential before such an order is issued. The amendment also requires the banking agencies, when they do seek such orders from a court, to satisfy the court that the orders are necessary.⁷ Because this amendment had to ride on the back of a controversial refunding measure, and because there remains substantial political pressure for action against professionals to recover S&L-related losses, an amendment requiring the agencies to seek asset freeze orders from the courts in every case and preventing the agencies from using their cease-and-desist powers for pursuing *damages* suits (as opposed to securing restitution) has not yet been forthcoming.

The ABA Standing Committee on Ethics and Professional Responsibility has also begun to address the Model Rules issues referred to it by the House of Delegates. In August, the Standing Committee released a formal determination that Model Rule 3.9 is not intended to apply to situations such as bank examinations.⁸ This opinion confirms the Working Group's suspicion that the OTS had misconstrued Rule 3.9.

Formal responses are not the only measure of the success of the Working Group's activities. The OTS seems already to have adjusted its enforcement policies and disciplinary expectations in some important directions. It has not used an asset freeze against another law firm since the *Kaye, Scholer* episode, and in its more recent enforcement actions against large law firms it has adopted some (though not all) of the more conventional interpretations of the Model Rules of Professional Conduct regarding the joint representation of insured depository institutions and their holding companies and the lawyer's duty to withdraw from representing a client who is engaging in unlawful conduct.

At the same time, banking lawyers have learnt more about the kinds of factors that need to be taken into account when discharging their professional responsibilities, both to clients and the regulators. Perhaps most important of all, the *Kaye, Scholer* affair has served to increase the awareness in law schools of the need to provide more guidance to students in the special area of "regulatory ethics." The Working Group's *Discussion Draft* has already been used as a basic text in ethics courses at some law schools. It will serve as such in a special seminar, entitled "Professional Responsibility in Representing Regulated Clients," that I am offering in the 1994 spring semester.

⁷ Resolution Trust Corporation Completion Act, Pub. L. No. 103-204, §25, 107 Stat. 2408.

⁸ See ABA Standing Committee on Ethics and Professional Responsibility, *The Lawyer's Obligation to Disclose Information Adverse to the Client in the Context of a Bank Examination*, Formal Opinion No. 93-375 (August 6, 1993).

the agency appears to have modified its position in the later *Jones, Day* case by recognizing that the attorney-client privilege qualifies a lawyer's duty of disclosure (see the Appendix accompanying this Report, where the case is discussed), the agency's general position on this duty remains unclear and public statements by some agency representatives present views that the Working Group believes to be incorrect statements of the meaning of the Rules. Given the wide and difficult range of circumstances in which lawyers must decide whether to make disclosures in the bank regulatory context, it is important that the ABA reaffirm the principles reflected in the Model Rules insofar as they would govern the duty of disclosure.

The Lawyer's Duty of Inquiry.

The *Kaye, Scholer* settlement order and subsequent orders against law firms seek to impose a duty of due diligence on lawyers with respect to the accuracy of any statements made to federal banking agencies by the lawyers. Once again, a series of Rules are relevant, including Model Rules 1.2, 2.1, and 2.3. The Working Group believes that the bank regulators have misconstrued the lawyer's duty of inquiry, rendering it far broader than the

Model Rules would require or even allow, ignoring the important role the Rules provide to the client in determining the scope of the representation.

The Lawyer's Duty to Climb the Corporate Ladder and Report Subordinate Wrongdoing. The OTS' interpretation of Model Rule 1.13, which governs the duty to climb the corporate ladder when representing clients that are organizations, differs sharply from that of the Working Group. First, the OTS has misstated the events that would trigger consideration of going up the corporate ladder. Second, lawyers at the agency assert that a lawyer must report subordinate wrongdoing to superiors in every case, and must do so all the way to the client's board of directors. The Working Group rejects the view that the lawyer never has a discretion in this regard. Third, the regulators sometimes have taken the view that the lawyer must resign if his or her efforts to prevent the wrongdoing prove unsuccessful. The Working Group again believes this to be an incorrect reading of Rule 1.13 and Rule 1.16.

Joint Representation. In the *Kaye, Scholer* charges the OTS asserted that the joint representation of a holding com-

pany and its insured savings and loan subsidiary "constituted reckless, unethical and improper professional conduct, reckless breaches of *Kaye, Scholer's* duty of loyalty to provide competent advice with due care, and demonstrated a lack of professional character and integrity necessary for an attorney to practice before the OTS." The settlement order specifically banned the firm from joint representation of an insured depository institution and its holding company in situations where their interests might be adverse.

Model Rule 1.7, on the other hand, would permit joint representation if the fully informed consent of the two clients is obtained. In some subsequent orders, the agency appears to have accepted this position, but as yet there is no indication that this is the agency's general position.

Applicability of Model Rule 3.3 and Model Rule 3.9. Model Rule 3.3 establishes a duty of candor before a tribunal. Any suggestion that an administrative agency conducting a bank examination becomes a tribunal is without support. Model Rule 3.9 extends most of the lawyer's duties of candor in judicial proceedings to lawyers representing clients before agencies in nonadjudicative settings. Yet

the applicability of this Rule to bank examinations is similarly unwarranted. Bank examinations are "complex processes involving considerable interaction between the regulators and the client during which discussion, 'negotiation' and even advocacy — might take place as part of an effort to help the examiner understand the precise nature of many of the transactions and assets under examination." The Working Group does not believe that Rule 3.9 is apt in bank examination context.

The Working Group therefore recommends that the ABA adopt Recommendation (8), which expresses the Association's opposition to the OTS' interpretations of the Model Rules identified in the preceding discussion.

The Working Group also believes that the potential applications of the Model Rules to the many issues of bank lawyer representation identified in the preceding discussions require further consideration and fuller analysis. The Working Group therefore recommends that the ABA adopt Recommendation (9), which would refer these issues to the ABA Standing Committee on Ethics and Professional Responsibility for their consideration and appropriate action.

RESOLUTIONS

RESOLVED, That the American Bar Association supports legislation by Congress to:

(1) amend subsections 8(b) and (c) of the Federal Deposit Insurance Act, 12 U.S.C. 1818(b) and (c), to clarify that the federal banking agencies (i.e., the Office of Thrift Supervision, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, and Board of Governors of the Federal Reserve System), when taking action against individuals affiliated with insured depository institutions (as opposed to the institutions themselves), are authorized to obtain asset preservation orders only through judicial proceedings under section 8(i)(4) of the Act, 12 U.S.C. 1818(i)(4);

(2) amend section 8(i)(4)(B), 12 U.S.C. 1818(i)(4)(B), to require the federal banking agencies, when seeking an asset preservation order under section 8(i)(4), to demonstrate that the person against whom the order is being sought is likely to dissipate or otherwise improperly transfer assets of the institution concerned;

(3) clarify that the federal banking agencies are not authorized to use their power to issue cease-and-desist orders as a means of securing money damages relief that is ordinarily only available through the prosecution of a damages suit in court.

BE IT FURTHER RESOLVED, That the American Bar Association

(4) recommends that the federal banking agencies promote the effective representation of parties before them and minimize the chilling effect on the attorney-client relationship that results from the fear of agency retaliation by adopting an affirmative policy not to use asset preservation orders against lawyers on account of lawyer conduct in representing their clients before the agencies, except in the extraordinary circumstances where an asset preservation order is the only method available to prevent dissipation of assets of an insured depository institution.

BE IT FURTHER RESOLVED, That the American Bar Association urges the federal banking agencies to:

(5) announce clearly and make available for inspection and copying all policy positions adopted by the agencies;

(6) develop, as far as is practicable, policies intended to have binding effect through the notice-and-comment rulemaking procedures prescribed in section 4 of the federal Administrative Procedure Act, 5 U.S.C. 553; and

(7) announce, where it is necessary to develop on a case-by-case basis, standards that substantially depart from expectations widely understood by the persons affected, that the agencies' newly articulated standards will have prospective application only, and to ensure that these views receive the widest possible dissemination among the profession and all interested parties.

BE IT FURTHER RESOLVED, That the American Bar Association

(8)(a) opposes certain federal banking agencies' interpretations of the Model Rules of Professional Conduct regarding:

- (i) the scope of the lawyer's duty of inquiry;
- (ii) the circumstances under which a lawyer has a duty to "climb the corporate ladder" under Model Rule 1.13 to report subordinate wrongdoing;
- (iii) the applicability of the duties of candor found in Model Rules 3.3 and 3.9 to the bank examination process; and
- (iv) prohibitions on the ability of a lawyer to represent simultaneously banks and bank holding companies; and

(b) opposes the use of such misinterpretations as a basis for assessing civil and administrative liability against lawyers.

(9) refers the issues identified in Recommendation (8)(a) to the ABA Standing Committee on Ethics and Professional Responsibility for further analysis and appropriate action.

The Effect of Victim Impact Evidence on the Defense in Death Penalty Cases

Robert P. Mosteller

In 1991, the Supreme Court through *Payne v. Tennessee*¹ reopened a door and authorized receipt of victim impact evidence in death penalty cases. *Payne*, which is perhaps best known for its assault on the principle of *stare decisis*,² reversed major elements of two recent decisions in *Booth v. Maryland*³ and *South Carolina v. Gathers*⁴ and held that consideration of victim impact evidence by the factfinder in



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capital sentencing does not offend the Cruel and Unusual Punishment Clause of the Eighth Amendment. The results of *Payne* are already beginning to be felt in a number of states. However, for reasons not entirely clear,⁵ use of victim impact evidence appears less prevalent than was expected. In any case, the issues raised by this questionable ruling are likely to be with us for years to come.

Victim impact evidence takes three forms: first, evidence relating to the personal characteristics of the victim; second, the emotional impact and other effects of the crime upon the victim's family and the community; and third, family members' characterizations of the crime and the defendant.⁶ *Booth* held that admission of all three types of evidence violated the Eighth Amendment.⁷ *Gathers* extended *Booth's* holding slightly, concluding that information relating to the characteristics of the victim violated the Constitution when presented through the prosecutor's closing argument.⁸

Payne held that the first two types of evidence — the characteristics of the victim and the impact of the death upon survivors—are not excluded by the Eighth Amendment. Because in the Court's view evidence of family members' characterizations and opinions about the defendant and the crime were not involved in the *Payne* case, the decision did not disturb that element of *Booth's* holding.⁹ Accordingly, receipt of survivors' opinions remains unconstitutional under *Booth*.

The Meaning Of *Payne*

The facts of *Booth* and *Payne* and a detailed analysis of the arguments regarding victim impact evidence are impor-

¹ 111 S. Ct. 2597 (1991).

² Rehnquist, writing for the majority, rejected the claim that *stare decisis* should compel adherence to *Booth* and *Gathers*. 111 S. Ct. at 2609–11. See also Opinions of Justice Scalia concurring, 111 S. Ct. at 2613–14, and Justice Marshall dissenting, 111 S. Ct. at 2619–25.

³ 482 U.S. 496 (1987).

⁴ 490 U.S. 805 (1989).

⁵ One possible explanation for prosecutors' reticence may be the enormous danger of victim impact evidence becoming over emotional and resulting in reversal on due process or evidentiary grounds. See *infra* Section VII.

⁶ *Booth*, 482 U.S. at 502–03; *Payne*, 111 S. Ct. at 2604–05.

⁷ *Booth*, 482 U.S. at 502–10.

⁸ *Gathers*, 490 U.S. 805.

⁹ *Payne*, 111 S. Ct. at 2611 n.2.

It is not so clear that *Payne* did not involve opinions of family members, at least as the concept was interpreted by *Gathers*. In *Payne*, the prosecutor argued as follows:

Somewhere down the road Nicholas [the surviving child-victim] is going to grow up, hopefully. He's going to want to know what happened. And he is going to know what happened to his baby sister and his mother. He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict, you will provide that answer.

111 S. Ct. at 2603. See *infra* note 42.

tant to understanding fully the import of the Supreme Court's *Payne* decision. *Booth* involved sympathetic victims and a particularly brutal crime. The victims, a husband and wife in their mid-seventies, were bound and gagged and then stabbed repeatedly with a kitchen knife during the course of a burglary. Mr. Booth, a neighbor of the victims, committed the burglary to obtain money for heroin, and he likely intended to murder them from the beginning of the episode to avoid their later identification of him.¹⁰ The victims were an admirable couple, who were loved and respected by their family and by the community. In the Victim Impact Statement, the murder victims' son described his mother as "a woman who was young at heart and never seemed like an old lady." The Court's opinion noted that "[t]heir funeral was the largest in the history of the [funeral home] and the family received over one thousand sympathy cards, some from total strangers."¹¹ The victim impact statement also described the severe emotional impact on the family resulting from the loss of parents and grandparents.

These facts made the opinion by Justice Powell both understandable and impressive. Powell concluded that the information contained in the victim impact statement about the characteristics of the victims and the emotional loss suffered was irrelevant to capital sentencing and that "its admission created a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner."¹² He reasoned that the blameworthiness of the defendant should provide the basis for the sentence, not the victim's characteristics and the impact of his or her death on the survivors, since generally such characteristics are unknown to the defendant and therefore irrelevant to blameworthiness.¹³

The true power of the opinion is in its treatment of the danger that use of victim impact statements will create an impermissible risk of arbitrary decisions regarding the imposition of the death penalty. Justice Powell argued that decisions on death should not turn on which victims were assets to their community or which victims have family members who are articulate and persuasive in expressing their grief. Such distinctions are irrelevant when deciding who should live and who should be executed, and our system of justice should not tolerate distinctions based on which victims are deemed to be more worthy.¹⁴ Moreover, such distinctions do not provide a "principled way to distinguish cases in which

the death penalty is to be imposed from those in which it [is] not."¹⁵

Jumping ahead somewhat in the story, Justice Stevens in his dissent in *Payne* amplified this theme of improper discrimination based on victim worth with one particularly telling suggestion. Stevens mentioned a factor that had otherwise not been explicitly noted — the impact of race: "Such proof risks decisions based on the same invidious motives as a prosecutor's decision to seek the death penalty if a victim is white but to accept a plea bargain if the victim is black."¹⁶ Although neither opinion acknowledges the fact, the victims were white and the defendants black in both *Booth* and *Payne*.¹⁷

Finally, in *Booth* Justice Powell noted that an opportunity by the defense to rebut the evidence offered by the state, which could well entail putting on evidence "that the victim was of dubious moral character, was unpopular, or was ostracized from his family," would create a mini-trial. Such proceedings would further divert attention from the appropriate focus on the defendant and the circumstances of the crime.¹⁸

The facts of *Payne*, which Chief Justice Rehnquist recited in detail, were even more grotesque than those of *Booth*. The victims in *Payne* were a 28-year-old mother of two, her 2-year-old daughter, and her 3-year-old son. All three were stabbed multiple times with a butcher knife, the mother receiving 84 wounds. Remarkably, the young boy survived despite several knife wounds that completely penetrated his body from front to back. Mr. Payne himself was described in the opinion as spending the time shortly before the murder drinking beer, injecting cocaine, and riding around town reading a pornographic magazine.¹⁹

The Rehnquist opinion began by disagreeing with the proposition accepted in *Booth* and *Gathers* that blameworthiness was unrelated to the harm caused to the family and the community, contending that the harm caused by an offense has historically been considered in sentencing, and receipt of such information is consistent with the broad range of information traditionally provided to the sentencing body.²⁰ In Rehnquist's view, victim impact evidence is simply another method of providing information to the

¹⁵ *Id.* at 506 (quoting *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980)).

¹⁶ *Payne*, 111 S. Ct. at 2631 (Stevens, J., dissenting) (citing *McClesky v. Kemp*, 481 U.S. 279, 366 (1987) (Stevens, J., dissenting)).

¹⁷ Vivian Berger, *Payne and Suffering: A Personal Reflection and a Victim-Centered Critique*, 20 FLA. ST. L. REV. 21, 24, 40 (1992). See also *id.* at 24–25 (discussing "invisible emotional baggage" of race on judicial decisions at all levels).

¹⁸ *Booth*, 482 U.S. at 506–07.

¹⁹ *Payne*, 111 S. Ct. at 2601.

²⁰ *Id.* at 2605–07.

¹⁰ *Booth*, 482 U.S. at 497.

¹¹ *Id.* at 499 n.3.

¹² *Id.* at 502–03.

¹³ *Id.* at 504.

¹⁴ *Id.* at 505–06 & n.8.

sentencer about harm caused by the crime.²¹ He also argued that a contrary rule unfairly tips the scales in favor of the defendant, who encounters virtually no limits in introducing mitigating evidence.²²

“[T]he state has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.” *Booth*, 482 U.S., at 517 (White, J., dissenting). . . . By turning the victim into a “faceless stranger at the penalty phase of a capital trial,” *Gathers*, 490 U.S., at 821 (O’Connor, J., dissenting), *Booth* deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murderer.²³

Unlike Justice Powell in *Booth*, Chief Justice Rehnquist was not concerned about a mini-trial developing should the defendant rebut the victim impact evidence. For Rehnquist, that would only present a difficult tactical decision for the defense. He also dismissed the concern expressed by Powell in *Booth* that juries would be encouraged to decide who were the more worthy victims, which he argued was not the purpose of victim impact evidence. On the contrary, he contended, its purpose is “to show instead each victim’s ‘uniqueness as an individual human being,’²⁴ whatever the jury might think the loss to the community resulting from his death might be.”²⁵ In rejecting *Booth*’s conclusion that use of victim impact statements would produce the arbitrary imposition of the death penalty, Rehnquist noted that

²¹ *Id.* at 2608.

²² *Id.* at 2607.

²³ *Id.* at 2608.

²⁴ Justice O’Connor in a concurring opinion gave a very poignant description of this governmental interest:

“Murder is the ultimate act of depersonalization” [quoting an amicus brief]. It transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about the person. The Constitution does not preclude a State from deciding to give some of that back.

Id. at 2612 (O’Connor, J., concurring).

²⁵ *Payne*, 111 S. Ct. at 2607.

Rehnquist argued that the facts of *Gathers* illustrated the validity of his argument since the evidence that showed the victim to be “an out of work, mentally handicapped individual” who society was not likely to see as a very significant human being. *Payne*, 111 S. Ct. at 2607. In *Gathers*, however, the prosecutor had not tried to demonstrate the uniqueness that Rehnquist described above but had rather attempted to use victim impact evidence exactly as Powell had suggested. The prosecutor argued that the victim’s voter registration card and a religious tract showed him to be a contributing member of the community. *Gathers*, 490 U.S. at 810. See Berger, *supra* note 17, at 35–36, 46.

if in a particular case the evidence is so unduly prejudicial as to render the trial fundamentally unfair the Due Process Clause provides a vehicle for relief.²⁶

Admission Of Victim Impact Evidence Is A State Law Issue

For a number of states, the most important aspect of *Payne* is that the Court did not rule that victim impact evidence had to be admitted in capital cases. Instead, it specifically stated: “We thus hold that *if the State chooses to permit the admission* of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar.”²⁷ Whether victim impact evidence is admissible is therefore a state law question.

Justice Powell argued that decisions on death should not turn on which victims were assets to their community or which victims have family members who are articulate and persuasive in expressing their grief.

Domestic law in several states excludes such evidence. For example, in *Sermons v. State*,²⁸ the Georgia Supreme Court recently rejected the state’s attempt to introduce victim impact evidence, relying on prior state caselaw that excludes the psychological impact of crime on the survivors because such evidence produces confusion and prejudicial digression in sentencing.²⁹ Victim impact evidence is also inadmissible in states whose death penalty statute specifically designates the types of aggravating factors that may be considered by the jury and omits victim impact evidence from that list. In this vein, the Arizona Supreme Court stated that “the trial court may give aggravating weight only to that evidence which tends to establish the aggravating circumstances specifically enumerated [in the statute], and we do not believe that victim impact evidence has such a tendency.”³⁰ By contrast, the California Supreme Court ruled after *Payne* that the statutory aggravating factor pertaining to the “circumstances of the crime” allowed the admission of victim impact evidence.³¹

²⁶ *Id.* at 2608.

²⁷ *Id.* at 2609 (emphasis added).

²⁸ 417 S.E.2d 144 (Ga. 1992).

²⁹ *Id.* at 146.

³⁰ *State v. Atwood*, 832 P.2d 593, 673 (Ariz. 1992).

³¹ *People v. Edwards*, 819 P.2d 436, 465–67 (Cal. 1991) (construing CAL. PENAL CODE §190.3(a) (West 1988)).

In states where victim impact evidence is not admissible in the state's case-in-chief in the penalty phase, such evidence may yet come in as rebuttal to evidence offered by the defendant, or through the "opening the door" concept. References to the loss that the defendant's family would suffer from the execution have been ruled to permit admission of the loss to the victim's family.³² Also, defense use of the favorable part of a document containing victim impact evidence has been ruled to open the door to prosecution use of other parts of the document damaging to the defense.³³ Clearly, however, the prosecution is not permitted to introduce victim impact evidence as anticipatory rebuttal.³⁴

The Morally Suspect Basis of *Payne*

In the aftermath of the Los Angeles riots that followed the acquittal of the police officers involved in the beating of Rodney King, the disparate treatment of African-American victims³⁵ is recognized as never before. If victim impact evidence is admitted, the predictable result will be that the race of the victim will play a greater role than ever in determining who will live and who will die.

The prospect of increasing discrimination and rendering the death penalty even more arbitrary by introducing victim impact evidence should be obvious. The survivors in murders involving white victims who were pillars of their community will no doubt be much more successful in causing verdicts for death. Moreover, in spite of Chief Justice

Rehnquist's arguments in *Payne*, predictably victim impact evidence will be offered more frequently in such cases than where the victim is a member of a minority group, particularly if the latter has any blemishes on his or her character.³⁶ Justice in America should not turn on such distinctions. If pressed by vigilant defense counsel, judges, in ruling on the admissibility of such evidence, and jurors, in deciding the sentence, should be able to appreciate and act to curtail the unfairness of the new system.

Furthermore, not all victim support groups believe that *Payne* helps their cause. While some survivors want to demonstrate their anguish in court, others do not. Some of this latter group are angered by the strategic importance given to their grief and the Court's requirement that they demonstrate it in a certain way. Some do not want their grief to be used for the purpose of achieving a death sentence.³⁷

Minor Benefits To The Defense In *Payne*

While the *Booth-Gathers-Payne* line of cases clearly on balance constitute a victory for the prosecution, these cases provide some benefit to the defense as well. They help to define victim impact evidence as evidence about the victim's characteristics, evidence about the impact of the murder on the family and community, and opinions by the survivors about the crime, the defendant, and the appropriate punishment.³⁸ For years, this type of evidence has been admitted at the margin in death penalty cases across the country, and more frequently, it has been effectively argued by prosecutors. In jurisdictions where victim impact evidence is not admissible, the label that these cases have put upon such evidence should be helpful in excluding it.³⁹ In particular, nothing about *Payne* suggested that victim impact evidence is admissible in the guilt phase of a capital trial.⁴⁰

³² *State v. Johnson*, 410 S.E.2d 547, 555 (S.C. 1991) (in response to defendant's sister's testimony that she would visit defendant at the penitentiary for Christmas, prosecutor argued that victim's family could only visit him at the grave), *cert. denied*, 112 S. Ct. 1692 (1992).

³³ *Williams v. Chrans*, 945 F.2d 926, 946-47 (7th Cir. 1991).

³⁴ See, e.g., *State v. Brown*, 315 N.C. 40, 64, 337 S.E.2d 808, 826 (1985), *cert. denied*, 476 U.S. 1165 (1986); *State v. Taylor*, 304 N.C. 249, 276-77, 283 S.E.2d 761, 779 (1981), *cert. denied*, 463 U.S. 1213 (1983).

³⁵ As recited in *McClesky v. Kemp*, 481 U.S. 279, 286-88 (1987), a study by Professor David Baldus of death sentences in Georgia showed that defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks. A subsequent analysis by the General Accounting Office of 28 studies from a number of different jurisdictions revealed a consistent pattern across the studies: the race of the victim significantly influences imposition of death sentences. U.S. GENERAL ACCOUNTING OFFICE DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5-6 (GAO/GGD-90-57, Feb. 1990). While the significance of the race of the defendant is more variable, *id.* at 6, historically, the number of whites executed for murdering African-Americans is incredibly small. Michael Tadelet, *Executions of Whites for Crimes Against Blacks: Exceptions to the Rule?*, 30 SOC. Q. 529, 532 (1989) (since 1608, only 30 of the nearly 16,000 executions have involved executions of whites for the murder of African-Americans). Thus, for example, a 1980 study of post-*Furman* death sentences in Florida revealed black defendants who killed white victims were eight times more likely to be sentenced to death than black defendants with black victims, and no white defendant had been sentenced to death for killing a black. Adalberto Aguirre, Jr. & David V. Baker, *Empirical Research on Racial Discrimination in the Imposition of the Death Penalty*, 22 CRIM. JUST. ABSTRACTS 135, 142 (1990).

³⁶ Defense counsel should be alert to disparate use of the technique and if it occurs make a record of the failure to use such evidence in cases of minority victims.

³⁷ In her article, see *supra* note 17, at 55-60, Professor Berger sensitively develops *Payne's* potential for manipulation of survivors and the somewhat ambivalent attitudes of victim rights groups to the opinion.

³⁸ Since *Payne* did not disturb the impropriety of the witness' opinion regarding death as the proper punishment, it gives the defense no new argument to have opposition by the victim's family to the death penalty admitted as relevant to victim impact or as mitigating evidence.

³⁹ For example, in *People v. Easley*, 592 N.W.2d 1036, 1064-65 (Ill. 1992), the Supreme Court of Illinois examined whether an outburst by the victim's family during defense closing argument constituted victim-impact evidence, and concluded that such outburst could not be considered by the jury or argued by the prosecutor even under *Payne*. It found no error in the case because of the trial court's proper instruction that the outburst was not evidence and because of the lack of reaction to the outburst by the jury. See also *People v. Raley*, 830 P.2d 712, 741-42 (Cal. 1992) (prosecutor's dwelling on youth of victim and the promise of the life that lay ahead treated as victim impact evidence).

⁴⁰ See, e.g., *Armstrong v. State*, 826 P.2d 1106, 1116 (Wyo. 1992) ("Consideration of victim-impact testimony or argument remains inappropriate during proceedings determining the guilt of an accused.").

Gathers is particularly worthy of careful examination for its help to the defense. In that case, the prosecutor used documentary evidence in closing — a religious tract and a voter registration card — that had been admitted in the guilt phase as physical items present at the crime scene. However, since the murder took place in darkness, there is no evidence that *Gathers* read or could have known the contents of the documents. Nevertheless, the prosecutor read from the documents to develop the perception of the victim as a person who was involved in his community, and the Supreme Court found this to be victim impact evidence even though it came only through the mouth of the prosecutor in closing argument rather than through any witness' testimony.⁴¹ *Payne* overruled *Gathers* by holding that such victim impact evidence was admissible; it did not say *Gathers* was wrong in considering such use of evidence in closing argument to be victim impact evidence.⁴²

In Rehnquist's view, victim impact evidence is simply another method of providing information to the sentencer about harm caused by the crime.

Learning To Live With the *Payne* Decision

In states where victim impact evidence is admissible, defense attorneys have begun to find ways to deal with it and have learned valuable lessons in the process. Criminal defense attorneys in these states are, of necessity, talking with survivors, and what they have learned is useful. They have found that victims' families are not monolithic in their attitudes toward the death penalty. While some change their view as the result of the murder, most who opposed the death penalty do not become supporters as a result of the murder. Also, victims' families are often ignored by everyone in the system. They sometimes feel exploited by the prosecutor with whom they may be more angry than they are with defense counsel.

⁴¹ *Gathers*, 490 U.S. at 811.

⁴² *Payne* somewhat muddies the waters, however, on whether prosecution argument constitutes witness impact evidence by its conclusion that no characterizations and opinions by the family were present in that case. 111 S. Ct. at 2611 n.2. In *Payne*, the prosecutor imputed an argument to the surviving child as to what he would want the sentence to be. 111 S. Ct. at 2603. See *supra* note 9. How to resolve the conflict is not entirely clear, but probably the most reasonable basis for a distinction is that in *Gathers* the prosecution made more extensive use, much like a witness, of evidentiary material while in *Payne* he only imputed a call for justice argument to a victim as a rhetorical device.

Contacts with victims' families can help neutralize their rage, which may otherwise eventually work against defendants. The defense may be helpful in providing the finality that survivors may care about more than anything else. A plea with a long sentence that will end the judicial ordeal will be enormously welcomed by some survivors. Also, conversations with victims' families indicate that, more than retribution, some want public acknowledgement of what happened and of the worth and dignity of the victim. It may be that these results can be achieved through a non-capital guilty plea where the defendant acknowledges what he or she did and expresses remorse.

Dealing With The Admission of Victim Impact Evidence

Because victim impact evidence has been ruled admissible, the task of the defense attorney is to counter it as best possible. I offer some ideas: First, state law may provide a basis to argue that notice and discovery is required. For example, in some jurisdictions prior to the authorization of victim impact evidence, no such notice and discovery was required because the statute specifically limited the aggravating factors, and the statute itself gave sufficient notice.⁴³ If a new open-ended area of aggravation is created, the issues of notice and discovery should be addressed anew.

Second, a demand for *Brady* evidence⁴⁴ that would counter the victim impact evidence is clearly in order. Information that impugns the character of the victim or the loss suffered by the family should logically fall within the *Brady* doctrine, a case that dealt with evidence helpful on the issue of the death sentence, not guilt.

Third, *Payne* continues to recognize that victim impact evidence may violate the Due Process Clause of the Constitution if unduly prejudicial as to render the trial fundamentally unfair.⁴⁵ Victim impact evidence may easily become excessively emotional and thereby produce a basis for reversing the death sentence, particularly if witnesses begin expressing their opinion regarding the appropriate sentence, which was ruled impermissible in *Booth* and left unchanged

⁴³ See *State v. Taylor*, 304 N.C. 249, 257, 283 S.E.2d 761, 768 (1981), *cert. denied*, 463 U.S. 1213 (1983).

⁴⁴ The term has come to mean information favorable to the defendant with respect either to guilt or punishment which derived from *Brady v. Maryland*, 373 U.S. 83 (1963).

⁴⁵ *Payne*, 111 S. Ct. at 2608. See similar statements by Justice O'Connor, 111 S.Ct. at 2612, and Justice Souter, 111 S. Ct. at 2614-15.

For a particularly graphic example of improper closing argument containing what we now would see as presenting the victim-impact issue, see *Hawthorne v. United States*, 476 A.2d 164 (D.C. 1984). In *Hawthorne*, the court of appeals reversed a murder conviction based on the prosecutor's improper closing argument, which he gave as if he were the victim, speaking in the victim's voice and recounting the victim's good works and aspirations. *Id.* at 170-73.

by *Payne*. Accordingly, caution by the state in using this technique is warranted, and defense counsel should carefully document any demonstration of emotion that otherwise would not be part of the record.

If victim impact evidence is admitted, the predictable result will be that the race of the victim will play a greater role than ever in determining who will live and who will die.

Victim impact evidence may likewise be excluded on standard evidentiary grounds where prejudice outweighs probativity. For example, courts should be challenged to exclude "celebrity witnesses" called to attest to the victim's character or standing in the community. Also, defense lawyers should object to use of witnesses who have in previous hearings engaged in emotional displays when other fully knowledgeable witnesses are available. Finally, cumulative witnesses who add only to the emotional impact of the evidence should be excluded.

Fourth, two types of evidence useful in countering victim impact evidence may be developed without directly confronting the prosecution's witnesses. If victim impact evidence has been ruled admissible, the impact of execution on the defendant's family should be developed as well.⁴⁶ Additionally, through a nonconfrontational cross-examination of victim impact witnesses, the defense counsel can bring out information about the supportive structure that the victim enjoyed while growing up. This background can then be contrasted with the deprived and often abusive environment in which the defendant was raised.

Fifth, all sides in both *Booth* and *Payne* recognize that the defendant has a right to rebut victim impact evidence. Whether the defense will want to do that as a tactical mat-

ter is unclear, and there may be a tendency to avoid confronting the issue in cases where the evidence is particularly powerful. However, many death penalty defenders believe that, in those cases where it is the most powerful, the jury will almost always demand a response or else they will assume that defense counsel agrees that the evidence decides the case for death. The defense response may come in cross-examination or in argument.

A direct counter to the evidence will generally depend upon the defense having developed information about the victim's life and its flaws—convictions, divorces, civil suits, alcoholism or drug usage, etc. Getting such information requires thorough investigation,⁴⁷ and the amount of information developed will determine whether the effort to counter the victim impact evidence is worth attempting. However, the better use of such evidence is to convince the prosecutor that putting on victim impact evidence would be a mistake or that at least it should be presented in a very truncated form.

The prospect of confronting survivors with the failures of the murder victim, as dreadful as it is to contemplate, is the consequence of *Payne*. However, while criminal defense attorneys are only beginning to deal with victim impact evidence, civil defense attorneys in wrongful death cases have been confronting similar problems for years, and defense attorneys may wish to seek their advice.

Sixth, if the information will be very powerful, the jury is unlikely to ignore it. Counsel may need to confront such effective victim impact evidence in either voir dire or opening statement or both, letting the jurors know its power so that when they hear the evidence itself they will not be surprised. In closing argument, counsel must almost certainly address it. One potential technique is an argument based on essential principles of fairness: Justice is not based on the identity and status of the victims; for the prosecution to suggest that death should turn on whether the victim was a prostitute or a bank president goes against the very principles on which our nation was built.

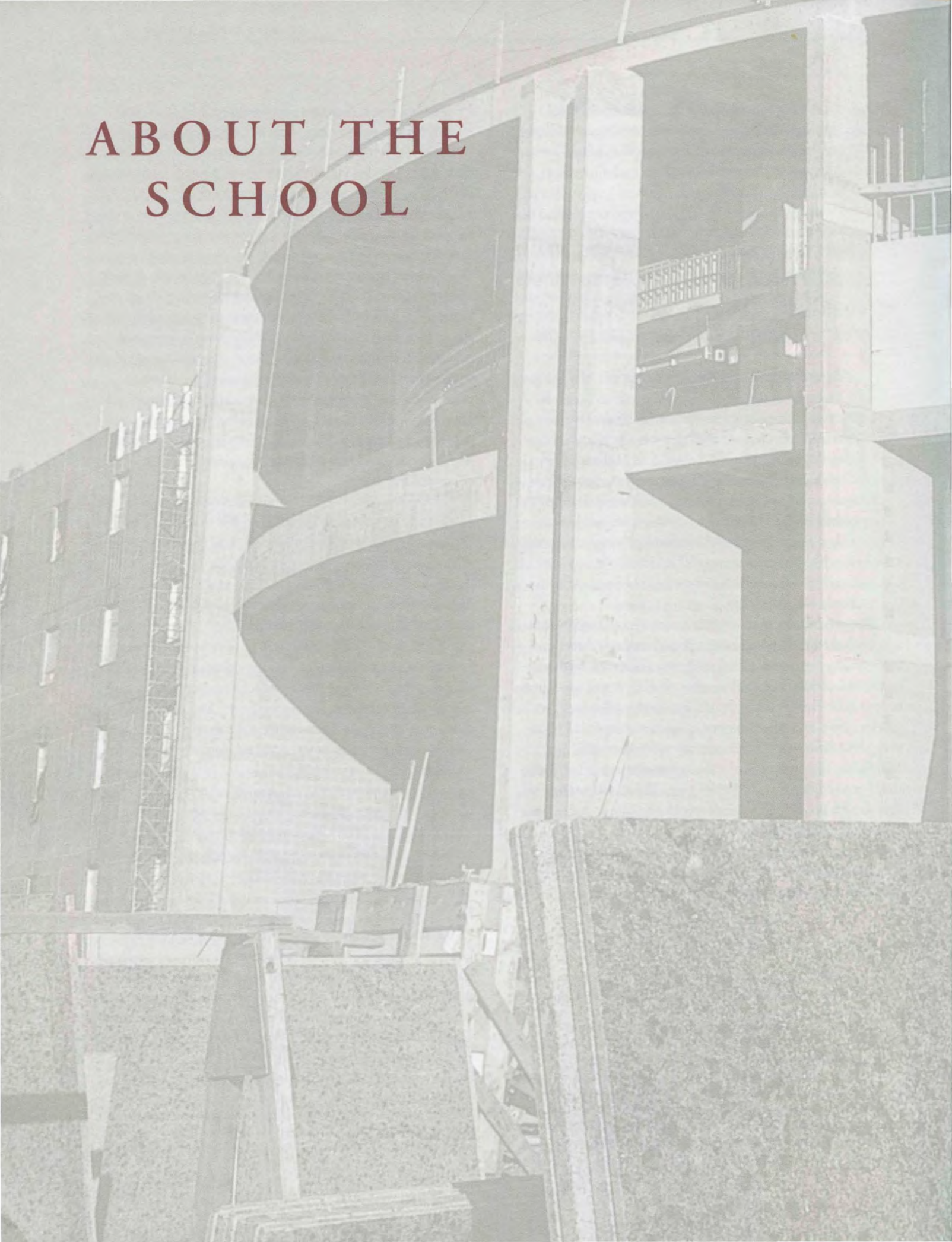
Conclusion

Awareness of the issues raised by *Payne* can provide benefits in alerting defense attorneys to improper evidence and arguments that presently may be slipping into trials. In particular, it should sensitize the defense to the potential benefits of opening communication with the victim's family. Finally, if victim impact evidence is admitted, careful preparation and investigation to meet the evidence is critical, and counsel must devise a strategy to counter its emotional impact on the jury.

⁴⁶ Even without the admission of victim-impact evidence, one may argue that *Payne* established that the impact of the defendant's death on the family is now a mitigating circumstance. Indeed, the California Supreme Court was willing to assume the validity of that proposition. *People v. Bacigalupo*, 820 P.2d 559, 581 (Cal. 1991). Note that if the defense introduces such evidence, the courts will likely allow victim-impact evidence to be received in "rebuttal." However, the theory of *Payne* does not support use of a victim's bad character as a mitigating factor, although the argument has been advanced already by defense attorneys in states permitting victim-impact evidence.

⁴⁷ Thorough investigation will entail funds for an investigator. If the prosecution intends to introduce victim-impact evidence, a motion for funds for an investigator has substantial merit.

ABOUT THE SCHOOL



Mordecai Legacy Continues through Scholarships

Among the “name” scholarships offered by the Law School, none carries the historic weight of the Mordecai [pronounced MOR-de-key] Scholarship honoring Samuel Fox Mordecai, the School’s legendary first dean. The award is financed by the R.C. Kelly Law Endowment Fund, named for one of the Law School’s first graduates and a widely-known and respected North Carolina attorney.

The scholarship endowment fund was established in 1990 with gifts from the late Ellen Mordecai Kelly Follin, Mordecai’s granddaughter and R.C. Kelly’s daughter. Born in 1911, Follin was a strikingly beautiful woman who inherited her grandfather’s famous wit. She spent her early childhood in Asheboro, North Carolina, where R.C. Kelly first practiced law. The family later moved to Winston-Salem and then to Greensboro. After her mother’s untimely death, young Ellen spent much time with her mother’s sister, Bessie Mordecai Mackie, in Washington, D.C. She graduated from Sidwell Friends Secondary School there in 1929. During those years, Follin became a great admirer of her grandfather Mordecai, having visited him in Durham as a child, and enjoyed reading his collected letters and verse.

Follin received her bachelor’s degree in English in 1933 from Sweetbriar College, an independent women’s college near Lynchburg, Virginia. On graduation, she took a staff position at Sidwell Friends School. Shortly thereafter, she wed insurance executive Marion G. Follin, Jr. and moved to Greensboro, where they raised two children, attorney Marion Follin III, of Smith, Follin & James in Greensboro, and Ellen Follin Kelly, of Charlotte. Follin was active in the Greensboro



Ellen Mordecai Kelly Follin (1964)

Junior League and in Holy Trinity Episcopal Church.

A private person, Follin was known among her many friends for her sparkling wit and talent for verse. A lifelong friend, Margaret Brooks of Greensboro, recalls Follin’s impressive knowledge of the classical poets and her passion for writing, though she never was published. During their youth, says Brooks, “She [Follin] was always the shining star in the class.”

Follin had her high-spirited side, as well. Her secondary school classmates at Sidwell Friends recalled in the 1929 yearbook her fondness for “short skirts and the highest of heels,” and her husband, Marion Follin, Jr., recalls her outgoing nature, interest in people, and love of dancing.

Follin’s gifts to Duke Law School over the years amount to the largest donation ever made to the School by an individual. Says Marion Follin, Jr., “She really wanted to do something that would benefit the University and at the same time identify her father and grand-

father’s connection with Duke. Her family encouraged her in doing that.”

Mordecai Scholarships are awarded to incoming students with outstanding undergraduate academic records, work experience showing leadership and maturity, community activities showing moral character, and need. As Dean Pamela B. Gann often remarks to alumni, “Financial aid is one of the most critical factors determining student choice of which law school to attend. Over half of our admitted applicants demonstrate a need for financial aid assistance to be able to pay their educational expenses. With so many students requiring scholarships, Mrs. Follin’s gift is extraordinarily important in providing the Law School with broad discretion in choosing students to benefit from the scholarship fund. Her gift also provides a leadership example to our alumni whom we hope will also want to help the Law School meet the financial needs of our students through increased scholarship endowment funds.”

The Mordecai Scholarship has been a deciding factor in attracting superior students to Duke. Sara Emley, JD/LL.M. ’93 in international and comparative law, says receiving the scholarship caused her to choose Duke over other top schools. Emley, who graduated Phi Beta Kappa from the University of Michigan, says the grant also enabled her to pursue the international degree, which requires one summer session overseas at Duke’s Transnational Law Institute held every July in Brussels. Emley clerked for a federal judge in Tulsa after graduating, and has been hired by Wilmer, Cutler and Pickering in Washington, DC, where she hopes to pursue a career in international law.

Anita Terry '95, a Phi Beta Kappa graduate of Colby College in Maine, says the award "really made it possible for me to come to Duke. The prospect of taking out \$30,000 a year in loans was incredibly daunting, even to someone who had a lot of loans coming out of college. It was certainly an honor to get that [the Mordecai Scholarship]."

During his lifetime, Dean Mordecai's powerful intellect and many eccentricities gained him legendary status. He was a master of socratic irony, and like his contemporary, Mark Twain, sharply honed his gift for irreverence. He was given to magnificent outbursts of cursing when his consistently high expectations were frustrated, appalling the more conservative faculty. Mordecai taught law "in the grand manner," according to a former student, and his *Law Lectures* and *Law Notes* became recognized as the best resources on law in the South.

Greensboro lawyer Marion Follin, III, Mordecai's great-grandson, notes that Dean Mordecai's writings still are cited in North Carolina cases. He recalls a 1971 land dispute in which the judge advised Follin and his partner to research their argument in Mordecai's *Law Lectures*, a restatement of Blackstone's Commentaries in terms of North Carolina law. They did so, and upon their making the citation, the judge declared, "That's the law of North Carolina!" The case was closed. Follin chuckled over the incident later: "They're not going to reverse Dean Mordecai — that would be an affront!"

From his beginnings in Richmond, Virginia, in 1852, Samuel Fox Mordecai's remarkable life spanned the period from the Civil War — General Sherman's victorious soldiers camped around the family home in Raleigh — to the coming of the automobile. In Mordecai's later years, Raleigh's chief of police once voided a ticket issued on Mordecai's auto for exceeding the 25-mile-an-hour limit. In her delightful

memoir, *Recollections of Papa*, Margaret Mordecai Blomquist reports the police chief sent the Dean a permit "allowing Samuel Fox Mordecai to ride through the city of Raleigh as fast as his car would go, just so long as he didn't knock the dome off the Capitol, which has recently been painted at great expense to the taxpayers."

Mordecai attended private schools in Raleigh, and was influenced in his



Richard Cecil (R.C.) Kelly.

pursuit of law by his Uncle George Mordecai, a Raleigh lawyer who was a father figure to him as Samuel's own father had died before his birth. Samuel Mordecai graduated from the University of Virginia in 1875, and later that year he and Bettie Grimes were married after a long, formal courtship. Their family eventually numbered nine children.

Mordecai established a distinguished practice in Raleigh with his partner, William H. Battle, and in 1900 began giving law lectures thrice weekly at Wake Forest Law School. In 1904, Trinity College (now Duke University) recruited Mordecai as Senior Professor of its fledgling law department. The department was formally instituted as

the School of Law in 1905, with Professor Mordecai as Dean.

Trinity's admission and degree requirements set a new standard in Southern legal education, according to Law School alumnus and former law professor, W. Bryan Bolich '21, in a 1972 history of the School. The School required two years of college work for admission, three years for the LL.B. degree, and adoption of the case method as the basis of instruction. Elsewhere, lectures or texts formed the basis of instruction, teachers were seldom full-time, and admission requirements seldom exceeded a high school education. Wrote Bolich of Mordecai's tenure: "We didn't just study law, we *lived* law. Mr. Mordecai was inspirational. He ran a strictly professional school...with a single aim: to make great lawyers. His method was socratic and his system near tutorial 'as he drove his students to excellence with a lash of jovial satire and scorn for mental laziness.' He loved his students and they loved him."

Trinity's high admission standards and degree requirements limited matriculation to a select few. Only about 200 were enrolled during Dean Mordecai's tenure, 1904-1927, yet that small group left a disproportionately large legacy in North Carolina. Two of the Dean's students, William B. Umstead and Gregg Cherry, became governors of the state. A third, Edwin Gill, became state treasurer.

In 25 years Dean Mordecai reportedly missed only three lectures. Even when ill, he would bolster himself with pillows and conduct classes from his sickroom. He frequently hosted his students at his home, and on his customary late night rambles would often visit them. On one occasion Mordecai cajoled a reluctant student from his studies to accompany him on an evening visit, saying, "You come on with me; I'll teach you more law on the way than you can learn in two

weeks studying by yourself." Next day, the Dean slyly queried his class on a point of law he had reviewed with the student the previous night. None but Mordecai's erstwhile companion had the answer. Railed Mordecai to the rest, "You fellows haven't studied this assignment. Why the hell don't you stay in at night like Mr. S___ and learn some law?"

Dean Mordecai's beloved dachshund, christened Pompey Ducklegs by his 90-year-old mother, accompanied him nearly everywhere, and was forgiven nearly everything. In *Recollections of Papa*, Margaret Mordecai Blomquist recalls, "Only Pompey Ducklegs could have chewed the Book of Genesis out of the family Bible and lived to digest it."

Pompey Ducklegs even, according to Blomquist, starred in a March 1948 account of Duke University history in *Cosmopolitan*. The writer, Ralph G. Martin, reported the Dean's favorite canine "would always accompany him to class and fall asleep, which few of the students dared do." One day, Martin continues, "Pompey embarrassed Mordecai by barking and moaning, diverting the whole class's attention to himself. The class had been particularly unresponsive that day and when Pompey finally coughed up some food, Mordecai yelled at his students, 'Get out of here, you numskulls, you're so dumb that you even make my dog sick.'"

Forgiving as he was of Pompey Ducklegs, Dean Mordecai never forgave law librarian J.P. Breedlove, with whom he had a minor altercation one day in 1921. From that day on, the Dean never set foot in the law library, and transacted library business by tapping with his cane on a ground floor window. The window would be opened for the assistant librarian to deal with the Dean. In his Alumni Directory sketch, Bolich attributed this development to the fact that, "Age was creeping up on the Dean and he was a

little crotchety." Indeed, Mordecai lived only six more years, passing away in December 1927.

Richard Cecil (R.C.) Kelly was born in 1886 at Staffordsville, Virginia, and in 1907 received his law degree from Trinity College. Dean Mordecai was a great influence on the young lawyer. Kelly met his future wife, the Dean's daughter, Ellen, at a dinner at the Mordecai home, and they were married in 1909. During his career, Kelly was general attorney for the R.J. Reynolds Tobacco company in Winston-Salem and division counsel for the Southern Railway company in Greensboro. In the latter capacity Kelly appeared before the North Carolina Supreme Court.

Regarding Kelly's Reynolds Tobacco position, a newspaper account of the time called it "perhaps the most desirable legal position in the State — possibly in the south." Kelly died of a heart attack in 1937, at age 50. It was a measure of the high regard in which he was held that a score of prominent attorneys from around the state gathered to pay him tribute in a special memorial service in the Guilford County superior court house later that year.

Samuel Fox Mordecai and R.C. Kelly's passing left their colleagues with a profound sense of loss. At a special memorial service for Kelly six months after his death in May 1937, attorney C.R. Wharton said the state had lost one of its "greatest and most learned lawyers." Of Mordecai, friend and fellow attorney Jones Fuller said, "I consider him the wisest man I ever knew and have never become reconciled to his death. Such an intellect should not be permitted to die." With her singular generosity to the Law School, Ellen Mordecai Kelly Follin has ensured the memories of both of these remarkable legal minds will live on.

Deborah M. Norman

MORDECAI'S MISCELLANIES

In addition to his scholarly writings, Dean Mordecai left a book of personal correspondence, speeches and verse entitled *Mordecai's Miscellanies*. By turns crotchety, whimsical, and solemn, the collection above all displays Mordecai's delight in the ridiculous. Here is a sample — a letter inquiring about a delayed shipment of shirts:

The A. Shirt Co., 1911, March 9th
"Philadelphia of the South," Virginia.

Dear Sirs:

I am writing my biography and am in need of certain facts connected with an event of my early life, about which event you may be able to gather some facts from the early records of your corporation.

The event was this: I ordered some shirts from a very agreeable gentleman who represented your company. This was long, long, ago and I suppose that salesman is now numbered among the oldest inhabitants of that Southern Philadelphia, Richmond. Possibly if you would make inquiry you might find him and he might give you the facts. Or possibly the early records of your corporation, as I suggested above, might give some information. I can recall only one incident connected with the matter, and that is that I did not get these shirts. Possibly the Southern Philadelphians are still working on them; as I suppose such work is handed down from one generation to another in that city of inaction and tradition. Of course the shirts would be too small for me now; but it will be an interesting thing to the readers of my biography to know what size I wore in the remote past. If some Southern Philadelphian, not exhausted by his efforts to catch a snail, could hunt up the records and even let me know what was my neck measure at the early period of my life it would be gratifying. Can you help me?

Yours truly, S.F.M.

P.S. I would not trouble you with this if I did not know that while you Southern Philadelphians are slow in action you are great on history. I have the proud heritage of having been born in the Philadelphia of the South, which is evidenced by my deliberation, not to say slowness, in paying bills — a characteristic which you may have observed. By the way, I expect to go to Richmond to be present at the general resurrection. Maybe those shirts will be ready to try on by then. Who knows?

Law School Creates Center on Law, Ethics and National Security

Last fall, Duke Law School established the Center on Law, Ethics and National Security (LENS) to encourage and sponsor teaching, research and publications concerning national security topics. The Center will also conduct courses, conferences and seminars in the national security field, and may occasionally serve as a contractor to perform a particular research project for the government.

The Center is the inspiration of Professor Robinson O. Everett '59, who retired in 1990 as chief judge of the United States Court of Military Appeals. "As I became aware of the vast array of legal topics with national security implications and the paucity of law school instruction and research in this area, I became convinced of the importance of establishing here at Duke a center on national security law," said Everett. "I believe that there is only one other program of this type in the United States — a program at the University of Virginia Law School — and so establishing the Center here puts Duke again in the forefront, as it is in so many areas."

Recently retired Air Force Colonel Scott L. Silliman has been named executive director of the Center. He acquired extensive military and government experience during his 25 year career as an Air Force judge advocate, and developed operational law expertise by reason of his service as Staff Judge Advocate to the Commander of Tactical Air Command (now Air Combat Command) during the Persian Gulf War. Silliman notes that the relevancy of national security issues has increased dramatically. "We're moving from what used to be a bipolar international community to a unipolar one—we're now the only dominant superpower — and

that's caused us to reconsider our national strategy and how we employ our military forces. This, coupled with budgetary constraints and the downsizing of our force structure, has led us to move towards the concept of deploying our forces from within the continental United States to wherever we need them in a contingency, rather than relying upon permanently assigned units in overseas theaters."

Although the Center is located at Duke, it is also conducting seminars on national security law at the law schools at Wake Forest University and the University of North Carolina, and there are plans to offer the seminar to other law schools in the state. The Center is also teaching several blocks of instruction in the Air Force Reserve Officer Training Corps (ROTC) curriculum at Duke University, the University of North Carolina at Chapel Hill, and North Carolina State University, and has already participated in various conferences in North Carolina, Washington, D.C., and New York. Finally, it has accepted an invitation to sponsor, in conjunction with the Triangle Universities Security Seminar (TUSS), a one-day seminar on the legal aspects of war, and has also been approached by the North Carolina Bar Association with regard to hosting a CLE seminar on national security law.

"We're moving quickly to establish ourselves both regionally and nationally," added Silliman. "The Center already has

an outreach program for conducting national security issue-oriented programs at major military installations in North Carolina and neighboring states, and negotiations are underway with universities which offer courses on these installations with a view towards developing videotapes and other materials for use in their course curricula." Silliman also believes the Center will be able to contribute, or facilitate the preparation of, articles for publication in several of the Law School's journals—*Law & Contemporary Problems*, the *Duke Journal of Comparative & International Law*, and the *Duke Law Journal*.

The Center's Board of Directors include, in addition to Everett, Duke Law professors George Christie, William Reppy and Melvin Shimm; Duke Law professor emeritus H.B. Robertson, a former judge advocate general of the Navy; UNC professor of history Richard Kohn, who serves as TUSS's executive secretary; associate dean James Taylor, Jr. of Wake Forest University Law School, a former deputy judge advocate general of the Air Force; and Eugene Sullivan, current chief judge of the United States Court of Military Appeals.



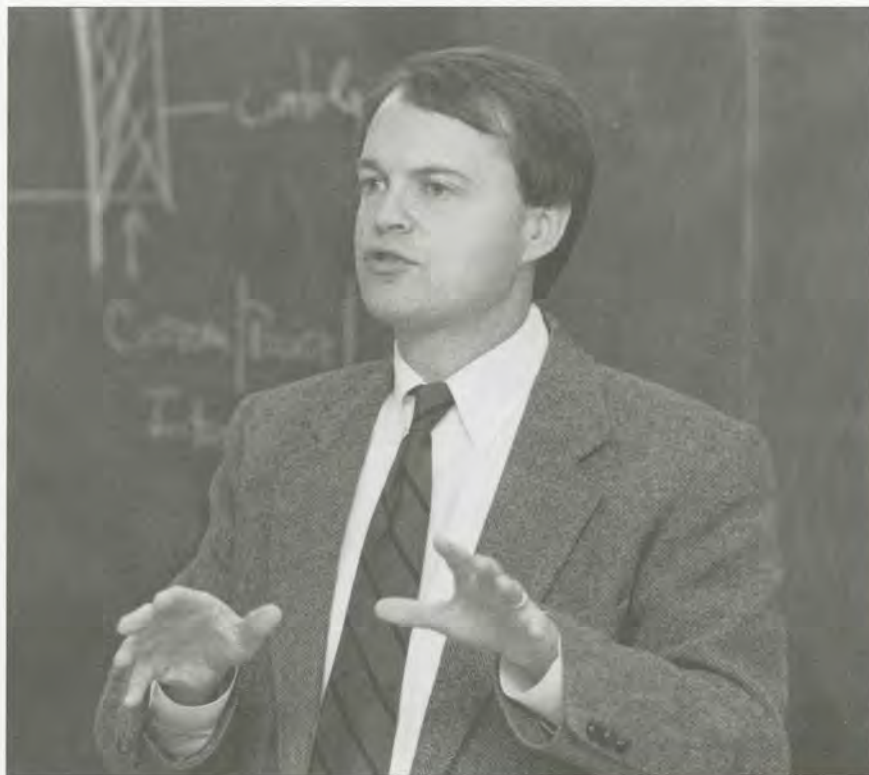
Scott Silliman, left, and Robinson Everett

Keck Grant Funds Ethics Offerings

Thanks to a \$300,000 grant from the W.M. Keck Foundation of Los Angeles, an innovative new Program in Ethics and the Legal Profession began this past fall at Duke Law School. The grant is part of a series of awards that the Keck Foundation is making to law schools to improve the teaching of ethics. Duke's approach, according to Dean Pamela B. Gann, will be to "develop courses and seminars that deal exclusively with ethical issues in the context of particular legal settings, such as civil or criminal litigation." During the period of the three-year grant, Gann said, the Law School faculty will evaluate the effectiveness of its teaching program. The faculty will also act as host for a conference for all the law schools who have received Keck Foundation grants for ethics. The conference will focus on the teaching methodologies developed and their effectiveness.

The W.M. Keck Foundation was established in 1954 by the late William Myron Keck, founder of The Superior Oil Co., one of the nation's largest and most successful independent oil companies. Under the leadership of President Howard Keck, the foundation has grown to become one of the nation's largest charitable organizations. The foundation's interests remain education, science, engineering and medical research.

Professor Thomas B. Metzloff, who is directing the Law School's program, says the Keck Foundation gift will enable the Law School to "fulfill its vision of what teaching legal ethics should be. The history of the teaching of legal ethics has been episodic," he notes, "something that, prior to Watergate, some schools did and some didn't. Primarily as a result of Watergate, the American Bar Association created a



Thomas B. Metzloff

requirement that students take at least one ethics course before graduation," said Metzloff, who has been teaching introductory legal ethics courses at Duke for the past eight years.

Most law schools responded by offering the required ethics course in the final semester of the third year—a course that often was unpopular with the students. When former Dean Paul D. Carrington introduced about 10 years ago a one-week, intensive ethics seminar for first-year law students, Duke was one of the first schools in the nation to do it that way. The faculty believes that offering the course in the first year starts students thinking about ethical issues early in their law studies.

That introductory course will continue. However, despite its overall popularity, Metzloff said it is, by necessity,

a "hodgepodge" of legal ethical issues that make it difficult for in-depth study. He said that's why advanced, more specialized courses like those to be featured in the new program are important. "For example, a third-year student who knows she's going to Atlanta to do litigation will be able to take a course that focuses on ethics within the litigation context. By allowing students to concentrate on what they actually think they'll be doing, we can reach a new level of relevancy."

Course Offerings

Several new courses dealing with ethics were offered during the 1993-94 academic year:

Ethical Issues in Civil Litigation, taught by Professor Metzloff. The course cov-

ered a number of specific ethical concerns relating to (1) negotiation tactics; (2) civility among lawyers; (3) discovery abuse; (4) the court's role in sanctioning litigator misconduct; and (5) alternative dispute resolution.

The History of the American Legal Profession as the Instrument of Civic Virtue, Patriotism and Public Service, taught by Professor Carrington. This course examined the role of the legal profession in the scheme of constitutional government as envisioned in the 18th century and the ways in which that role and vision were modified by subsequent events. The course was intended to afford students an opportunity to reflect on the extent to which their own careers can and should serve the public interest.

Governance, Responsibility, and Crime in the Public Corporation, taught by Professor James D. Cox. In general, this course considered a number of issues relating to business ethics, including a number of interfaces with legal issues.

Professional Responsibility in Representing Regulated Clients, taught by Professor Lawrence G. Baxter. Professor Baxter was a member of and reporter to the ABA's Working Group on Lawyers' Representation of Regulated Clients that analyzed the ethical issues related to the *Kaye, Scholer* lawsuit (see article on p. 4). The seminar focused on such topics as the duties of confidentiality (to clients) and candor (to courts and tribunals), the duty (if any) to report regulatory problems to superiors within client institutions, and to the regulators, conflict of interest problems in the joint representation of affiliated entities, and special ethical responsibilities when dealing with regulators.

Other upper-level courses that have been previously offered also deal with ethical issues. For example, Pro-

essor Melvin G. Shimm is again teaching a seminar on *Medical-Legal-Ethical Issues*, an interdisciplinary seminar which brings together students and faculty from the Medical, Law and Divinity Schools. Also, Professor Metzloff is again teaching a course on *Professional Liability* that includes a major section on the issue of lawyer liability for ethical violations. Professor Martin P. Golding is also offering his seminar, *Responsibility in Law and Morals*, which investigates the relationship between responsibility in the law and moral blameworthiness.

Several of the new courses mentioned above will again be offered in the 1994-95 academic year. In addition, several professors are planning other ethics-related course offerings, and the Law School anticipates teaching a total of at least eight advanced ethics courses, and perhaps as many as 10, during the next academic year. Professors Sara Sun Beale and Robert P. Mosteller will likely offer a course on ethical issues in the practice of criminal law. Professor Deborah A. DeMott intends to teach a course on lawyer's fiduciary obligations, and Professor Christopher H. Schroeder is planning a course on the ethical obligations of government attorneys. Professor Metzloff is working on a course studying the modern American legal profession, examining such trends as specialization, the growth of law firms, and corporate in-house lawyering on the provision of services. Nancy R. Shaw '73, who is a senior lecturing fellow at the Law School teaching the substantive courses in trust and estate planning, has agreed to teach a course on ethical issues faced by the estate and trust lawyer.

Lecture Series

The Keck grant also provides support for a series of lectures on specialized ethics topics. During the fall 1993, Duke conducted two excellent programs that were both well-received

and well-attended. Each is available on videotape in the Law School Library.

On November 4, The Honorable David Ebel of the Tenth Circuit Court of Appeals, presented a lecture entitled "The Ethics of Alternative Dispute Resolution." Judge Ebel was a major proponent of a recent ethics rule change in Colorado — the first state in the country to so amend its rules — that urged lawyers to affirmatively consider ADR in handling their cases. A number of other states are now considering similar changes.

On November 10, The Honorable Mary M. Schroeder of the Ninth Circuit Court of Appeals spoke on the recent amendments to Rule 11, which is the primary means by which attorneys are sanctioned for misconduct. Since its amendment in 1983, Rule 11 has been one of the most controversial of the civil rules as literally thousands of attorneys have been sanctioned pursuant to its dictates. Recently, a revised Rule 11 was approved by the Supreme Court over strong dissent by Justice Antonin Scalia. Judge Schroeder, who had been an active participant in the entire Rule 11 debate, explored the difficulties of controlling attorney behavior.

It is planned that the Law School will host at least two speakers this spring to take part in a symposium relating to the *Kaye, Scholer* matter, and plans are being made for the conference with the other law schools that received Keck grants, to be held in 1995.

It is clear that student awareness of and interest in ethical issues has been increased because of courses and lectures made possible by the grant from the Keck Foundation. In the past, students sometimes criticized the Law School's one-week ethics course as being inadequate. There is now a greater sense among the students that the first-year course is an appropriate introduction, and the Duke Law School is committed to advanced studies in the area of legal ethics.

Frontiers of Legal Thought Conference: A Personal Reflection

Editor's Note: The Frontiers of Legal Thought Conference was first organized by students in 1990 to explore new directions in legal thought and practice. Previous Frontiers Conferences have dealt with issues of race, gender, and law and the family, among others. The 1994 Conference was centered on the issue of "Criminal Justice: Towards the 21st Century." Attorney General Janet Reno gave the Conference's keynote address on January 22, 1994.

The following is a personal reflection about the Conference by the student organizers, both members of the Class of 1994.

When we began planning this year's Frontiers of Legal Thought Conference over 10 months ago, we set for ourselves one very simple goal: to focus the attention of the Duke University community on criminal justice issues. We selected that topic for several reasons. Both of us intend to pursue careers in criminal justice and that personal interest clearly played a role in our decision. We also felt, however, that any proper discussion of criminal justice would necessarily involve broader social questions of race, class and gender. We feel strongly about those issues as well and we were confident that a conference focusing on criminal justice would provide an excellent forum for a discussion of those social concerns.

We should not have been surprised, then, to find at the close of the Conference that social concerns played such an important and central role in the panel discussions and in Attorney General Janet Reno's keynote address. We were surprised, however, because we had failed to predict the fundamental role that social issues play in the criminal justice system. The mistake is under-



Attorney General Janet Reno delivered the keynote address at the Frontiers of Legal Thought Conference on January 22, 1994.

standable, as it was largely a product of the overwhelming sentiment of the American public. In public opinion polls, Americans are citing crime as the one issue that most concerns them, even above the budget deficit. Politicians have responded to this atmosphere as electoral politics requires them to; they have implemented "tough on crime" policies that have very near-sighted objectives, re-election being chief among them. Social concerns like racism, economic inequity, education, child care, and health care have played little or no role in the debates that produced the "tough on crime" policies.

No matter what the politicians think the public wants, however, the 30 or so experts that gathered at Duke Law School for the fifth annual Frontiers of

Legal Thought Conference agreed that if we are going to be serious about solving the problems in our criminal justice system, we have to be serious about social issues. Repeatedly, social problems were identified as the source of criminal behavior or the source of the current system's failures. This position was taken up by none other than the Attorney General herself.

In the Conference's keynote address, delivered before a crowd of more than 1,000 students, faculty, and community leaders, Reno declared that "lawyers working with doctors and other disciplines have got to develop an approach that can reweave the fabric of society.... Some people say, that's Janet. She's a nice, sweet, young thing;

but she's more a day-care person than a prosecutor. She's soft on crime. I don't know any victim of crime who would rather have had the crime occur than have had it prevented in the first place. And if preventing crime is soft on crime, I plead guilty." Instead of building more prisons, she argued, we should be establishing drug rehabilitation programs, advocating for parental leave, and pursuing an equitable health care reform policy.

Gwendolyn Chunn, director of North Carolina's Youth Services, echoed the Attorney General's sentiments at a panel on 'Juvenile Justice.' "What I don't want to see is the notion that getting tough will alleviate the problems." Other panelists agreed, calling for a bet-

ter education system, better health care, and counseling programs.

Panelists assembled for a discussion of 'Race and the Death Penalty,' focusing on the landmark Supreme Court decision in *McCleskey v. Kemp*, 481 U.S. 279 (1987), urged the view that racism pervades every level of the criminal justice system. Stephen Bright, director of the Southern Center for Human Rights, explained that in its *McCleskey* decision, the Supreme Court could not find the death penalty unconstitutional even though statistical evidence proved that the penalty was disparately imposed against blacks. Such a finding, Bright argued, would have suggested that racism operates throughout the criminal justice system, not merely in capital proceedings. Julius Chambers, chancellor of North Carolina Central University and past director of the NAACP's Legal Defense Fund, summarized the holding in *McCleskey* with these words: "A little bit of discrimination doesn't make a difference, especially against black folk."

Similar issues emerged at a panel discussion of 'Citizens' Justice' which dwelled on the recent Seagroves shooting incident in Durham. Michael Seagroves, a white Durham resident, shot two black youths who had broken into his garage. One of the teenagers died and Seagroves was tried for manslaughter. The jury deadlocked over the case and a mistrial was declared. Seagroves' trial left unresolved many of the issues that arose after the incident, and the panel provided a forum for resolving some of those questions. Duke Law School professor Jerome Culp moderated the charged discussion that moved from the topic of racism, to gun control, to education and then back to racism. Steve Twist, the executive director of the NRA's Crime Strike, added balance to the panel, calling for a consideration of the rights of the victims of crime.

The Conference also featured panels that discussed 'Prison Reform' and

'Criminal Legal Theory.' The 'Criminal Legal Theory' panel featured Abbe Smith, deputy director of Harvard Law School's Criminal Justice Institute, who presented her paper, *Criminal Responsibility, Social Responsibility, and Angry Young Men: Reflections of a Feminist Criminal Defense Lawyer*. The paper argues that juries ought to have access to more information about defendants, including information about the social conditions in which they were raised. Gil Garcetti, district attorney for Los Angeles County, responded by emphasizing the need for the courts to produce justice within the framework of the law and not ambiguous, though sympathetic, social circumstances.

There is little question that we succeeded in the goal that we set for ourselves. For three days in January, Duke Law School focused its collective attention on the criminal justice system; and the Conference panels and the Attorney General's speech continue to spark discussion among Duke Law students. This is only the beginning, however. As concern for crime increases steadily, it begins to take on the face of the major social crises that have threatened the foundation of this nation in the past. At every turn, we have confronted those crises with, among others, legal solutions. The Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution set about healing the wounds left by a legacy of slavery and the bloody Civil War fought to end it. Supported by law, the New Deal was implemented to salvage a nation racked by the Great Depression.

Again, it will be the law that will be called upon to help America solve the criminal crisis that has overtaken us. It is clear that this will require that we think of the law more holistically, with its obvious social implications in mind. The current generation of law students will be the judges, scholars and practitioners that will face this challenge, and it seems that we cannot

begin thinking and talking about it soon enough. The 1994 Frontiers of Legal Thought Conference has already set Duke Law students down that path.

We would like to thank the many panelists, student volunteers and financial contributors that made this year's Conference possible. We are especially indebted to Duke Law School professor Walter Dellinger, who is currently on leave serving as an assistant attorney general, for his help in securing the appearance of Attorney General Reno as the keynote speaker. We are also grateful to Duke President Nan Keohane and Dean Pamela Gann for their tactical and financial support. The Duke Bar Association provided generous support, as did the Duke University Women's Center and Duke Law School's Prisoner Rights Project. We would be remiss if we failed to mention the corps of Duke Law students who labored over the past months beside us. We especially extend our appreciation to Anne Harrison '96, Mary Johnson '96, Linda Martin '96 and Ted Bennett '96.

We would also like to recognize the efforts of those who have organized this Conference in the past. Under the leadership of students, both past and present, the Frontiers of Legal Thought Conference has truly become a national event.

James W. Smith, III '94
Russell A. Miller '94

James Smith '94 was honored by the North Carolina Bar Association last fall as the recipient of a Student Pro Bono Service Award. During his years at the Law School, Smith has volunteered with the Henderson Office of the North Central Legal Assistance Program, the Federal Public Defender's Office in Fayetteville, the Institute for Southern Studies, and the Wage and Hour Division of the Department of Labor. He has also worked for the North Carolina Attorney General's Environmental Section and for Legal Services of the Lower Cape Fear.



THE
DOCKET

Egerton K. van den Berg '59

Lawyering with Heart

Late in the winter of 1955, as snow howled through the Russian border outpost where the U.S. Army's Tenth Infantry Division shivered under the firs in their outdoor billet, Egerton King van den Berg '59 decided he'd had enough. Chilled to the bone, he set his sights on a career in law.

A 1953 West Point graduate and the grandson of Ernest J. King, the highest ranking admiral in Naval history, van den Berg held government offers to study at Harvard and Princeton. But Duke not only offered a "magnificent" law school — it offered sunshine. He took the LSAT in Heidelberg in February and was accepted, with a scholarship. By the fall of 1956 he was in Durham.

Today, the sun still shines on van den Berg. He is one of Orlando, Florida's most respected attorneys, known for his prodigious intellect, business acumen and pro bono involvement. As general counsel for the Orlando airport, he has steered the authority through an ambitious quarter-century of land acquisition that has given it the third largest land area in the United States. His litigation expertise is sought on issues ranging from water and transportation to agriculture and employment. He was a major force behind Orlando's award-winning Legal Aid program, and recently developed an ingenious minority-and-women-owned business capitalization program that promises to become a model in the nation's capital and elsewhere.

When he started Law School, van den Berg, like a number of returned military students, was married, with children. In addition to the scholar-



Egerton K. van den Berg '59

van den Berg surprised everyone by accepting the offer of a relatively little-known real estate firm — in equally little-known Orlando, Florida.

ship, he financed his education and household expenses with G.I. bill checks and three part-time jobs. His main job was designing mechanical systems for T.C. Cooke and Company, a local engineering firm. He also worked at the Duke Law Library and at Sears, Roebuck in town.

In 1958, van den Berg became the first editor-in-chief of the *Duke Law Review*. Prior to that, Duke had pub-

lished a student-written *Bar Journal*. The faculty offered to fund a full-fledged quarterly publication if van den Berg would accept the job of editor-in-chief, and he was talked into it by then-Dean Elvin R. Latty. Despite his extracurricular responsibilities, van den Berg graduated first in the class of 1959.

Then he made a surprising move. More surprising even than forsaking the family tradition of brilliant military service for law school. But looking back at his school days, the signs were there. van den Berg has always been quick to spot opportunity. While part-timing at the Sears, Roebuck pet department, he discovered a sure-fire way to maximize his three percent commission. He learned to spot the women whose deceptively simple dress masked their potential as customers — they were schoolteachers, out to buy a class aquarium, and they were a gold mine.

"They would spend \$50 or \$60 at a crack — a lot of money in those days. They bought the whole thing — stand, pump, filter, plants, fish, shells, everything," he says. The young van den Berg nimbly skimmed off these high-yield tropical fish buyers, leaving the low-yield birdseed purchasers for his colleagues.

When van den Berg began to entertain employment offers during his last year at Duke Law, his keen business sense again came into play. His classmates expected him to go with some well-known New York or Washington practice. Indeed, he had plenty of such offers. But van den Berg surprised everyone by accepting the offer of a relatively little-known real estate firm — in equally little-known Orlando, Florida.

van den Berg recalls the Orlando area in 1959 as a pleasant, medium-size municipality of somewhere around 100,000, surrounded by lakes and shade trees. To a law graduate being wooed by Big Apple firms, it seemed a professional backwater. Besides, he had visited Florida once and suffered a terrific sunburn. But on closer observation, van den Berg realized Orlando represented opportunity. The town was emerging as a financial and transportation hub. A new interstate had been built, and the town was drawing businesses and families into the capillaries of its newly-platted suburbs as if by osmosis.

Thirty-five years later, van den Berg's move appears remarkably prescient. The Orlando-Osceola area has grown to 1.3 million. It is the fifth most-popular meeting destination in the country and one of the top 10 in the world. Top employers are Martin-Marietta, Universal Studios, and Disney World, as well as a coterie of well-heeled financial, restaurant and hotel establishments. Families have flocked there, attracted by the employment opportunities and low cost of living.

van den Berg started work in Orlando with Anderson, Rush, Ward & Dean. "Their specialty was real estate. They had a vision of the future of Orlando, and they saw a need to develop a full-service law firm. They hired a lot of people during that time period," van den Berg says now. Among those people were Duke Law graduates John Lowndes '58 and Frank Gay '61. It was the persistence of senior partner Robert Anderson that finally convinced van den Berg to accept the job offer. Anderson enlisted the support of Dean Latty, whose younger brother was practicing medicine in Orlando, to encourage van den Berg to interview with the firm.

On January 1, 1964, van den Berg and Francis Gay left Anderson, Rush to set up their own practice. At the time, van den Berg was a partner and Gay was slated to become a partner the following spring. Gay had been van den Berg's roommate at West Point, and had applied to Duke Law School at his suggestion. The two have been lifelong friends.

He is one of Orlando, Florida's most respected attorneys, known for his prodigious intellect, business acumen and pro bono involvement. . . . His litigation expertise is sought on issues ranging from water and transportation to agriculture and employment.

The move was risky — the two families had seven children and two houses between them. But they never even tapped the \$5,000 line of credit Gay had set up. "It was the right time and place. The established lawyers couldn't handle all the work. We practiced, billed and made money," Gay says now. The two shared an office; when one was occupied with a client the other would work in a cramped storage room. They did everything except criminal law and patent law. Gay handled real estate and tax work; van den Berg handled litigation and corporate work. The firm grew to become van den Berg, Gay, Burke, Wilson and Arkin, and in 1985 merged with Foley and Lardner, a national firm with offices throughout Florida.

van den Berg built his practice by supporting Orlando — and by networking. The growing city needed civic volunteers, and van den Berg rolled up his sleeves and joined the Red Cross, which he chaired for several years, the United Fund (now the United Way), and the Art Museum board of trustees, which he also chaired. He broadened his political contacts by working on two mayoral campaigns, and was active in his church.

In 1961, two years after he arrived in Orlando, he was appointed to chair the Legal Aid Committee of the Orange County Bar Association. His generous nature warmed to the challenge. "It was something I loved doing," he says now. On van den Berg's watch the organization greatly expanded the narrow definition of qualified services to include landlord-tenant disputes, employer-employee disputes and child welfare-child custody cases. "By the mid-1960s we had a real legal aid program. We were the first legal aid society in Florida to have legislation which added money to the court filing fee to help fund...the legal aid office. In about five years we probably increased our accessibility by a factor of four or five."

van den Berg also instigated what remains one of the oldest mandatory pro bono programs in the state. Membership in the Orange County Bar Association obliges Legal Aid Society involvement. (While Bar Association membership itself is voluntary, participation is high — about 90 percent). Today the Legal Aid Society achieves 100 percent participation by the 2,200 Orange County Bar Association members by requiring attorneys to take two cases annually or pay a \$350 fee. Says Catherine Tucker, pro bono coordinator, "There is a lot of pro bono work done in Orange County for its size. We have had a lot of sup-

port from the legal community.” The program was honored in 1991 by the Florida Supreme Court.

A separate program, conceived by van den Berg for Foley and Lardner’s 150th anniversary in 1992, is the

van den Berg built his practice by supporting Orlando — and by networking. The growing city needed civic volunteers, and van den Berg rolled up his sleeves....

Guardianship for Senior Citizens. “We decided to create the program and enhance it for a year hoping we could get community support to carry it from there. There are a surprising number of elderly people who cannot care for themselves, or to whom proper care is denied even though it’s available.

There are two things you need: A person who serves as guardian to love and care for the elderly person, and a lawyer to help the guardian through the maze of gaining guardianship power over the elderly person.” Both services are volunteered. The program, brought to fruition by Foley and Lardner partners and associates, now has been integrated into the county human services agency, with a goal of serving 300 elderly annually.

van den Berg puts his heart as well as his legal mind into pro bono programs. He has been a senior guardian, and according to Tucker of the Legal Aid Society has surprised local judges by making personal court appearances as a guardian ad litem for children involved in abuse and custody cases.

Recently, van den Berg put his negotiating skills to work on an ingenious financing program for minority-and-women-owned businesses at the airport that promises to serve as a model for municipalities and other agencies looking to increase minority-and-women-owned business participa-

tion. “It is a milestone. He was very creative in setting it up,” says Lavern Kelly, owner of Blue Springs Blueprints and a member of the board of directors of the Florida Association of Minority Contractors. “He is a very good listener.

We gave him suggestions and he got it through the legal bases.”

The program deals with one of the biggest barriers to minority-and-women-owned businesses — lack of working capital. To overcome it, the airport proposes to offer a “mobilization payment” of between five and ten percent of the contract to the minority firm. The payment is made in the form of a certificate of deposit, issued by a bank in the firm’s name. The bank bids for this opportunity. The bank then lends the firm 125 percent of the mobilization payment, using the CD as collateral, and is paid from cash flow on the contract. The bank lends the money at prime and pays interest on the CD. At today’s rates, the net cost to the borrower would come to about three and a half percent.

One of the program’s strengths is that it establishes the minority firm’s credit for future jobs. Banks balked at an early, more traditional version of the plan. “They’d meet with us and when the time came to do something their eyes would glaze over,” van den Berg recalls. “They’d say it’s just like pouring water into the sand. Now they’re bidding against each other to see who can lend the most money at the cheapest rate.”

van den Berg’s personal and professional associates hold him in high regard as a friend and colleague. Frank

Gay recalls van den Berg flying from Orlando to Durham and back in one afternoon, just to check on Gay’s progress as a Duke Medical Center heart patient. Regarding his intellect, Gay says, “He is one of the smartest people I have ever known.”

Says client Phil Brown, airport deputy executive director for administration, “Shrewd business people seek him out. He is as well-rounded an individual as I have come across, in the personal, business and legal sense.” Client and friend Harvey Heller, of Heller Bros. Packing Corp., cites van den Berg’s personal qualities, “He’s decent, reasonable, and compassionate. A guy with integrity and sound judgment.”

The van den Berg family is dynastic in proportions: seven children and seven grandchildren, with two more grandchildren on the way. Farthest from home is a son who is an environmentalist on assignment in Alaska’s Brooks Range. The youngest child, a daughter, is four years old — a late-in-life gift of whom van den Berg speaks with unabashed delight. Son Egerton van den Berg, Jr., who also went to Duke (M.D. ’81) and is a practicing cardiologist, is married to Duke Law School graduate, Anne ’86.

van den Berg’s wife of 23 years, Caroline, is a native of Nashville, Tennessee, whom he met on a blind date in Orlando. She is a successful businessperson in her own right, with three retail establishments, two offering jewelry and one specializing in bridal and gift items.

van den Berg speaks of his family with more pride than any of his accomplishments, and enjoys summers trout fishing and riding with the close-knit clan at their Colorado ranch high in the Rockies near the community of Eagle. At that time of year, the snows are only a memory, and the sun shines on them all.

Deborah M. Norman

Katharine T. Bartlett

A Non-Traditional Bridge-Builder

Readers of law professor Katharine Bartlett's essay *Theory as Traction: Feminist Methodology in Practice* a year ago in the DUKE LAW MAGAZINE (Winter 1993) may remember her description of a traditional upbringing on a New England family farm — complete with fresh eggs and milk, barn chores, maple syrup operations, and old-fashioned Yankee “horse sense.” Bartlett still returns “home” with her husband and her three children at least once a year, at Christmas, where her mother, brother, sisters and cousins continue to live, and it is clear in the stories she tells in her writing and to her students that family and tradition play an important role in her life.

Non-Traditional Scholar

At the same time, Bartlett's life as a scholar has taken her to some of the most nontraditional cutting edge issues of our time. As a family law scholar, she has urged legal recognition of a child's psychological parents even when the child's biological parents maintain some parental rights, urged joint custody under certain circumstances, and given testimony on the pros and cons of surrogate mother contracts. A nationally-prominent feminist scholar, she has written and lectured extensively on how law furthers practices based on gender role stereotypes. In addition to her pathbreaking work in the HARVARD LAW REVIEW entitled *Feminist Legal Methods*, she has published a leading anthology in feminist jurisprudence, *FEMINIST LEGAL THEORY* (Westview Press 1991), and an innovative set of materials for law school courses on sex discrimination, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* (Little, Brown 1993).

With this apparent contradiction between the commitment to tradition she displays in her personal life and the commitment to legal and social change in her professional endeavors, it perhaps was inevitable that she eventually should turn to the relationship between tradition and change as an intellectual focus. Her latest project, begun last year when she was a fellow at the National Humanities Center, concentrates on the necessary links between the two. “The treatment of tradition and change by courts, academics, and the popular press as if they were opposites is a mistake,” she argues. On the one hand, tradition is not as fixed as it is usually assumed. “It is constantly being reinterpreted in light of the present and exists only if it is accepted, usually in some revised form, by those in the present,” she says. By the same



Katharine T. Bartlett

token, it is not useful to think of change in stark opposition to tradition. “The most stable kind of change, especially change affecting such matters as

attitudes about gender, builds on recognizable concepts handed down to us from the past,” she says, “concepts as basic as equality and autonomy.” Bill Clinton was able to win the presidency because of his ability to present change in a way that connected with existing American values and traditions. “Too often we think that change requires

“Too often we think that change requires distance from existing values and concepts,” Bartlett observes, “while often what is most necessary is connecting those values and reinterpreting them in light of new insights that emerge from our present circumstances.”

distance from existing values and concepts,” Bartlett observes, “while often what is most necessary is connecting those values and reinterpreting them in light of new insights that emerge from our present circumstances.”

Bartlett currently is the Senior Associate Dean of Academic Affairs of the Law School, a responsibility she has tackled with skill and grace under pressure. While the job is a demanding administrative post, she enjoys the closer look it gives her at the inner workings of the Law School and the opportunities for problem-solving it presents. This year, her work includes continued curriculum development in

areas of increasing importance to lawyers, such as negotiation, international practice, and legal writing, a review of joint-degree programs, and the institution of regular faculty lunch seminars.

Career Decisions

Bartlett received her B.A. from Wheaton College in Massachusetts in 1968 and an M.A. in history from Harvard University in 1969. She was

at the time, but it lay dormant and later when I was re-evaluating things it somehow re-emerged as a direction point for me.”

Bartlett’s decision to study law was a break from family tradition. “There were no lawyers in my family; I didn’t have any role models. At the first orientation I went to as a first-year law student people were talking about Pillsbury, Madison, Sutro and Heller, Ehrmann. I had no idea until much

Paul Carrington, she began teaching civil litigation at Duke, while working part-time at a Durham law firm. Now, she and Schroeder both are full professors at Duke — an enviable “matched career” situation. They have three children, Lily age eight, Ted age fifteen, and Emily age sixteen.

Focusing on Children and Gender

Bartlett’s initial academic interests centered on family law, especially as it

Through her work, Bartlett seeks to identify and build on connections, whether they be among families and their children, or between traditional values and the changes required to eliminate gender-based discrimination.

teaching high school in her home town of Guilford, Connecticut when she attempted to “make a clean break” with her past. She applied for teaching jobs in several large cities and to law school. “It turned out to be easier,” she deadpans, “to get into law school.”

Her decision to attend law school was stimulated by her interest in the juvenile justice system. “I was working with teenagers, some of whom were in trouble with the law,” she explains, “and I wanted to improve what the law could do for children.” She also credits her decision to study law to a cryptic remark her mother made as Bartlett prepared to leave for Harvard’s graduate history program. “I asked her for reassurance that I was doing the right thing in going into a Ph.D. program. Characteristically, she did not answer me directly, but said, ‘When I was a legal secretary I always wondered whether I might have been just as good a lawyer as the men I worked for.’ The remark didn’t make much impression

later that they were referring to law firms — I didn’t know that a law firm consisted of a lot of last names strung together!”

Bartlett met her husband, fellow Duke Law School professor Chris Schroeder, while in law school at the University of California at Berkeley (Boalt Hall). After receiving her J.D. in 1975, Bartlett clerked for the California Supreme Court and then spent three years as a staff attorney at the Alameda County Legal Aid Society in Oakland. “I thought I would be a legal services attorney forever,” she writes of her work, which included major impact litigation in disability law and pension law reform, “until my husband decided to pursue his long-time aspiration to go into law teaching.” Bartlett and Schroeder moved in Durham in 1979 when Schroeder joined the Duke faculty.

“I hoped to get a job in legal services in Durham,” Bartlett says. Instead, at the invitation of then-dean

relates to children. She developed the two-semester Child Advocacy practicum for third-year students that still is in the curriculum, and was a co-author of the widely-used text *FAMILY LAW: CASES, TEXT, PROBLEMS* (Michie 1991). Her most well-known work in family law is an article recommending greater flexibility by the law in custody disputes arising when a child has both biological parents and psychological parents. Commenting on the latest surge of children’s rights advocacy associated with the recent widely-publicized custody disputes between biological and psychological parents, she cautions, “I’m comfortable with the shift from the primacy of the biological unit to the psychological unit. But I would do it in the name of protecting already-established parent-child relationships, not in the name of children’s rights versus the parent.” “Children’s rights are a very attractive notion,” she explains, “but parental rights, however we might re-define who is a parent, are what protects families

from over-intrusive state intervention.”

Bartlett's interest in family law led her to explore the legal implications of gender and her work on gender issues has made her one of the foremost feminist legal theorists in the country. This academic year alone, she already has lectured at the University of North Carolina at Chapel Hill, Dartmouth College, Vermont Law School, and the University of Wisconsin Law School, with other engagements planned at Cornell Law School, Washington University School of Law, and Georgetown.

Regarding Bartlett's work on gender and law, professor Sara Beale says, “She is



Chris Schroeder and Kate Bartlett attended the inauguration of President Clinton in January 1993.

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nationally recognized as one of the leading scholars in the area of feminist jurisprudence. Whenever there’s a conference or lecture series, she is one of the short list of names that everybody wants to have.” Associate professor Madeline Morris agrees. “Kate is a prominent voice in the area of feminist legal studies, both at Duke and at other schools. I’ve found her recent book, *FEMINIST LEGAL THEORY*, particularly useful as a

teaching tool.” This reputation has been strengthened in part by her ability to build bridges, to connect arguments for gender change to recognizable concepts in our tradition, and to find useful components in many different points of view.

Dean Pamela Gann also noted that “It is an extraordinary pleasure to be working so closely with Kate in her position as Senior Associate Dean. The respect that she garners from the faculty has enabled her to tackle some of the most prickly curricular issues for the faculty, such as the quality of our legal writing program and the appropriate content of the first-year curriculum more generally. Kate is such a fine scholar that it is a real sacrifice for her to spend so much time performing administrative tasks, but the faculty and the students are benefitting greatly from her thoughtful attention to some long overdue reviews of what we do in our curriculum.”

Bartlett has also been highly visible in a number of national organizations, including the Society of American Law Teachers (SALT), an organization dedicated to improving diversity and the quality of teaching in American legal education. She has served on the Board of Directors of SALT since 1987.

Through her work, Bartlett seeks to identify and build on connections, whether they be among families and their children, or between traditional values and the changes required to eliminate gender-based discrimination. Bartlett writes, “An interactive view of the relationship between tradition and change recognizes the need to connect and build from aspects of the past, to identify some common ground.” It is clear that Bartlett expects to be judged, ultimately, on how well she achieves that integration in both her personal life and her professional one.

Deborah M. Norman

Trade and Investment Opportunities in China: The Current Commercial and Legal Framework*

by Dong Zhizhong, Danian Zhang '89 and Milton R. Larson

The subtitle of this informative book is more reflective of its content than the main title. Rather than presenting specific trade and investment opportunities, it offers practical advice about the legal environment. As former U.S. Ambassador to China James Lilley comments in his foreword: "This is a businessman's book."

Readers, however, should not expect a detailed "how to" manual, though the chapters on foreign trade and joint ventures come close. Accordingly, relevant statutes and regulations are reviewed with far more "black letter" explication than close theoretical analysis. Particular attention is given to the Foreign Economic Contract Law, which governs many foreign trade

published in the LAW & CONTEMPORARY PROBLEMS issue on *The Emerging Framework of Chinese Civil Law*, this most analytical of the book's chapters revolves around a case study of Occidental Oil's massive investment in the An Tai Bao coal mine project. It remains one of the best introductions to socialist property concepts, which, while attenuated in many respects, continue to inform Chinese leaders' thinking about the parameters of economic reform.

The book contains the requisite chapter on negotiation, and like nearly all other writers on the subject, the authors counsel patience. Strikingly, however, they are far more explicit than most about encouraging the use of high level connections, or *guanxi*, to expedite



Danian Zhang '89 is an associate in the Hong Kong office of Baker & McKenzie, where he specializes in international investment and trade laws of the People's Republic of China. Previously, he practiced law for three years with a major international firm in Washington, D.C., and clerked in both Shanghai and Shenzhen international economic law firms.

Strikingly, however, [the authors] are far more explicit than most about encouraging the use of high level connections, or guanxi, to expedite negotiating and closing a deal.

activities. There follows a discussion of equity joint ventures and wholly foreign owned enterprises and then a walk-through of the steps necessary to establish a joint venture. In a nice touch, the authors not only emphasize the importance of basing discussions on Chinese form agreements but also thoughtfully provide in the appendices translations of the equity joint venture model contract and of the model articles of confederation for an equity joint venture.

Another sort of model is to be found in the insightful discussion of foreign secured lending. Previously

dite negotiating and closing a deal. This advice builds on the recommendation in the initial chapter not to ignore the valuable experience and knowledge that resides in the older generation of Chinese legal and business practitioners who are likely to have developed extensive personal networks. Of course, as the authors usefully remind us, caution must be exercised because impressive titles on Chinese name cards may not always reflect the realities of power and position.

This hardnosed depiction of the pervasiveness and utility of connections contrasts with what I consider

overly sanguine comments on gift-giving. The authors correctly note Chinese negotiators' frequent requests for large delegations to make "study tours" of the American side's facilities. But their observation that gifts need not otherwise be expensive clashes with recent experience in China. The authorities are desperately trying to halt the corrosion of increasing corruption. Taiwanese businessmen have begun to set up warehouses in China so that they can order expensive goods in Taipei or Hong Kong for delivery in the mainland. And, although the Law School has not yet encountered this problem, the representatives of ever

*Quorem Books, 1992.

more impoverished academic and non-commercial institutions have taken to demanding substantial "signing bonuses."

Here and in several other places, the book shows its age. This seems an odd thing to say about a study published in 1992, but China's legal and economic systems have undergone substantial change since the authors completed the manuscript in late 1991. The Economic Contract Law, to which they devote considerable attention, has been substantially revised and should soon appear in its new form. The Ministry of Foreign Economic Relations and Trade (MOFERT) is now the Ministry of Foreign Economic Trade and Cooperation (MOFTEC). Township and village industrial enterprises (TVIEs) are becoming increasingly important actors in both foreign trade and joint ventures as the center relinquishes its micromanagement approval procedures and refocuses on macroeconomic controls. Stocks now play a major role in China's financial markets. (See the profile of Gao Xiqing '86 in DUKE L. MAG., Summer 1993, at 23.)

And, although the Law School has not yet encountered this problem, the representatives of ever more impoverished academic and non-commercial institutions have taken to demanding substantial "signing bonuses."

Not only has much of [the book's] practical advice retained its value, but the portrayal of the system as it stood in 1992 provides a useful benchmark against which to judge the nature of forthcoming change, in particular a sense of the direction, depth, and breadth of that change.

To the authors' credit, they had remarked on the potential importance of TVIEs and had called for an expanded and better regulated equities market. Thus, although their book is no longer as "current" as it was at publication, it is still worth a careful reading. Not only has much of its practical advice retained its value, but the portrayal of the system as it stood in 1992 provides a useful benchmark against which to judge the nature of forthcoming change, in particular a sense of the direction, depth, and breadth of that change.

One hopes that the authors, themselves, will help develop this understanding in a new edition of their work. However, given the pace of change occasioned by Deng Xiaoping's early 1992 celebrated Southern Tour to promote accelerated reform, one also hopes that the authors will find a more readily revisable format than hard cover text. Perhaps a CD-Rom version, or better

yet, electronic publication on the Internet, though that would make the work inaccessible in China.

Reviewed by Jonathan Ocko, Adjunct Professor of Legal History, Duke University, since 1983, and Professor of History, North Carolina State University. At the Law School, Professor Ocko teaches seminars on Chinese law and society.



Jonathan Ocko

Publications by other recent Duke Law alumni that touch on subjects addressed in this book include an essay by **Li Xiaoming '90** on Chinese arbitration practice (1989 DUKE INT'L & COMP. L. ANNUAL 1) and pieces by **Susan Mac Cormac '93** on China's accession to GATT (20 CHINA BUSINESS REVIEW, March–April 1993), and foreign banking in China (20 CHINA BUSINESS REVIEW, May–June 1993, and forthcoming in COLUMBIA J. OF CHINESE LAW).

The Moral Tradition of American Constitutionalism: A Theological Interpretation*

by H. Jefferson Powell

What we have here is an assessment of United States constitutional theory with something to offend everybody. This is because Powell argues that everybody doing constitutional theory these days is captured by liberalism, and that liberalism as a moral and intellectual tradition is dying.

Powell establishes the terms of his argument in the introduction, where he describes the two main camps in contemporary constitutional theory not in the conventional terms of "liberal" and "conservative," but in terms of two competing forms of liberalism. There are those who "see the past 50 years or so as a triumphant vindication of liberalism in its American form"—"liberal" liberals, so to speak—and "those who think many of the trends of recent jurisprudence are wrong" and thus "call for a return to authentic tradition as the solution for constitutional and moral disagreement"—"conservative" liberals—but in either case the point for Powell is that they are liberals. By which he means that they fall within "the tradition of thought and action which originates in the Enlightenment and which regards the individual, understood as an autonomous center of will and reason, as logically and morally prior to any community and all moral commitments" (p.6).

Powell employs this definition of liberalism in diagnosing America's ailing body politic. His diagnosis of the two main camps in constitutional theory is that "neither position is tenable," and then he goes on to offer this terribly bleak prognosis: "the American constitutional tradition has worked

itself into a conceptual and moral quagmire from which it does not appear to have the moral resources to escape" (p.6). Powell is quick to point out that this quagmire is not the result of misguided judges, mischievous politicians, or misled voters, but rather is a symptom of a much broader moral and intellectual illness afflicting liberal democratic polities in the West.

...Powell argues that everybody doing constitutional theory these days is captured by liberalism, and that liberalism as a moral and intellectual tradition is dying.

By way of clarification, Powell's book is in no way a handbook on what is to be done for the survival of the liberalism. It offers no prescription, no course of treatment, no program for recovery, no life-support system that might forestall the death of the body politic. Powell's prose is mercifully free of such consensus-fabricating slogans as "popular sovereignty," "the American people," and "genius of democracy." He displays virtually no stake in furnishing Uncle Sam with a *raison d'être*. This is because Powell inhabits a discursive space that is distinct from Amer-

ican democracy. As suggested in the book's subtitle, "A Theological Interpretation," Powell's identity is Christian and the different discursive space he inhabits is the church. It is from there that Powell executes his unflinching critique of contemporary legal theory, the ultimate purpose of which "is theological; to provide a truthful description of American constitutionalism that will enable American Christians to live and act appropriately in a world in which constitutionalism is one of the most seductive masks worn by state violence" (p. 47).

The book comes in four chapters. The first, "The Concept of a Moral Tradition," consists of a summary presentation of the work of Alasdair MacIntyre, whose two books, *AFTER VIRTUE* (1981) and *WHOSE JUSTICE? WHICH RATIONALITY?* (1988), constitute something of a frontal assault against the leading assumptions of liberalism that have dominated philosophy and political theory since the Enlightenment. MacIntyre rejects the liberal assumption that the self is an autonomous entity existing prior to and apart from communal tradition. From this perspective, there really is no such thing as an "individual;" there are only selves-embedded-in-communal-contexts. Powell spells out how MacIntyre employs this understanding of the self to disclose the central irony of liberalism, which is this: originating as a flight from the tyranny of (mainly religious) tradition, liberalism has demanded that substantive accounts of the good be excluded from public discourse, but this political arrangement has generated yet another tradition,

*Duke University Press, 1993.



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whereby all nonliberal accounts of the good are suppressed in favor of liberal accounts in which "the good" is individually and privately chosen. Liberalism, in other words, has become a moral tradition that rejects moral traditions. Can such a "tradition" of liberalism survive?

In chapters two and three, Powell brings this question to bear on U.S. constitutional theory. Chapter two is an extensive review of constitutional theory from its European and American colonial antecedents to the present day. Each phase in its development is

depicted in terms of conflicts that had to be overcome: in the period of the emergence of the Constitutional tradition, for example, there was the conflict between a common law vision of tradition-dependent discourse and an Enlightenment preference for rationalistic logic; in the period of slavery, secession, and reconstruction, the conflict between the Radical Republicans and the Court's more traditional concern with the distribution of power; in the Middle Years, the conflict between the doctrine of substantive due process and what Powell calls the "Modern Theory" as espoused by Brandeis and Holmes; in the Modern Era, the conflict between the Modern Theory's deferential judicial stance and the continued existence of non-deferential judicial review; and in the present period, the conflict between social morality jurisprudence and a new jurisprudence espousing a doctrine of radical individ-

dition has entered into "a full-scale epistemological crisis" (p. 170).

Chapter three is an examination of how legal theorists are dealing with this epistemological crisis. And they are not, according to Powell, dealing with it very well. After perusing the work of John Hart Ely, Bruce Ackerman, Cass Sunstein, Frank Michaelman, Michael J. Perry, Rogers Smith, Mark Tushnet and Robert Bork, Powell announces that the social morality approach in constitutional theory ("or its postmodern consummation in the antitheories of Tushnet and Bork") has failed (p. 254). He credits Sanford Levinson for taking "the final step" and announcing the "death of constitutionalism." For Levinson, "[l]aw is stripped of any moral anchoring becoming instead the product of specific political institutions enjoying power under the Constitution" (p. 258). This leaves us with a constitutional faith that consists in nothing

Powell's prose is mercifully free of such consensus-fabricating slogans as "popular sovereignty," "the American people," and "genius of democracy." He displays virtually no stake in furnishing Uncle Sam with a raison d'être.

ualism. Powell argues that the radical individualism of *Eisenstadt v. Baird* and *Roe v. Wade* marks the return of substantive due process and thus runs directly counter to the socially oriented premises of the Modern Theory, the result being that the constitutional tra-

dition has entered into "a full-scale epistemological crisis" (p. 170).
 more than "a commitment to taking political conversation seriously;" "[o]r, more darkly... 'a means of fending off the end of the conversation itself.'" Levinson finds that contemporary constitutional theory is ultimately groundless. And Powell concurs.

In chapter four, Powell spells out the “Christian perspective” that informs his reading of American constitutionalism, which he describes as “self-consciously anti-Constantinian” (p. 261). That is to say, it rejects the assumption that Christians should provide an ethic for wielding of secular political power. Accordingly, Powell refuses to put forth a Christian theory of statecraft or jurisprudence on the grounds that this would give theological legitimation of the violence of the nation-state; more specifically, it would foster the twin illusions that the courts are instruments that mete out “justice” in an uncoercive manner, and that individuals play a decisive role in determining how the instrument of the courts are used. When Christians harbor such illusions, which lie at the heart of democratic ideology, they fall into the service

principle, based on Christian commitments, for deciding in the abstract the proper balance between majoritarian and judicial decision-making” (p. 287). Powell suggests that Christians do have a limited stake in voicing a preference for majoritarian over judicial decision-making and in urging the Court to adhere to a renewed judicial deference doctrine, but these are tactical matters that can be decided only on a temporary basis. Hence, this understated observation in the closing paragraph: “Christian commitments, construed in a non-Constantinian manner, lead to a relatively austere view of American constitutionalism.”

The view of jurisprudence put forth in this book is not what you would call “upbeat.” Powell’s dismal prognosis of the health of the body politic is likely to meet the scorn of

“[c]onstitutionalism may be dead but people will continue to be harmed or saved from harm by magistrates invoking its ghost” (p. 257). Given the dying and eventual death of liberalism, Powell’s unrelenting realism can help to disenthral us — and by “us” I mean Christians — of the nation-state’s obscuring ideologies and thus enable us to see more clearly the needs of its victims: homeless people who in some cities are forbidden by law to sleep on park benches, people on death row whose recourse to appeal is being steadily whittled away, divorced single-parent mothers who never see their alimony checks, illegal immigrants detained in prison camps, women beaten in their homes, migrant workers, “fetuses.”

Powell’s assessment of constitutional theory has something to offend

Powell suggests that Christians do have a limited stake in voicing a preference for majoritarian over judicial decision-making and in urging the Court to adhere to a renewed judicial deference doctrine, but these are tactical matters that can be decided only on a temporary basis.

not of God but of Caesar. Instead, Powell draws on the work of John Howard Yoder and Stanley Hauerwas to put forth an understanding of Christian engagement with the nation-state that is casuistic. In this understanding, Christians negotiate the conflicting claims of interest groups in the nation-state and its courts on an *ad hoc* basis, in service of the gospel and of the poor and oppressed whom they are obliged to reverence as they would Christ.

Regarding constitutional thought, this means that “there can be no general

readers whose political imaginations are captured by the news media and political pundits inside the beltway, on the basis that it is, to mention two favorite key words in the liberal lexicon, “negative” and “extreme.” But if Powell is right, then such readers are suffering from a political form of what pop psychologists call the first stage of the grieving process: denial.

On the other hand, Powell’s vision is in no way a formula for a Christian withdrawal from society. In referring to Levinson’s views, Powell writes that

everybody. But this is because it places such high regard on those whom the state, and its courts, consider to be nobody.

*Reviewed by Michael J. Baxter,
doctoral candidate in religion and Charlotte
Neucombe Fellow for 1993–94,
Duke University*

Faculty News

Paul D. Carrington will spend a month this spring at the Bellagio Study and Conference Center in Italy, which is operated by The Rockefeller Foundation for international conferences and scholars-in-residence. He will be completing work on several papers that are part of his project on the history of law teaching in America.

Walter E. Dellinger, III was confirmed as assistant attorney general, Office of Legal Counsel, by a 65-34 vote of the United States Senate on October 13, 1993. He advises President Clinton and Attorney General Reno on the constitutionality of government actions and congressional bills. Dellinger is assisted by fellow Duke Law professors, **H. Jefferson Powell**, deputy assistant attorney general and **Christopher H. Schroeder**, acting deputy assistant attorney general. Both Powell and Schroeder are teaching their courses at Duke this spring, and commuting part-time to the Justice Department.

Professor emeritus **John Hope Franklin** has received four significant awards, honoring his contributions during a career that spans six decades. In October 1993, he was lauded by President Bill Clinton in a ceremony at The White House as one of the five recipients of the 1993 Charles Frankel Prize awarded by the National Endowment for the Humanities. The Frankel Prize honors the outstanding achievements of Americans who have expanded the public's understanding of history, literature, philosophy or other subjects in the humanities. It is named in honor of the late Charles Frankel, a Columbia University professor who was the first director of the National Humanities Center in the Research Triangle Park.

In November, Franklin was one of five North Carolinians to receive the

state's highest honor, the North Carolina Award, bestowed by Governor James B. Hunt. "It's thrilling, and I am humbled by it. I hope that I can deserve it," Franklin said.



Professor emeritus John Hope Franklin

Franklin received Turner Broadcasting's Trumpet Award in February for his contributions to humankind. The Trumpet Awards were created to honor "the outstanding legacy and accomplishments of African-Americans in the building of America." Other honorees this year were poet Maya Angelou, former Atlanta mayor Tom Bradley, entertainer Lena Horne, writer Terry McMillian, and ABC news correspondent Carole Simpson. Franklin was also honored in February as the recipient of the Kelly M. Alexander, Sr. Humanitarian Award from the North Carolina branch of the NAACP for his "commitment to freedom, justice and equality."

Donald L. Horowitz was awarded a grant from July 1993 to June 1994, of

\$180,000 from the Carnegie Corporation for a project entitled "The Deadly Ethnic Riot." Professor Horowitz, who has worked extensively in the field of ethnic conflict around the world, will be continuing his study of a particularly difficult and destabilizing type of ethnic violence. The deadly ethnic riot is an event in which members of one group kill members of another group. The killing usually involves various forms of torture and mutilation. Such riots are often the prelude to more organized and widespread violence, including civil war, so it is especially important to understand the forms and patterns of the riot in order to prevent it.

Professor Horowitz's material is drawn from well over 100 such riots in 40-50 countries, mainly in Asia, Africa, and the former Soviet Union. He intends to produce a book that will explain how and why this form of violence develops.

Chief Justice William Rehnquist has appointed **Thomas D. Rowe, Jr.** to a three-year term on the United States Judicial Conference's Advisory Committee on Civil Rules. The Committee, which consists of judges, practitioners, and academics, initiates proposals for changes in the Federal Rules of Civil Procedure, which if approved are eventually promulgated by the Supreme Court.

Jonathan Wiener joined the Law School faculty on January 1, 1994, as associate professor of law, with a joint appointment in Duke's School of the Environment. He comes to Duke from The White House, where he was a senior staff attorney at the Council of Economic Advisers. His teaching interests include environmental law, risk assessment and regulation, and property and torts.

Law Alumni Association News

The Duke Law Alumni Association (LAA), which includes all Duke Law alumni, sponsors programs designed to advance legal education and to promote communication between alumni and the Law School. Following is a report on some of these programs.

Alumni Directory

A complimentary copy of the 1993 Duke Law Alumni Directory was mailed in mid-October to all alumni who paid dues or made a gift to the Law School in 1991-92 or 1992-93. If you did not receive a Directory and would like to purchase one for \$25, please contact the Law Alumni Affairs Office at 919-489-5089.

Information for the Directory was taken from the computerized database in the Law Alumni Affairs Office at the end of August, 1993. A survey was sent to all alumni with the LAA dues solicitation in early July and address changes received by the end of August were reflected in the Directory. If your address information in the Directory is not current and you have not sent in a change since late August, please update your address information by mailing the address verification form included in the Directory or by calling 919-489-5089.

Computer software purchased by the LAA will make it possible to print the Directory on a regular basis. The

Law Alumni Board of Directors, the governing body of the Association, will discuss at its spring business meeting the frequency and timing of future printings. The Council will also consider how best to utilize the information on legal specialty areas being compiled in the Law Alumni Office.

Alumni Seminar

LAA-sponsored Alumni Seminars bring alumni back to the Law School to speak to students on topics of current interest in the legal community. An Alumni Seminar on "Specialization" was held at the Law School on October 7, 1993, where panelists considered such questions as whether it is necessary to specialize, and if so, when and how a specialty area should be chosen; whether specialization makes a lawyer more or less desirable in the job market and more or less flexible. Panelists shared information on how special-

tages of specialization within large law firms or government agencies versus boutique firms or smaller agencies or public interest organizations.

Members of the panel were alumni who also serve on the Law School's Board of Visitors and are actively involved in alumni affairs at Duke: **Ronald W. Frank '72** is a shareholder in Babst, Calland, Clements and Zomnir in Pittsburgh, Pennsylvania; **Brett A. Schlossberg '74** formed Schlossberg and Associates, P.C. in Bryn Mawr, Pennsylvania in 1988; **Patricia H. Wagner '74** is a partner with Heller, Ehrman, White & McAuliffe in Seattle, Washington. The panel was moderated by **Valerie T. Broadie '79** who is director of major gifts and planned giving and special assistant to the vice president for planning at Howard University in Washington, D.C. She is also secretary/treasurer of the Law Alumni Council and a member of the Board of Visitors.

Law Alumni Weekend

Law Alumni Weekend 1993 was held October 8 and 9, with classes ending in '3' and '8' celebrating reunions. Over 200 alumni returned with their families to renew ties with one another, the faculty and others at the Law School. Members of the Half Century Club also attended, including seven members from the Class of 1937. Next fall, classes ending in '4' and '9' (1944 through 1989) will celebrate reunions at Law Alumni Weekend 1994 scheduled for October 7 and 8.

In addition to the traditional class dinners, North Carolina barbecue and a football game, several new activities were added to the Law Alumni Weekend schedule including an all-alumni



Pat Wagner '74, far left, visits with Law students following the Alumni Seminar on "Specialization."

ization affects issues such as lawyer satisfaction, client development, and conflicts in representation. They also discussed the advantages and disadvan-

dinner, a substantive legal education program, and hard-hat tours of the new building addition given by student tour guides.

This year the Law Alumni Association began the new tradition of holding its annual meeting during an all-alumni dinner on Friday evening. The LAA meeting was previously held on Saturday morning and included a brief program. The Saturday morning event will now be a substantive program for which CLE credit will be available. The Alumni Association dinner was held at the Washington Duke Inn and included Duke University's new president, Nannerl O. Keohane, as special guest.

President Keohane's Remarks

President Keohane welcomed alumni back to Duke and thanked them for their loyalty to the Law School and to Duke University. She shared some of her thoughts regarding Duke and her visions for its future. Keohane noted how well-known Duke is around the world, not only for basketball, but also for medical research, strong undergraduate teaching and its professional schools.

"From the earliest days of what is now Duke University, the teaching of law has been important to our work. Law was taught as part of the liberal arts curriculum of Trinity College, and a Law School opened at Trinity in 1904. The Law School was one of the central objects of James Buchanan Duke's benevolence, since he regarded law as one of the most useful and worthwhile of the professions. He included lawyers along with preachers, teachers, and physicians as professionals who are 'most in the public eye, and by percept and example can do most to

uplift mankind.'" President Keohane also noted that under the leadership of Dean Gann and her colleagues, the

tant goal. President Keohane stated, "We also want to think more creatively about how to build alliances among



Duke University president, Nan Keohane, left, and Dean Pamela Gann chat with Harry Chadwick '53 at the Law Alumni banquet.

Law School "is steadily achieving ever higher levels of prominence, and we are very proud of that."

Keohane spoke of Duke's goals and priorities. Internationalization and interdisciplinary study are two high priorities. The goal of internationalization is being studied by the Provost's office aided by a strong external advisory committee. By year-end, they plan to provide a more detailed understanding of what this goal of "becoming more international" should mean at Duke and how best to focus Duke's efforts to meet this goal most effectively.

Use of Duke's wealth of talent in interdisciplinary study is also an impor-

tant goal. President Keohane stated, "We also want to think more creatively about how to build alliances among the faculty in the various professional schools, with each other and with those in the Arts & Sciences and Engineering, to provide a robust education for students who will be better equipped for the world they are to lead if they can draw on a variety of skills." The Law School has already made strides in these two areas and will be involved in their further implementation.

President Keohane noted both Duke's strengths and the challenges it faces. "I have been struck by the degree to which, in countless ways, Duke stands on as firm a foundation as any research university in the United States. A notable exception is the size

of our endowment, which is the area where we lag farthest behind the other institutions with which we are typically compared. This is true for the University as a whole, and it is certainly true also for the School of Law. Comparative figures that Dean Gann and her colleagues have compiled as part of our strategic planning effort make clear that this excellent Law School, competitive with the very best in students and faculty recruited, placements of our graduates, and every other relevant measure, is woefully underendowed.... Our continued excellence will depend on our ability to make very hard choices about where to invest limited resources.... The plain truth is that our aspirations are great and our abilities constrained. We must be willing to concentrate our efforts and our resources on those areas where our greatest strengths lie, and be honest with ourselves about what those strengths—and our weaknesses—are.”

She also addressed alumni concerns. “In addition to your well-justified pride in Duke, which I share, I know there are also things that worry you about Duke... Some of you worry that Duke has gotten too big, or that it costs too much, ... or that the University spends too much time teaching undergraduates and does not pay sufficient attention to the professional schools, or that too many of our professors are notorious for being overly PC.

“I am here to tell you that all these stereotypes are overblown — especially the ones about what is now commonly called ‘political correctness.’ In fact, compared with other universities that I am familiar with, I am absolutely convinced that there is a greater diversity of faculty perspectives — and even more important, a greater tendency actually to talk with one another about

different views — at Duke than at any other place I know.

...“Thus, while I have no reason to believe the debates over so called ‘political correctness’ are likely to end anytime soon, I am glad to report that I have found the debates at Duke to be healthier and more honest and open than at any other institution I know. Free speech is both cherished and exercised at Duke, in a diverse and flourishing intellectual life, from which our students benefit tremendously.”

In closing, President Keohane reminded alumni that, in addition to their financial generosity, they can provide other resources to their University, including their knowledge and experience of Duke. “This group gathered here tonight, and indeed our entire alumni body, possesses a wealth of knowledge about Duke, about what it has been and is today, and about what it has the potential to be. I urge you to help me and your colleagues draw on this reservoir of knowledge, and to share with me your perceptions and insights on this important issue. Your understanding and your support will be crucial to any effort to ensure that Duke is as vibrant, relevant, and stimulating to students of the 21st century as it has been to students of the 20th.”

Following President Keohane’s remarks, **David G. Klaber ’69**, president of the Law Alumni Association, presented

Founders’ Society sowers to **John G. Grimsley ’63** and **F. Roger Thaler ’63** to recognize their contributions to the Elvin R. Latty Professorship Endowment Fund. The Founders’ Society of Duke University recognizes and honors individuals who establish and continue permanent endowments at the University with the presentation of bronze replicas of the statue of the sower on East Campus.

Klaber next presented two awards to outstanding alumni. **Nancy Russell Shaw ’73** received the University’s Charles A. Dukes Award and **Robinson O. Everett ’59** received the Law School’s Charles S. Murphy Award.

Charles A. Dukes Award

Recipients of the Charles A. Dukes Award are chosen by the Awards and Recognition Committee of the Board of Directors of the Duke University



Nancy Shaw '73 receives the Dukes Award from Dave Klaber '69.

SPECIALLY NOTED

General Alumni Association. The award is named for the late Charles A. Dukes, a 1929 graduate of Duke University and former director of Alumni Affairs. The Award is given annually to alumni who have gone "above and beyond" the call of duty in volunteer leadership roles.

Shaw, who was nominated by the Law School to receive this award, was given an engraved plaque as a symbol of Duke's appreciation of her service, which includes a number of volunteer roles for the Law School. She served as chair of the Barristers for 1991-92 and 1992-93, working particularly hard to encourage Barrister membership and to increase attendance at Barristers Weekend. She has also served as an annual fund law firm representative for her firm, on the Class of 1973 Reunion Fund-Raising Committee, and is a past member of the Law Alumni Council (1989-92). Shaw also previously served as the organizer and first president of the Durham local law alumni association (1989-91). Shaw is presently a senior lecturing fellow on the Law School faculty, teaching trusts and estates and estate planning, and a partner in the Charlotte office of Poyner & Spruill.

When asked about the motivation for her volunteer activities, Shaw responded, "The life of a great university is important not only to those who participate in it on a daily basis, but also to society at large. To the extent that one contributes to the university's strength, one is part of what that university represents and accomplishes. In my view, Duke is a force for good in our complex world."

Charles S. Murphy Award

Robinson O. Everett '59 received the Charles S. Murphy Award. The Murphy Award is presented annually

by the Law School Alumni Association to an alumnus of the School who, through public service or dedication to education, has shown a devotion to the common welfare, reflecting ideals exemplified in the life and career of

Visitors and the Duke University Board of Trustees.

The Awards Committee of the Law Alumni Council recommended that Robinson Everett receive the 1993 Murphy Award because he has dedi-



Robinson Everett '59 (right) receives the Murphy Award from Dave Klaber '69.

Dan Crawford

Charles S. Murphy. Murphy was a 1931 graduate of Duke University. He graduated from Duke Law School in 1934 and received an honorary LL.D. from Duke in 1967. A native North Carolinian, Murphy died in 1983. During his career, he held several positions in the Truman, Kennedy, and Johnson administrations including serving as administrative assistant and special counsel to President Truman, undersecretary of agriculture under President Kennedy and counselor to President Johnson. He was also a member of the Law School's Board of

visited his career to education and public service. Everett received undergraduate and legal degrees at Harvard and completed his LL.M. at Duke Law School in 1959. Everett became an assistant professor at Duke Law School in 1950. He then served with the Air Force for more than two years during the Korean War where he was assigned to the Judge Advocate General's Corps. He became a commissioner of the United States Court of Military Appeals upon his release from active duty.

In 1955, Everett returned to Durham to practice law with his par-

ents. From 1955 to 1980 he was engaged in private practice in North Carolina and at various times in the District of Columbia. He was also an officer of and counsel for various business organizations and nonprofit corporations.

Everett rejoined the Duke Law faculty in 1956 on a part-time basis and has served continuously on the faculty since that time. He became a tenured professor in 1967. In 1956, he published a textbook, *MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES*. He has written numerous articles on military law, criminal procedure, evidence, and other legal topics. He also edited and prepared forewords for various symposia on many topics while associate editor of *Law and Contemporary Problems*.

Everett served part-time as counsel to the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary from 1961–64, and from 1964–66 he was a consultant to that Subcommittee. During this period he participated in extensive studies and hearings, which helped lead to the enactment of the Military Justice Act of 1968.

Everett has been active in numerous legal associations. He served as president of the Durham Bar Association and from 1978–83 he was a member of the Council of the North Carolina State Bar. He was a member of the North Carolina IOLTA Board of Trustees and currently is the chair of the North

Carolina Continuing Legal Education Board. From 1973 to 1977, he was a member of the American Bar Association's Standing Committee on Military Law, and from 1977–79, he chaired that committee. He is a life member of the American Law Institute and of the National Conference of Commissioners on Uniform State Laws. He has chaired various sections and committees for the Federal Bar Association and received the Association's Earl W. Kintner Award for his service in September of 1987. He is an American Bar Fellow and was a director of the American Judicature Society. He also served on the Advisory Committee of the Federal Rules of Criminal Procedure and Evidence (1988–91) and was a member of

to serve as chief judge. His term expired on September 30, 1990. He now serves as a senior judge of that Court.

In 1993, Everett was instrumental in the establishment of the Braxton Craven Inn of Court at Duke Law School which involves a number of alumni and students (*see Braxton Craven Inn of Court Established*, DUKE L. MAG., Summer 1993, at 38), and he has established the Center on Law Ethics and National Security (*see p. 20*).

Dave Klaber presented a pair of etched bookends to Judge Everett to commemorate the award, remarking that it was a particular pleasure for him to make the award as he had had the privilege of being one of Professor Everett's students. As a military lawyer,



René Stemple Ellis '86, Vin Sgrosso '62, and Professor Melvin Shimm meet after the professional program. Ellis is executive director of the Private Adjudication Center and she presented the Alumni Weekend professional program.

the Committee to Review the Criminal Justice Act of 1964 (1991–93).

In 1980, President Carter nominated Everett to the United States Military Court of Appeals, and he was asked

Klaber noted that he had found Everett's book on military justice invaluable.

Upon accepting the award, Everett remarked that he was particularly delighted to be so honored by Duke

SPECIALLY NOTED



Law Alumni Association officers, from left, Richard Salem '72, incoming secretary/treasurer; David Klaber '69, president; Haley Fromholz '67, president/president-elect; Dara DeHaven '80, immediate past president; and Valerie Broadie '79, secretary/treasurer.

Law School with which it has been his great pleasure to be associated for so many years.

Alumni are encouraged to submit nominations for the Murphy Award by contacting the Law School's Alumni Affairs Office, Box 90389, Durham, NC 27708-0389, telephone 919-489-5089.

Law Alumni Weekend Program

During Law Alumni Weekend, **René Stemple Ellis '86**, the executive director of the Private Adjudication Center, presented a program to the alumni on alternate dispute resolution (ADR). The program, entitled "ADR Basics: How To Choose the Best Approach for Your Case," was offered Saturday morning at the Law School and CLE credit was available. The program began with a presentation of various ADR techniques and when and how they could best be used. The participants then broke into smaller groups to consider hypothetical cases and to design ADR solutions. Upon reassembling, group leaders reported on their decisions to all the program participants, and there was lively discussion.

Haley Fromholz '67, vice-president of the Law Alumni Association and chair of the Education Committee that recommended the program, commented, "The alumni and spouses who took part liked having the opportunity to participate. In the past, Alumni Weekend programs have been lectures by the faculty. This year's interactive program was a change of pace."

By-Laws

A vote was taken by ballot during Law Alumni Weekend, approving the revisions recommended by the Law Alumni Council for the Law Alumni Association constitution and by-laws.

The revisions include changes in terminology. The governing body of the LAA, which includes at least fifteen alumni members and the LAA officers, will now be called the Law Alumni Association Board of Directors. The Law Alumni Council (LAC) will continue to include the presidents of the local associations and the members of the LAA governing body, and the Executive Committee will be composed of the LAA officers.

Alumni members of the Board of Directors will be elected by the Board upon nomination by the Nominating Committee which considers names recommended by alumni, the Dean, and the Law School Alumni Office. Officers shall be elected by a majority of Board members present at the spring business meeting. Twenty-five percent of the Board shall constitute a quorum for the transaction of business.

If you would like more information about any of these programs, please contact the Law Alumni Office at 919-489-5089.

UPCOMING EVENTS FOR THE LAW SCHOOL

April 15-16, 1994
Barristers/Board of Visitors Weekend

May 7, 1994
Graduation Reception

May 8, 1994
Degree Awarding Ceremony

August 8, 1994
American Bar Association Reception
New Orleans

October 6, 1994
Alumni Seminar

October 7, 1994
Board of Visitors Meeting

October 7, 1994
Law Alumni Association Board
of Directors Meeting

October 7-8, 1994
Law Alumni Weekend

Gifts to the Law School

Bost Research Professorship

The Charles A. Cannon Charitable Trust No. Three of Concord, North Carolina, recently contributed \$50,000 to the Eugene T. Bost Research Professorship Fund. Since the establishment of the Fund in 1980, the Trust has given \$1,669,350 in support of the Bost Professorship. Income from the Fund subverts faculty salaries while members of the faculty are on research leave.

The Fund honors the memory of Eugene T. Bost '33, who served in the North Carolina House of Representatives for nearly 20 years. When he left political life in 1959, Bost joined Cannon Mills Company where he served as general counsel, vice president and director of the Cannon Foundation, trustee of the Charles A. Cannon Charitable Trusts, and president of Cannon of the West Coast, Inc.

Ruth W. Latty Gift Annuity

Ruth W. Latty of Durham, North Carolina, widow of former Dean Elvin R. "Jack" Latty, recently established the Ruth W. Latty Gift Annuity with a gift of \$100,000. Upon the termination of the annuity, its assets will be transferred to the Elvin R. Latty Professorship Fund. During his 36-year career at the Law

School from 1937 to 1973, Dean Latty served as professor of law (1937-58), as dean of the Law School (1958-66), and as William R. Perkins professor of law (1965-73).

When making the gift, Mrs. Latty said to Dean Pamela Gann, "My family and I consider that our gift annuity to benefit the Professorship Fund is a most fitting way to sustain the memory of Jack, who gave the best years of his life in service to Duke University School of Law. Under his deanship the Law School achieved national prominence. His legacy has been well preserved by those who have followed in his footsteps."

McGuire Scholarship Endowment Fund

William McGuire '33 and Grace McGuire of Charlotte, North Carolina, have established the McGuire Scholarship Fund. Income from the Fund will provide scholarship assistance.

As a student, McGuire organized the Duke Bar Association and served as its first president. He was also on the editorial board of the *Duke Law Journal*. A nationally-known businessman and civic leader, he was employed by Duke Power Company his entire professional life, serving in the legal department, as

assistant to the president, as president, and finally as a consultant. He is also an emeritus trustee of The Duke Endowment.

In acknowledging the McGuires' gift, Dean Gann said, "Bill and Grace McGuire are pillars of the Charlotte community and of Duke University. We take great pride in the confidence they have expressed in the excellence of the Law School, and in their understanding of the importance of scholarships to enable the best possible students to attend Duke.

Wherrett Charitable Remainder Unitrust

Norman L. Wherrett '41 and Evelyn V. Wherrett of Hillsborough, California have established the Wherrett Unitrust with a gift to the Law School of \$280,500. Upon the termination of the Unitrust, its assets will be used to create an endowment fund that will support the teaching of ethics at the Law School. "The Wherretts have been interested in the teaching of ethics for many years," noted Dean Gann, "and their gift will enable the Law School faculty to deepen the ethics curriculum to educate our students to behave ethically in all types of practice settings."

Administration News

Judith A. Horowitz, the Law School's Associate Dean for International Studies, began full-time duties at the Law School on January 1, 1994. In the past, she has divided her time between the Law School and the Fuqua School of Business. Because the international programs and activities conducted by the Law School have increased over the past several years, it became important to have a person with full-time responsibilities for these areas.

Dean Horowitz serves as consultant for the Soros Foundation and the Institute of International Education. She is a member of the selection committee for Muskie Fellowship students, who are brought to the United States from the former Soviet Union to enroll in LL.M. programs at a large number of American universities. She conducted interviews of Muskie Fellowship applicants for the Soros Foundation during

January in Ukraine and Belarus, and will be on the final selection committee to meet in April to make scholarship awards. Dean Horowitz is also helping the Ukrainian Legal Foundation, which is sponsored by the Soros and other foundations, to establish an independent law faculty at Kiev Mohyla University in Kiev, Ukraine. She is chair-elect of the AALS Section on Foreign Law Graduates for 1995-96.

Professional News

'36 **Horace L. Bomar** continues his practice of business, commercial and estate law with Holcombe, Bomar, Cothran and Gunn in Spartanburg, South Carolina.

'40 **Margaret Adams Harris**, who is retired and lives in Greensboro, North Carolina, served as the 1992-93 president of the Duke University Half-Century Club.

James M. Poyner, retired from the firm of Poyner & Spruill in Raleigh, North Carolina, was the honoree at the 1993 Commemorative Men's Member-Member Tournament at the Country Club of North Carolina in Pinehurst in August.

'42 **Jackson M. Sigmon** has been honored by the Northampton County, Pennsylvania Bar Association for 50 years of service. During his legal career, he has been the solicitor for the city of Bethlehem, special counsel for Bethlehem Steel Corp., and a partner in the firm of Sigmon and Sigmon. "It's been a good 50 years," he noted. "It's gone too fast."

'43 **Jane Parker Harris** of Wake Forest, was honored in October by the North Carolina Bar Association for 50 years of practice in the state.

'49 *Reunion plans are underway for the Class of 1949. Law Alumni Weekend will be October 7-8, 1994. Details will be mailed in the spring. Please contact the Law Alumni Office at 919-489-5089 if you are interested in helping plan your reunion or if you have any questions at this time.*

David K. Taylor has assumed the directorship of the Georgetown University

Fellows in Foreign Service Program, which provides a year of advanced study and research at Georgetown for promising mid-career professionals from both the public and private sectors.

'50 **Kwan Hi Lim** has retired after 32 years in private practice and eight years as a family court judge in Honolulu, Hawaii. He also was for 25 years an actor in movies and in television shows such as "Hawaii Five-0" and "Magnum P.I."

William R. Patterson, a partner with Sutherland, Asbill & Brennan in Atlanta, Georgia, has been elected a member of the Board of Regents of the American College of Mortgage Attorneys.

'52 **Robert C. Oshiro** has been awarded the honorary doctor of humane letters degree by the University of Hawaii at Manoa. He helped found the Democratic Party in Hawaii, and served as a party leader and state legislator.

'53 **Julius J. Gwyn** of Reidsville, North Carolina was honored by the Rockingham Community College Board of Trustees for nearly 30 years of service to the College.

'54 *Reunion plans are underway for the Class of 1954. Law Alumni Weekend will be October 7-8, 1994. Details will be mailed in the spring. Please contact the Law Alumni Office at 919-489-5089 if you are interested in helping plan your reunion or if you have any questions at this time.*

Charles E. Rushing will retire in May 1994 from the Foreign Service after 38 years and assignments in 10 countries.

'56 **Frederic E. Dorkin** has retired after 20 years in the Boeing legal department, and has established a practice as a contract corporate counsel for companies in the Seattle, Washington area. He is also on the arbitration panels of the American Arbitration Association, the National Association of Securities Dealers, and the King County Superior Court.

William B. Eldridge has just completed his 25th year as the first director of research at the Federal Judicial Center — the research and training arm of the federal court system — in Washington, D.C.

'57 **Charles A. Dukes, Jr.** has joined Carey Winston, a commercial real estate services firm in Laurel, Maryland, as chairman of the executive committee.

'59 *Reunion plans are underway for the Class of 1959. Law Alumni Weekend will be October 7-8, 1994. Details will be mailed in the spring. Please contact the Law Alumni Office at 919-489-5089 if you are interested in helping plan your reunion or if you have any questions at this time.*

Leif C. Beck devotes most of his time to ownership and publication of *The Physician's Advisory*, a monthly newsletter to private practicing physicians nationwide, which he began in 1977.

'63 **Henry H. (Bucky) Fox** has been elected chairman of Broward Business Against Narcotics and Drugs, Inc. and to the executive committee of the Broward County Commission on Substance Abuse. He is a partner with Greenberg, Traurig, Hoffman, Lifoff, Rosen & Quentel in Fort Lauderdale, Florida.

Frederic S. LeClercq was visiting professor of law at Friedrich Wilhelms Universitate in Bonn, Germany during 1993.

Frank T. Read has stepped down as dean of the Hastings College of the Law of the University of California and is now the deputy consultant on legal education to the ABA. He is also a visiting professor of law at the Indiana University School of Law.

J. David Ross continues his fund-raising consulting work based in Durham.

'64 *Reunion plans are underway for the Class of 1964. Law Alumni Weekend will be October 7-8, 1994. Details will be mailed in the spring. Please contact the Law Alumni Office at 919-489-5089 if you are interested in helping plan your reunion or if you have any questions at this time.*

Charles A. Powell, a partner in the Birmingham, Alabama-based firm of Powell, Tally & Frederick, has been named chair-elect of the Section of Labor and Employment Law of the American Bar Association.

David G. Warren, a professor at the Duke University Medical Center Department of Family Medicine, has been elected to the Board of Directors of the American Society of Law, Medicine and Ethics.

'65 **David C. Hjelmfelt** continues to teach economics and business law in Kiev, Ukraine. He is also training Ukranian school teachers how to teach Christian ethics in the public schools.



Frank W. Hunger '65

Frank W. Hunger '65 has been appointed assistant attorney general, Civil Division, United States Department of Justice. He is also president-elect of the Bar Association for the Fifth Federal Circuit. Hunger previously practiced with the firm of Lake, Tindall, Hunger & Thackston in Greenville, Mississippi, where he specialized in products liability and insurance defense.

'66 **Anthony S. Harrington** has been appointed to the President's Foreign Intelligence Advisory Board, which provides the President with an independent source of advice on the effectiveness with which the intelligence community is meeting the nation's intelligence needs. Harrington and two other Advisory Board members comprise a related body called the Intelligence Oversight Board, which ensures that the foreign and domestic intelligence agencies—such as the FBI, the Department of Energy and the Department of Treasury—comply with U.S. law and presidential orders.

Harrington is a partner in the Washington, D.C. office of Hogan &

Hartson, where he practices primarily in the corporate area. He is also the co-chair of the National Alliance to End Homelessness and the co-founder and director of Ovation: The Fine Arts Network (CATV network).

James B. Maxwell announces the opening of the firm of Maxwell, Freeman & Beason in Durham.

Sidney J. Nurkin has become a partner in the Atlanta, Georgia office of Alston & Bird, where he concentrates in the areas of corporate securities and banking.

'67 **Norman G. Cooper** has been appointed assistant general counsel for appellate litigation at the Department of Veteran Affairs in Washington, D.C., where he represents the Secretary of Veteran Affairs before the U.S. Court of Veterans Appeals.

Lanty L. Smith has been named a director on the Board of Masland Industries of Carlisle, Pennsylvania, a leading designer and manufacturer of floor systems, interior trim, luggage compartment trim and acoustical products, serving the North American automotive industry. He is chairman of the Board of Directors and chief executive officer of Precision Fabrics Group, Inc. of Greensboro, North Carolina.

'68 **David W. Carstetter**, an attorney in Jacksonville, Florida, has edited a book entitled, *A TOUR OF JAPAN IN 1920, AN AMERICAN MISSIONARY'S DIARY WITH 132 PHOTOGRAPHS*. The book, published by McFarland & Company, Inc., is based on the diary and photos of his grandfather, the late Rev. Wilson P. Minton, a missionary to Japan.

ALUMNI ACTIVITIES

Robert I. Frey, executive vice president of Whirlpool Corporation and president of Whirlpool Overseas Corporation, relocated to Tokyo last fall to serve as executive vice president of Whirlpool's Asian Operations.



Robert I. Frey '68

Rosemary Kittrell is a staff attorney specializing in death penalty prosecutions and wiretapping for the Prosecuting Attorney's Council of Georgia, in Smyrna.

William R. Norfolk, a partner at Sullivan & Cromwell in New York City specializing in antitrust, securities and general commercial litigation, and mergers and acquisitions, has been elected to the Board of Trustees of The New York Methodist Hospital.

Marlin M. Volz, Jr., vice president and trust officer of Norwest Bank-Quad Cities in Davenport, Iowa, has been appointed to the Council of Probate and Trust Law Section of the Iowa State Bar Association.

'69 *Reunion plans are underway for the Class of 1969. Law Alumni Weekend will be October 7-8, 1994. Details will be mailed in the spring. Please contact the Law Alumni Office at 919-489-5089 if you are interested in helping plan your reunion or if you have any questions at this time.*

William J. Bates, a partner in the Charleston, South Carolina firm of Young, Clement, Rivers & Tisdale, has been elected chair of the Real Estate Section of the South Carolina Bar Association.

Charles L. Becton, a partner in the Raleigh firm of Fuller, Becton, Billings & Slifkin, is president-elect of the North Carolina Academy of Trial Lawyers.

David D. Laufer has been appointed assistant general counsel of Toyota Motor Sales, USA, Inc. in Torrance, California.

Alex Durham Newton is presently assigned to Dhaka, Bangladesh as a lawyer for the Agency for International Development, covering Bangladesh and Nepal.

Breckinridge L. Willcox, a partner with Arent, Fox, Kintner, Plotkin & Kahn in Washington, D.C., spoke to Professor Sara Beale's Federal Criminal Law class about the federal government's administrative policy regarding federal prosecutions arising out of the same facts that gave rise to an earlier state prosecution (as occurred in the recent federal trial of the police officers who beat motorist Rodney King). Willcox, who is the former United States Attorney for the District of Maryland, also compared his experience as a government lawyer and prosecutor with his present role in private practice, where he specializes in white collar defense work.

'70 **Charles B. Neely, Jr.**, a director in the Raleigh, North Carolina office of Maupin Taylor Ellis & Adams, has been elected to the Board of Directors of the Greater Triangle Community Foundation. The Foundation was established in 1983, and now manages over 110 charitable funds with total assets of more than \$9.2 million.

Michael A. Pearlman has recently completed a term as president of the Central and Western New York Chapter of the American Corporate Counsel

Association. He is counsel to Eastman Kodak Company in Rochester.

'71 **John A. DeFrancisco** is serving his first term as a New York state senator, 49th Senate district, while continuing his law practice in Syracuse.

Randolph J. May is chairman of the Ratemaking Committee of the Section of Administrative Law of the ABA for 1993-94, and has authored two recent articles on communications law.

Thomas E. McLain has joined the Los Angeles, California office of Perkins Coie, where he heads the corporate department and specializes in complex international business transactions with a special emphasis on Asia. He recently was appointed to the Advisory Board of the *International Corporate Lawyer* and the Advisory Committee for the USAID-funded Indonesia Law Reform Project.

Gail Levin Richmond, acting dean for 1993-94 of the Shepard Broad Law Center of Nova University, is also president of the Association of American Law School's Southeastern Conference.

'72 **Stephen J. Bronis** has become a partner in the Miami, Florida office of Davis, Scott, Weber & Edwards, where he heads the white-collar crime section.

John D. Englar, senior vice president of finance and law and general counsel of Burlington Industries, Inc. of Greensboro, North Carolina, has been elected to the additional position of chief financial officer.

C. Marcus Harris has joined the firm of Poyner & Spruill as a partner in the Charlotte, North Carolina office.

Charles R. McManis, professor of law at Washington University School of Law in St. Louis, Missouri, has authored, *Intellectual Property Protection and Reverse Engineering of Computer Programs in the United States and the European Community*, 8 HIGH TECH. L.J. 85 (1993).

Cary A. Moomjian, Jr. has become vice president and general counsel for Santa Fe International Corporation in Dallas, Texas.

'73 **S. Ward Greene** has been named president of the Oregon Law Institute, the largest non-profit corporation providing continuing legal education services throughout Oregon. He is the managing partner of the firm

of Greene & Markley in Portland, which focuses on bankruptcy, collection, real estate and commercial law.

Philip A. Pfaffly has become a partner with Robins, Kaplan, Miller & Ciresi, a new firm in Minneapolis, Minnesota.

Roger A. Reed has been named dean of academic affairs and professor of political science at the American College of Switzerland.

Frank D. Spiegelberg is in his second year as president of the Union Public Schools in Tulsa, Oklahoma. He is a partner with Boesche, McDermott & Eskridge.

Donald R. Williams is an assistant regional counsel for Lawyers Title Insurance Corporation in Lakeland,

Florida. His region is responsible for Florida, Puerto Rico, the U.S. Virgin Islands, and the Bahama Islands.

'74 *Reunion plans are underway for the Class of 1974. Law Alumni Weekend will be October 7-8, 1994. Details will be mailed in the spring. Please contact the Law Alumni Office at 919-489-5089 if you are interested in helping plan your reunion or if you have any questions at this time.*

Candace M. Carroll serves on the boards of the San Diego, California affiliate of the American Civil Liberties Union and of the San Diego Volunteer Lawyer Program. She is co-chair of the San Diego Women's Leadership Council for Dianne Feinstein, and is of counsel

Alumna Merges Law and Diplomacy

Amy Gillespie '93

For a Duke Law grad who always wanted to be a diplomat, an appointment by President Clinton to the United States Mission to the United Nations was a dream come true. Since March 1993, **Frances Zwenig '74**, has served as chief of staff to



Frances Zwenig '74

Madeleine K. Albright, U.S. Permanent Representative to the United Nations. She is the ambassador's point person, helping the Mission's 150-member staff navigate the complex subculture of international diplomacy. In fact, the buck stops on her desk. She also ensures that

Ambassador Albright's work runs smoothly, arranging meetings with other diplomats and the media, and helping to evaluate policy proposals. In short, Zwenig says, her duties range from "making dinner reservations to making policy."

Zwenig finds herself working at a time of unprecedented expansion of the U.N.'s stature. As the organization prepares for its 50th anniversary in 1995, "it is about to start realizing the dreams the founders had for it," Zwenig says. "There were so many years during the Cold War when there were

no expectations of the U.N. We didn't want it to operate," she admits. "The United States was a party to letting it get bogged down in bureaucracy. We didn't want the other side to have a victory, even a rhetorical one."

Now, with the end of the Cold War and the eruption of regional conflicts, the U.N. has become a powerful force for global peace. Zwenig has had a hand in crafting an innovative American response to the U.N.'s new role. In July she organized a factfinding trip to Somalia, Cambodia, and El Salvador for Ambassador Albright and her staff. "Previous ambassadors have always visited the European capitals," she says. "But this is the cutting edge of the U.N." They observed firsthand the circumstances of U.N. peacekeeping troops and interacted directly with soldiers. "We drew some interesting lessons about what peacekeeping can and cannot be and do. These are conclusions we would not have had by just reading reports and talking to people in New York," Zwenig says.

Although she arrived at the United Nations by a circuitous route, Zwenig had always wanted to be a diplomat. She served in the Peace Corps in Thailand, studied at the Fletcher School of International Law and Diplomacy, and passed the foreign service exam. But her detour to Duke Law School led to a progression of domestic policy jobs. She was a legal aid lawyer; a lobbyist for Congress Watch

and People for the American Way; the executive director of a non-profit environmental education organization; and an administrative assistant for a U.S. congressman and senator.

Next Zwenig was appointed to be staff director of the Senate Select Committee on POW/MIA Affairs. As someone with experience both in Southeast Asia and on Capitol Hill, she was perfect for the job. Working closely with Senator John Kerry, the Committee chairman, Zwenig helped plan the Committee's schedule, organized hearings, and coordinated trips to Asia for the entire Committee, which included negotiating with three foreign governments.

This experience administering a complex political unit reintroduced her to international affairs and led to her current position. Zwenig's new job employs her legal training as well as her diplomatic know-how. "Two things struck me when I got here," she recounts. "How much the United Nations is like the Congress—a political body—and the importance of words." Zwenig compares diplomatic language with legal language. "Just as in a court of law, every word has a meaning, a political implication, and a history to it."

Zwenig clearly loves her job. "Every day is a graduate seminar in foreign policy. It's really an incredible opportunity to watch history unfold before your very eyes."

ALUMNI ACTIVITIES

to the firm of Sullivan, Hill, Lewin & Markham.

Kenneth W. McAllister has been named executive vice president and head of the Administrative Services Division of Wachovia Corporation in Winston-Salem, North Carolina, where he will also continue as general counsel. McAllister was recently elected to the Board of Directors of the University of North Carolina School of Nursing Foundation, Inc.

Lynn McLain teaches evidence and copyright law at the University of Baltimore, and is the special reporter to the Maryland Court of Appeals for the codification of evidence rules.

W. Page Montgomery has received the 1993 Distinguished Service Award from the International Communications Association, a business trade group.

Ira Sandron, a United States immigration judge in Miami, Florida, participated in a program on immigration law in August 1993 at the ABA Annual Meeting in New York, entitled, "Access to Justice: U.S. Immigration Policy and Protection of the Vulnerable."

A. Terry Sorrells has received an LL.M. degree in taxation from Emory University. He is a partner with Carter & Ansley in Atlanta, Georgia, specializing in commercial litigation, taxation and real estate.

'75 **David W. Kerber** has recently opened his own firm, Kerber & Sasz, in Denver, Colorado.

John B. McLeod is the editor of the *Fourth Circuit Review*, a newsletter sent to various clients and federal judges. He practices in Greenville, South Carolina.

Clinton D. Richardson has published his second business law book, *THE GROWTH COMPANY GUIDE TO INVESTORS, DEAL STRUCTURES AND LEGAL STRATEGIES* (Pfeiffer & Company, 1993). The book is a practical guide for growing companies and private company investors. He

practices with Arnall Golden & Gregory in Atlanta, Georgia.

'76 **Kenneth S. Coe** is a partner with the Charlotte, North Carolina office of Moore & Van Allen.

Lewis E. Melahn has joined the Kansas City, Missouri firm of Polsinelli, White, Vardeman & Shalton. He will establish the firm's office in Jefferson City, Missouri.

Griffith T. Parry announces the opening of the firm of Parry & Howard in South Orange, New Jersey, specializing in insurance and reinsurance litigation and arbitration.

Harry F. Tepker, Jr., a professor at the University of Oklahoma Law Center, has been honored with the Regents Award for Superior Teaching.



Harry F. Tepker '76

'77 **Donald H. Beskind** has become of counsel to the firm of Blanchard Twiggs Abrams & Strickland in Raleigh, North Carolina, where he concentrates on business torts, professional negligence, and personal injury law.

Edward M. Hanson, Jr., an attorney with Shulman, Rogers, Gandall, Pordy & Ecker in Rockville, Maryland, has been appointed to a one-year term on the Board of Trustees of Duke University.

Timothy E. Meredith, a partner with Corbin, Warfield, Schaffer & Meredith in Severna Park, Maryland, has been elected president of the Anne Arundel County Bar Association.

Michael H. Wald, of Dallas, Texas, has been appointed vice-chair for one year of the Alternative Dispute Resolution Committee in the General Practice Section of the American Bar Association. He has also earned certification as a creditors' rights law specialist from the Commercial Law League of America.

'78 **Marilyn Hoey Howard** has returned to the Harris Corporation, Semiconductor Sector Legal Department as division counsel in Melbourne, Florida, after spending two years marketing semiconductors for Harris in southern Europe.

Linda L. McCall, of Greene, Radovsky, Maloney & Share in San Francisco, California, is the 1993 chair of the Probate & Trust Law Section of the Bar Association of San Francisco. She is certified as a specialist in probate, estate planning, and trust law by the State Bar of California Board of Legal Specialization.

Chris A. Rallis has been promoted to director of planning and business development of Burroughs Wellcome Company in Research Triangle Park, North Carolina.

Christopher Glenn Sawyer has joined the Board of Directors of the Trust for Public Land, a San Francisco, California-based national nonprofit land conservation organization. He is a partner with Alston & Bird in Atlanta, Georgia, specializing in real estate and corporate law. He also serves on the Board of Directors of The Nature Conservancy of Georgia and is chair of The Nature Conservancy's National Real Estate Advisory Board.



Christopher Glenn Sawyer '78

'79 *Reunion plans are underway for the Class of 1979. Law Alumni Weekend will be October 7-8, 1994. Details will be mailed in the spring. Please contact the Law Alumni Office at 919-489-5089 if you are interested in helping plan your reunion or if you have any questions at this time.*

Thomas A. Croft announces the formation of the firm of King & Croft in Atlanta, Georgia, specializing in the resolution of disputes in civil matters

Campbell New Atlanta Mayor

Debbie Selinsky

On January 3, when Duke Law School alumnus **William C. Campbell '77** took the oath of office as mayor of Atlanta, he took on the same adversary facing every mayor of every major city in the United States — crime. To that daunting task, Campbell, a native of Raleigh, North Carolina, must add another challenge which is clamoring for immediate attention — the 1996 Summer Olympics.

While he doesn't minimize the difficulty of either challenge — his advice to the city of Sydney, Australia, which will act as host for the games in the year 2000, is to "celebrate for one day, and then get to work!" — the new mayor said in a telephone interview that he believes the Olympics will bring the city benefits far beyond obvious financial ones.

"The Olympics — as well as this year's Super Bowl — give us great leverage to improve the city and the quality of life of the people of our city. The centennial Olympics will be very exciting, but with challenge comes great opportunity. The transformation of Atlanta will be so dramatic that visitors may not recognize the new city when they return in '96," he said, pointing to plans for a new 72-acre Olympic Park in downtown Atlanta.

"This facility will not only provide a great legacy for the Olympics but also will offer residential and commercial redevelopment possibilities. Neighborhoods around the Olympics sites will be revitalized. There's really no way to quantify the great impact the Olympics will have on Atlanta, and not just from the financial point of view. We've seen the kind of spirituality and uplifting that the Olympics can bring to a community, and we look forward to that for Atlanta."

That spiritual lift will be needed as the people of Georgia's largest city continue to wage the battle against crime, Campbell added. "Controlling crime has become such an important issue, because, from the ravages of crime, we're simply seeing so many other effects on cities. With the increase in crime comes greater costs for policing, for our court systems. Crime is without a doubt the critical issue that faces urban America." In Atlanta, a community-oriented policing approach is being implemented, Campbell said. "We're returning, in a sense, to some of the older police techniques, like walking beat patrols."

Campbell, an attorney with Ellis, Funk, Labovitz & Campbell of Atlanta, easily defeated Michael Lomax in a runoff election last November to become

the first black mayor in twenty years with neither deep roots in the city's civil rights community nor notoriety drawn from it. During the campaign, Campbell, who had represented a downtown council district since 1981, hit hard with his message of reducing crime, holding the line on taxes and making government more efficient. "If I can make Atlanta a safer city, if I can improve the schools, provide better economic development, then people may say I've been a good mayor as well," he said, referring to the accomplishments of his predecessors Andrew Young and Maynard Jackson.



William C. Campbell '77

In an editorial in the November 24, 1993 issue of *The Atlanta Journal-Constitution*, Campbell was described as representative of "a new generation of leadership." "His task will be doing something new with Atlanta's vexing problems. The loss of population, questionable management at the airport, an oversized and inbred City Council and far too much crime are daunting. A new style and a willingness to experiment are needed. Campbell has the vision and the background to accomplish that — if he is willing to break the bonds of past administrations," the editorial said.

Some say Campbell has been preparing for a career in politics since 1950, when he, as a seven-year-old second grader, became the first black stu-

dent to enter a white public school in Raleigh. Raised in a family with a passion for politics, Campbell was marching for civil rights as soon as he could walk. His father, president of the local chapter of the National Association for the Advancement of Colored People, taught his children the importance of making allies inside the political system and preparing themselves to become part of it. Both Bill and his brother Ralph, who was elected state auditor in North Carolina last year, took his advice seriously.

A three-year graduate of Vanderbilt University, Campbell came to Duke Law School in 1974. "Attending Duke was a tremendously exciting and challenging time for me," Campbell recalled. "I found the size of the School to be especially important; it allowed me to get to know my classmates and allowed me the kind of interaction with professors that people attending larger law schools don't generally have. Because of the personal relationships I developed during Law School, I've been able to continue to use these professors as sources throughout my career."

After graduating from the Law School in 1977, Campbell clerked at Kilpatrick & Cody and decided to settle in Atlanta. He followed a brief stint as attorney at the law firm with service as a prosecutor in the Justice Department's antitrust division in Atlanta. He resigned a year later and was elected in 1981 to the City Council's District 2 seat, representing an area encompassing downtown as well as affluent Virginia-Highland and Inman Park neighborhoods and impoverished areas near Atlanta-Fulton County Stadium. His activities as city councilman included backing legislation to ban discrimination in private clubs, providing police officers with bulletproof vests and encouraging new inner-city housing.

In looking to the myriad difficult issues facing law and lawmakers, Campbell said he is pleased with what he sees as a national resurgence in the teaching of professional ethics. During his mayoral campaign, Campbell promoted tougher ethics laws in the wake of the corruption scandal at Hartsfield International Airport. "Financial pressures today are such that people are taking moral short cuts, so I certainly believe in the notion of stronger teaching of ethics and see this as an important factor in trying to get back to the civility that once existed in the practice of law," he said.

ALUMNI ACTIVITIES

through negotiation, mediation, arbitration, and litigation in state and federal courts.

Laura M. Franze has joined the firm of McKenna & Cuneo as a partner in its new Dallas, Texas office, concentrating on a wide range of labor and employment issues, including employment discrimination litigation, employer counseling, and union contract negotiations and organizational activities. She is also counsel to the Coalition of Responsible Employers (CORE), a Texas employers' group, and is former president of the Dallas Area Labor and Employment Law Group.

Sara S. Beezley Keller was recently installed on the Board of Governors for the Kansas Bar Association. She represents District 3, an 11-county area in southeast Kansas. She practices in Girard.

Denise L. Majette has been appointed a judge for the State Court of DeKalb County, Georgia. She was previously an administrative law judge for the Georgia Board of Workers' Compensation, and is a member of the Board of Directors of Mainstreet Community Services Association.

William C. Nordlund has joined Panda Energy Corporation, an international developer of power projects and natural gas resources located in Dallas, Texas, as its general counsel.

Peter R. Pendergast has opened an office in Boston, Massachusetts, for the practice of securities law.

Jeffrey B. Ritter, who practices in Columbus, Ohio, has co-authored, *ELECTRONIC DATA INTERCHANGE AGREEMENTS: A GUIDE AND SOURCEBOOK* and is editor-in-chief of *The Data Law Report*, a new journal. He has been named by the ABA as co-advisor on technology issues to the NCCUSL Drafting Committee, undertaking the revision of Article 2 of the UCC.

Richard I. Yankwich is with the firm of Gray Cary Ware & Friedenrich in the Palo Alto, California office. The firm was recently created by the merger of Ware & Friedenrich of Palo Alto, and Gray Cary Ames & Frye of San Diego.

'80 **C. Mark Baldwin** has retired from the United States Marine Corps and has opened a private practice in Jacksonville, North Carolina.

Blain B. Butner is co-author of a primer for the National Association of College and University Attorneys on limiting institutional liability from the management of federal student aid programs, a guide for college counsel and senior campus administrators. He is also a frequent speaker on topics related to limiting liability from the student financial aid programs to college and university administrators and legal counsel and is a partner in the Washington, D.C. office of Dow, Lohnes & Albertson.

John H. (Jack) Hickey is chairman of the Florida Bar Fee Arbitration Committee for the 11th Circuit (Dade County) and a member of the Board of Directors and Executive Committee of the Dade County Bar Association. A partner with Hickey & Jones in Miami, he spoke on recent trends in flood insurance claims and litigation at the Annual "Write Your Own" Flood Insurance Conference in Orlando in May 1993.

Elizabeth F. Kuniholm of Raleigh, has been elected legal affairs vice president of the North Carolina Academy of Trial Lawyers.

Frank L. Polk has joined the firm of McAfee & Taft of Oklahoma City as counsel, where he continues to practice in the area of aircraft title and finance law.

'81 **Karen E. Carey** has become a partner in the Winston-Salem, North Carolina office of Womble Carlyle Sandridge & Rice.

Robert E. Casselman continues to work in the investment area in Phoenix, Arizona, primarily in income-producing real estate and publicly traded annuities.

Michael R. Dreeben, who is an assistant to the Solicitor General in the Justice Department in Washington, D.C., assisted the Duke Law School faculty in the fall of 1993 in selecting the case that would serve as the basis for both the Federal Appellate Advocacy class and the Dean's Cup Moot Court Competition. He also traveled to Durham to address the Appellate Advocacy class.

Steven R. Klein practices with the firm of Cole, Schotz, Bernstein, Meisel & Forman in Hackensack, New Jersey.

E. Page Potter is the director of Meredith College's Legal Assistants Program. Located in Raleigh, the program has recently been re-approved by the ABA, and is the only post-baccalaureate, ABA-approved paralegal program in North Carolina.

Edmund C. Tiryakian has relocated to Hong Kong, where he is assistant to the branch manager of the Union Bank of Switzerland.

'82 **Karen Koenig Blose** has been promoted to vice president of RTKL Associates, Inc., an architecture and engineering firm in Baltimore, Maryland. As general counsel she represents the firm in the areas of corporate law, contracts, construction and design law, labor, litigation management, securities, tax, and licensing requirements for professional design services.

Terrence P. Collingsworth is now general counsel for the International Labor Rights Education and Research Fund in Washington, D.C., a non-profit organization devoted to improving rights for workers.

ALUMNI ACTIVITIES

Richard R. Hofstetter, who practices in Indianapolis, Indiana, and the Hua Xia law firm in Hangzhou, Zhejiang Province, People's Republic of China, have signed an Affiliation Agreement for the joint representation of clients in China and the United States. He will be of counsel to the Hua Xia firm, available to handle matters for Chinese clients who need representation in the United States.

I. Scott Sokul has been named director of field operations for Save Our Everglades, Inc., a nonprofit coalition of businesses and environmental organizations dedicated to cleaning-up and restoring the Everglades and Florida Bay through the political arena. He has also been appointed to the Board of Directors of the Juvenile Diabetes Foundation International, Central Florida Chapter, and to the Justice of Peace Coalition of Apopka, Florida.

'83 **Lisa E. Cleary** has joined the firm of Patterson, Belknap, Webb & Tyler in New York City, where she will continue her regulatory and insurance litigation and counseling practice, as well as products liability, securities and commercial litigation.

Clement R. Gagne, III is a partner with Janis, Schuelke, and Wechler in Washington, D.C. When he returned for his tenth Law School reunion last fall, he met with students from Professor Sara Beale's Federal Criminal Law class and her first-year Criminal Law classes and talked about his experiences as a white-collar defense lawyer.

Paul A. Hilding has opened a business litigation practice specializing in real estate and insurance coverage matters in San Diego, California. He is also chairman of the Insur-



Paul A. Hilding '83

ance Coverage/Bad Faith Section of the San Diego County Bar Association.

Michael L. Spafford is now a partner in the Washington, D.C. firm of Swidler & Berlin.

'84 *Reunion plans are underway for the Class of 1984. Law Alumni Weekend will be October 7-8, 1994. Details will be mailed in the spring. Please contact the Law Alumni Office at 919-489-5089 if you are interested in helping plan your reunion or if you have any questions at this time.*

Joseph D. Fincher has become a member of the firm of Hall, Estill, Hardwick, Gable, Golden & Nelson, resident in the Tulsa, Oklahoma office.

Mary J. Hildebrand has authored a book, *A VENDOR'S GUIDE TO COMPUTER CONTRACTING*, published by Prentice Hall Law & Business in 1992. She was a speaker on "Computer Software and Vendor Liability," at a meeting of the ABA Section on Science and Technology.

Kenneth J. Krebs has been admitted to partnership in the Columbus, Ohio office of Squire, Sanders & Dempsey, where he is in the firm's corporate law practice.

A. William Mackie is a trial attorney with the U.S. Department of Justice in Washington, D.C.

John H. Sokul, Jr. is a director and shareholder at Cleveland, Waters and Bass in Concord, New Hampshire.

Anne M. Stolee is now a partner in the Washington, D.C. office of Heiskell, Donelson, Bearman, Adams, Williams and Kirsch.

David T. Thuma announces the formation of the firm of Jacobvitz, Roybal & Thuma in Albuquerque, New Mexico, specializing in bankruptcy, commercial litigation, and business law.

Xavier Van der Mersch has joined the firm of McGuire Woods Battle & Boothe as a partner in the firm's Brussels office, where he handles general

corporate matters with an emphasis on Belgian law.

Peter G. Verniero has been appointed chief counsel for Governor Christie Whitman of New Jersey.

'85 **Harry P. Brody** is practicing high-tech litigation with Wilson, Johnson & Jaffer in Sarasota, Florida. He has authored a collection of poetry, *FOR WE ARE CONSTRUCTING THE DWELLING OF FEELING*, published by Bluestone Press, 1993, and is a fellow to the Bread Loaf Writer's Conference for 1993.

Anne W. Claussen has opened her own dispute resolution practice in Tallahassee, Florida, specializing in environmental, land use, and insurance mediation.

Tia L. Cottey has relocated to Dallas, Texas, where she is assistant general counsel with NationsBank, responsible for real estate lending and corporate real estate services for Florida.

Alan G. Dexter is serving as 1993 chairman of the Mecklenburg County Board of Tax Equalization and Review. He concentrates his practice on representing developers of country clubs, master planned communities, and resort properties at Parker Poe Adams & Bernstein in Charlotte, North Carolina.

Brenda Hofman Feis is a partner in the firm of Seyfarth, Shaw, Fairweather & Geraldson in Chicago, Illinois, where she specializes in labor law and employment litigation.

Lynn Gilleland Hawkins has been named a partner in Moyle, Flanigan, Katz, Fitzgerald & Sheehan in West Palm Beach, Florida.

Michael A. Kalish is a senior associate with Winthrop, Stimson, Putnam & Roberts in New York City, representing management in labor and employment litigation.

ALUMNI ACTIVITIES

Anne May Knickerbocker has been promoted to senior editor at Lawyers' Cooperative Publishing in Rochester, New York, where she is in charge of Florida text and jurisprudence products.



Anne May Knickerbocker '85

Mary Woodbridge Leaf has joined Lehman Brothers in New York City as managing director in investment banking, and group head of the debt financing division.

James E. Lilly has relocated to Atlanta, Georgia to open an office for Womble, Carlyle, Sandridge & Rice. The office will focus on banking and finance matters.

Rebecca Bloch Livingston has been elected a shareholder in the Pittsburgh, Pennsylvania office of Buchanan Ingersoll, where she practices real estate law.

Neil D. McFeeley has been re-elected to the Board of Directors of the American Judicature Society. He is an attorney with the Boise, Idaho firm of Eberle, Berlin, Kading, Turnbow & McKlveen.

David E. Mills has become a member of the Washington, D.C. office of Dow, Lohnes & Albertson where he specializes in litigation.

Peter G. Rush has been named a partner in the Chicago, Illinois law firm Bell, Boyd & Lloyd, where he is a member of the litigation department.



Peter G. Rush '85

Belleanne Meltzer Toren is associate general counsel of Triton Energy Corporation in Dallas, Texas. She has been elected chair of the International Energy Committee of the American Corporate Counsel Association (ACCA) and authored *Vietnam Opens the Field for*

Energy Opportunities and co-authored *Emerging Opportunities in Vietnam*, which were published in the spring 1993 issue of the ACCA DOCKET. She spoke in London in April 1993 on petroleum contract terms in Argentina, Ecuador and Peru.

Aaron Watson has been elected to the Atlanta, Georgia School Board and was unanimously chosen by his fellow Board members to serve as president for 1994.

Peter G. Weinstock has been elected an equity shareholder of Jenkins & Gilchrist in Dallas, Texas. He has also been elected president of The Family Place, a United Way agency that counsels and protects victims of domestic violence.

'86 **Susan Bysiewicz** is serving a term in the Connecticut General Assembly, where she serves on the Judiciary and Program Review and Investigations Committees. She is also an attorney in the law department of the Aetna Insurance Company, where she practices in the health care and pension areas.

James M. Cohen continues to reside in Tokyo, and is the founder of Cohen & Associates, a legal consulting firm, and ISLES, an education service for Japanese lawyers.

John F. Grossbauer has become corporate counsel at Collins & Aikman Group, Inc. in Charlotte, North Carolina.

Christopher J. Hagan has been named a partner in the Washington, D.C. office of Davis, Graham & Stubbs. He is in the firm's corporate and securities department and handles public offerings, mergers and acquisitions, and venture capital transactions.

Scott J. Mikulecky has been named a partner with Dufford & Brown in Denver, Colorado.

John M. Tanner has been made a partner of Fairfield & Woods in Denver, Colorado.

Richard H. Winters has recently been ordained as a priest, and is the assistant

rector of St. David's Episcopal Church in Glenview, Illinois.

'87 **David H. Donaldson** runs the Bysiewicz-Donaldson Insurance Agency in Manchester, Connecticut.

James E. Felman, a partner with Kynes & Markham in Tampa, Florida, recently spoke to Professor Sara Beale's Federal Criminal Law class about the federal sentencing guidelines. He specializes in criminal defense work, teaches a course in federal criminal law at Stetson University College of Law, and he advised Professor Beale on the preparation of the sentencing guidelines chapter in her new federal criminal law casebook.

Christopher J. Petrini has joined the Boston, Massachusetts law firm of Conn, Kavanaugh, Rosenthal & Peisch, specializing in employment and construction litigation. He is also chairman of the Framingham School Committee, which oversees the 7,500-pupil Framingham School District.

Julie O'Brien Petrini has joined the Polaroid Corporation in Cambridge, Massachusetts, where she specializes in trademark law.

Harlan I. Prater, IV has become a partner in the Birmingham, Alabama firm of Lightfoot, Franklin, White & Lucas, where he practices in the areas of products liability and business litigation.

'88 **Sandra Hardgrove Andrade** is an associate with Foley & Lardner in Washington, D.C.

Charles N. Bowen is an associate at Gambrell & Stolz in Atlanta, Georgia.

D. Willas Miller is the chief of the sex crimes prosecutions unit for the Queen's County District Attorney's Office in Brooklyn, New York. Last fall, he addressed first-year students in Professor Sara Beale's Criminal Law class on his experiences as a prosecutor.

Robert J. Nagy is now assistant general counsel of the NationsBank Corporation in Charlotte, North Carolina.

Duke Grads Bring American Law to Eastern Europe

Amy Gillespie '93

Since the late 1980s, the crumbling of the Iron Curtain has created a vacuum of legal and business expertise in Eastern Europe's emerging democracies. Countries accustomed to centrally-planned economies have found themselves ill-equipped for the shift to free-market economics and democratic governments. Stepping in to help fill this need are two recent Duke Law graduates, **Brenda Brown '91** in Estonia, and **Susan Somach '88** in Hungary.

Brenda Brown has embarked upon the ultimate adventure for an American lawyer in a foreign country: she has opened her own law firm. Affiliated with a small firm from the country of Cyprus, Brown works solo in Tallinn, Estonia's capital of 500,000. Though several U.S. firms are setting up branch offices there, she is currently the only American lawyer in Tallinn.

Brown will practice international finance, banking, tax, and commercial transactions for foreign investors in Estonia and Estonians doing business abroad. Open since November 1, 1993, Brown's firm already has two clients: an Estonian shipping company and a British timber company planning to harvest, process and export logs from Estonia.

Brown combines a J.D. and LL.M. in international law from Duke with valuable substantive knowledge of international banking and finance. She observed firsthand the problems created by the transition from communism to capitalism when she studied banking reform in the Baltic states as a Ford Fellow in 1992-93. "Here we're watching the birth of banking systems," Brown explains. "Under the Soviet structure, people didn't have a lot of responsibility or accountability for what they did. In a western system, the central bank should be independent of the government so it can monitor the stability and creditworthiness of new financial institutions. But the central banks have been a problem here. Are they standing up and taking control or just listening to the government?"

Banking in Estonia is still rudimentary. It is difficult to move money from one bank to another, and there are few checking accounts. Furthermore, investment can be risky in a system that charges

50% annual interest and does not guarantee deposits. Despite these obstacles, capitalism is flourishing in Estonia. Since the nation became independent in 1991, the number of joint ventures registered there has risen to 3,000. As the western-most warm-water port of the old Soviet Union, Tallinn remains a desirable export center, especially for Russia. Estonia's manufacturing sector is also thriving. Formerly used for the Soviet defense



Brenda Brown '91



Susan Somach '88

industry, many Estonian high technology plants are being converted to civilian uses by companies seeking "western European manufacturing standards at eastern European prices," Brown explains.

Brown's interest in Estonia goes deeper than just personally benefitting from business opportunities. She has been involved in many of the projects that are shaping the country's emerging legal system. She has helped write a bilingual comparative analysis of civil code systems; drafted laws governing mortgages and the use of collateral; and edited the English translation of the Estonian Constitution. Curious Estonian leaders have quizzed her about all aspects of the American legal system. "They were very interested in our system of legal aid," Brown remembers. "How we did it and who pays for it."

In 1992, Brown organized a constitutional law conference for the newly-appointed justices of the brand-new Estonian supreme court. She brought American and European constitutional scholars together to discuss judicial independence, judicial review, and the new Estonian Constitution. "This was the most rewarding thing I've done so far," Brown says. She compares the new judges to first-

year law students who, at first befuddled by a professor's hypothetical, suddenly grasp its meaning. "You could see the learning process reflected as their faces would light up," Brown says.

While Eastern European countries currently rely on outside experts like Brown, they know they must also grow their own talent. Accordingly, a tremendous demand for legal and business education has accompanied the spread of capitalism.

Susan Somach is one American lawyer responding to this demand. After three and a half years at Washington D.C.'s Shaw, Pittman, Potts and Trowbridge, representing foreign banks in the United States, Somach now teaches both law and business at Janus Pannonius University in Pecs, Hungary.

Somach was brought to the university by Language for Eastern European Development (LEED), an organization which combines the teaching of English with teaching of technical subjects. Somach has found her law students hungry to learn about the U.S. legal system. She accommodates their interest by simulating the American legal experience. After an overview of the Declaration of Independence and U.S. Constitution, students in her American Legal English class use debate, mock trials and mock congressional hearings to explore the basic areas of American jurisprudence — constitutional issues, criminal law, torts and contracts.

Somach believes education is crucial to sustaining fledgling democracies like Hungary. "I see the tragedy raging in the Balkans; the civil wars in Georgia, Armenia and Azerbaijan; and the struggle for autonomy elsewhere as a warning that democracy cannot thrive without educating the people," she comments. "Taking the time to teach people how to live and participate in democracy really is the key to its success."

Somach sees her role as much broader than just teaching the "how-tos" of capitalism. She tries to teach her students strategies that will nurture Hungary's democracy. "For this whole region, and increasingly throughout the world, the skills I learned in my negotiations class at Duke seem critical in maintaining a rational world order," she

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ALUMNI ACTIVITIES

Howard A. Skaist taught copyright law as an adjunct faculty member at Albany Law School last year. He is also a patent attorney with General Electric.

'89 *Reunion plans are underway for the Class of 1989. Law Alumni Weekend will be October 7-8, 1994. Details will be mailed in the spring. Please contact the Law Alumni Office at 919-489-5089 if you are interested in helping plan your reunion or if you have any questions at this time.*

Kathleen Westberg Barge and **J. Stephen Barge** are both associates at Covington & Burling in Washington, D.C.

Michael L. Flynn has become an associate in the Charlotte, North Carolina office of Kennedy Covington Lobdell & Hickman, practicing corporate and banking law.

Pamela A. Hulnick has become associated with Kirsch, Gartenberg & Howard in Hackensack, New Jersey, where she continues to practice in the areas of creditors' rights/bankruptcy and general and commercial litigation.

Debra M. Parrish is investigating and litigating cases involving research fraud for the Office of Research Integrity in Rockville, Maryland.

Hans J. Piehl is now an associate with Döser Amereller Noack, which is the German branch of Baker & McKenzie, where he works in the field of corporate law.

Robert E. Rigler announces the formation of The Rigler Law Firm in Alexandria, Virginia, concentrating on the representation of commercial banks, investment banks, insurance companies and other financial institutions.

Mark J. Rosenberg has returned to school to pursue a master's in public administration at New York University.

Wendy D. Sartory has joined the Los Angeles, California office of Shearman & Sterling, practicing in the banking and real estate financing areas.

John Reed Stark is now an attorney with the Division of Enforcement of the United States Securities and Exchange Commission in Washington, D.C.

James E. Tatum, Jr. is now assistant corporate counsel in the Office of the Corporation Counsel in Washington, D.C.

'90 **Gregory S. Baylor** has joined the Washington, D.C. office of Seyfarth, Shaw, Fairweather & Geraldson.

Jon A. Brilliant has joined the Wilmington, Delaware office of Skadden, Arps, Slate, Meagher & Flom.

D. Paul Dietrich, II has become an associate at the Florida law firm of Akerman, Senterfitt & Eidson, resident in the firm's Orlando real property group. He emphasizes transactional, development and commercial lending work.

Deanna Tanner Okun is a legislative assistant to Senator Frank Murkowski (R-Alaska), handling trade and foreign relation matters.

Anthony D. Taibi is an assistant professor at the University of Illinois College of Law. He organized a conference in 1993 on community empowerment and economic development, the proceedings of which will be published by the Duke University Press.

Robert A. Van Kirk is a trial attorney for the Justice Department in Washington, D.C.

'91 **Louis S. Citron** received an LL.M. degree in taxation in July 1993 from New York University School of Law. He is a tax associate at Reid & Priest in New York City.

Franck Courmont has joined the Paris office of Wilkie Farr & Gallagher, concentrating in mergers and acquisitions.

Rebecca P. Falco is an associate at the firm of Gray Cary Ware & Friedenrich in the Palo Alto, California office. The firm was created by the merger of Ware & Friedenrich of Palo Alto, and Gray Cary Ames & Frye of San Diego.

'92 **James A. Burnham** has joined the Chicago, Illinois firm of Barach, Ferrazzano, Kirschbaum & Perlman.

Gloria Cabada-Leman is an associate in the Durham office of Moore & Van Allen, practicing in the areas of litigation, computer law and intellectual property.

Gail H. Forsythe has joined the Vancouver, Canada firm of Clark, Wilson, where she is developing her personal injury, malpractice and intellectual property litigation practice. She also is involved in mediation and in promoting dispute resolution services in Vancouver, and is an S.J.D. candidate at Duke studying comparative dispute resolution.

Norbert B. Knapke, II has become an associate in the Chicago, Illinois office of Jenner & Block.

Robert E. Kohn is now a litigation associate in the Washington, D.C. office of Akin, Gump, Strauss, Hauer & Feld.

Steven M. Marks is now an associate at Steel Hector & Davis in Miami, Florida, specializing in libel and appellate law.

Karl N. Metzner has become an associate with the firm of Spriggs & Hollingsworth in Washington, D.C.

Thomas G.W. Telfer is a doctoral candidate at the University of Toronto Faculty of Law, where he received an Insolvency Institute of Canada Fellowship. He is teaching commercial and debtor-creditor law at the University of Auckland Faculty of Law in New Zealand, while continuing work on his doctoral thesis.

Tracy D. Traynham has joined the labor practice of the Dallas, Texas office of McKenna & Cuneo.

Personal Notes

'63 **Julian C. Juergensmeyer** and his wife, Ewa Gmurzynska, proudly announce the birth of a daughter, Kristina, on June 10, 1993.

'71 **Arthur W. Carlson** and his wife, Jeri Waite, are pleased to announce the birth of their second child and first daughter, Sara Elizabeth Carlson, on March 25, 1993.

'74 **Russell B. Richards** and his wife, Melanie, happily report the birth of a daughter, Kelsey Jane Richards, on July 26, 1993.

'76 **Michael R. Casey** was married to Kathleen Molchan in December 1991. They practice in the firm of Casey & Molchan in Fort Lauderdale, Florida.

Kent L. Mann was married to Amy Holdren on May 2, 1992. They proudly announce the birth of their daughter, Emma Frances, on June 18, 1993.

'79 **Nancy A. Nasher** and her husband, David Haemisegger, announce with joy the birth of a daughter, Sarah Nasher Haemisegger, on August 11, 1993.

Neil P. Robertson announces the birth of a second daughter, Katherine Marie, on June 14, 1993.

Sam D. Scholar and his wife, Kathy Kish, are happy to announce the birth of a daughter, Helen Elizabeth, on December 27, 1991.

Evan H. Zucker and his wife, Paula Eisenhart, happily report the recent birth of a son, Cameron Paul Zucker.

'80 **Clifford B. Levine** and his wife, Rosanne, proudly announce the birth of their fourth child, a daughter named Rebecca Leigh, on June 23, 1993.

'81 **Melissa MacLeod May Brydges** and her husband, Tom, are pleased to announce the births of their son, Andrew MacLeod Brydges, on June 17, 1991, and their daughter, Elizabeth Hendricks Brydges, on August 22, 1992.

Michael R. Dreeben and his wife, Lila Fendrick, are the proud parents of a son, Alexander, who was born September 29, 1992 in Seoul, Korea, and who arrived at their home on February 11, 1993.

Alan S. Madans and his wife, Denise, are happy to announce the birth of a second daughter, Debra Anne Madans, on April 24, 1993.

Bruce H. Saul and his wife, Polly, are pleased to report the birth of their first child, a son named Dylan Britton Saul, on May 9, 1993.

'82 **L. Sidney Connor** and his wife, Shirley, announce the birth of a daughter, Elizabeth Anne Frances Connor, on January 20, 1993.

Alan T. Gallanty and his wife, **Sheila Koalkin Gallanty '83**, are pleased to announce the birth of a son, Eric Tyler Gallanty, on February 15, 1993.

Thomas W. Logue and his wife, Sheila, happily report the birth of their first child, a daughter named Teresa Caroline Logue, on June 14, 1993.

Duke Law Grads in Eastern Europe *(continued from page 54)*

says. Thus, students in her negotiations class read the American classic *Getting to Yes*. "It's really amazing to see these students beginning to view disagreements from an interest perspective rather than [from preconceived] positions. We had a fascinating discussion about nationality and statehood. Although Hungarians aren't known for the blood-feuding of the Balkans, emotions can run high on nationality issues."

In her spare time Somach consults for a Hungarian company involved in joint ventures in telecommunications and energy technology. "One of

the major lessons I have learned from being here is how important it is to go beneath the surface of what you see. When I first arrived in Pecs, I was shocked to find a place that seemed only a step behind Western Europe, complete with a Dairy Queen and Adidas shop," Somach reflects. "But after living here for over a year, I can see more clearly the effects of the last 50 years. I have spent time noticing how things are and asking about how they were to develop a more complete understanding of Hungary and Hungarians."

Somach believes such an in-depth understanding is critical for those who would assist the political and economic transitions in Eastern Europe, and credits her undergraduate degree in Russian and Eastern European Studies for her knowledge of the historic and cultural background of the region. "It is naive and even politically dangerous to approach problems here from the background of western traditions and a solid democratic history. Economic, political and legal transitions are shaped and colored by history and culture."

ALUMNI ACTIVITIES

'83 **Clement R. Gagne, III** and his wife, Nusrad Alam, proudly report the birth of a daughter, Jasmin Nicole, on March 20, 1993.

Sheila Koalkin Gallanty and her husband, **Alan T. Gallanty '82**, are pleased to announce the birth of a son, Eric Tyler Gallanty, on February 15, 1993.

Richard L. Garbus and his wife, Margaret, are the proud parents of a daughter, Haley Caitlin Garbus, born on November 10, 1992.

Valerie A. Schwarz and **Christopher M. Mason**, both Class of '83, were married on December 31, 1993 in New York City, where Val is a partner with the firm of Windels Marx Davies & Ives, and Chris is a partner at Hunton & Williams.

'84 **Sol W. Bernstein** and his wife, Risa, proudly announce the birth of a son, Benjamin Bernstein, in December 1992.

Thomas J. Blackwell was married to Laura Richter on June 12, 1993. They reside in St. Louis, Missouri, where Tom is associate general counsel of Washington University.

Roger M. Cook was married to Amy Louise Brannock on October 2, 1993 in Durham. Roger is an attorney with East Central Community Legal Services in Raleigh.

Barbara Tobin Dubrow and her husband, Kenneth, are pleased to announce the birth of a daughter, Samantha Rose Dubrow, on June 11, 1993.

Kelley Badger Gelb is happy to announce the birth of a daughter, Chandler Elizabeth Gelb, on April 4, 1992.

Marc A. Leaf was married to Debra Ann Oaks on May 23, 1993 in White Plains, New York. Marc is a senior associate with the firm of O'Sullivan Graev & Karabell in New York City.

A. William Mackie and his wife, Linda Haile Mackie, are proud to announce the birth of their third child and first son, John Marshall Mackie, on July 28, 1993.

Mark H. Mirkin happily reports the birth of a daughter, Emily Sarah, on June 2, 1993.

Audrey McKibbin Moran and her husband, John, are pleased to announce the birth of their third child and second daughter, Mary Kelley Moran, on October 26, 1992.

John H. Sokul, Jr. and his wife, Susan, happily report the recent birth of a son, James Fletcher Sokul.

'85 **Aaron J. Besen** was married to Jennifer Jai on June 27, 1993 in Portland, Oregon, where he is special counsel to the firm of Sussman Shank Wapnick Caplan & Stiles.

Michael A. Kalish and his wife, Barbara, are pleased to announce the adoption of Zachary Alex Kalish, who was born on July 7, 1993.

Gordon A. Kamisar and his wife, Karen, happily report the birth of their first child, a son named Nicholas Welles Kamisar, on May 14, 1992.

Anne May Knickerbocker and her husband, Bob, are proud to report the birth of their first child, a son named Robert George Knickerbocker II, on March 29, 1993.

James P. Lidon and his wife, **Jean Sih Lidon '86**, are the proud parents of their fifth child, a daughter named

Siobhan Elizabeth Lidon, born on May 4, 1993.

David S. Liebschutz and **Elizabeth Hoffman Liebschutz**, both Class of '85, are pleased to announce the birth of their second child, a daughter named Rebecca Joy Liebschutz, on August 22, 1993.

Peter G. Weinstock happily reports the birth of a second child, a daughter named Molly Elizabeth, on May 6, 1993.

'86 **John F. Grossbauer** was married to Tracey Burnett on September 18, 1993 in Wilmington, Delaware.

Elizabeth A. Gustafson and **Mark D. Gustafson**, both Class of '86, joyfully announce the birth of their second child, a son named Andrew Lee, on October 9, 1993.

Jean Sih Lidon and her husband, **James P. Lidon '85**, are the proud parents of their fifth child, a daughter named Siobhan Elizabeth, born on May 4, 1993.

Scott J. Mikulecky and his wife, Susan Marie, report that they now have four children—Nick, Tony, Greg and Jeff.

Anne T. Wilkinson and her husband, Shrin Rajagopalan, happily announce the birth of their second daughter, Sheila, on November 22, 1993.

'87 **James E. Felman** and **Marleen A. O'Connor**, both Class of '87, are the proud parents of their first child, a daughter named Sarah Elaine Felman, born on March 10, 1994.

Brian B. Gilbert and his wife, Elyse, happily announce the birth of a daughter, Kaila Hope Gilbert, on March 23, 1993.

Tish Walker Szurek and her husband, Paul, are happy to announce the birth of their second child, Walker Allen Szurek, on January 8, 1993.

'88 Sandra Hardgrove Andrade and her husband, Juan Andrade, proudly announce the birth of their first child, John Alexander Andrade, on August 9, 1993.

Erik O. Autor was married to Ariadne Marguerite Allan on September 5, 1993 in Medfield, Massachusetts. Erik is minority international trade counsel for the United States Senate Finance Committee in Washington, D.C.

Anders C. Jessen and his wife, **Margaret G. Wachenfeld-Jessen '89**, are happy to announce the birth of a son, Alexander, on August 28, 1993.

Philip M. Nichols and his wife, Amy, are pleased to report the birth of a son, Thomas Anthony (Tanner) Nichols, on May 4, 1993.

Taylor D. Ward was married to Sally Foster McSween on May 9, 1992. Taylor is with the firm of White & Case in New York City.

'89 Andrea Lee Bailey was married to Geoffrey Miller Lyman in November 1992. Andrea is an associate with Sutherland, Asbill & Brennan in Atlanta, Georgia.

Kathleen Westberg Barge and **J. Stephen Barge**, both Class of '89, are proud to announce the birth of their first child, a son named Aaren, on August 14, 1993.

Rose E. Kriger was married to Dan Renberg on October 10, 1993 in

Memphis, Tennessee. They reside in Washington, D.C., where Roz is an associate with Patton, Boggs & Blow.

Russell E. Ryba was married to Maureen A. O'Malley on February 13, 1993. Russ is an associate with Foley & Lardner in Milwaukee, Wisconsin.

Guy A. Vermeil was married to Gilanne Chamorel on January 29, 1993. They reside in Geneva, Switzerland.

Margaret G. Wachenfeld-Jessen and her husband, **Anders C. Jessen '88**, are happy to announce the birth of a son, Alexander, on August 28, 1993.

'91 Calvin B. Bennett, III and his wife, Valerie, are pleased to announce the birth of their second son, William Christian Bennett, on June 17, 1993.

Jane Elizabeth H. Davis was married to Richard Robinson Smith on August 7, 1993 in Winston-Salem, North Carolina. They reside in Koblenz, Germany; Jane Elizabeth is working in the Frankfurt office of Jones, Day, Reavis & Pogue.

Dara S. Grossinger was married to Daniel S. Redler on August 28, 1993 in Philadelphia, Pennsylvania. Dara is an associate at Alston & Bird in Atlanta, Georgia.

Jennifer Gimer Hays and her husband, Robert, are the proud parents of their first child, a son named Robert Daniel Hays, III, born on June 26, 1993.

Evy M. Jarrett and **William L. Bostleman**, both Class of '91, were married on August 28, 1993. They reside in Toledo, Ohio, where Evy is with the firm of Robinson, Curphey & O'Connell and Bill works with the Bostleman Corp., a real estate development and construction company.

Hiroyuki Hosoi was married on July 4, 1993 in Tokyo, Japan.

Helle R. Weeke was married to Kirk H. Weichsel on September 4, 1993. They reside in Charlotte, North Carolina, where Helle is an associate with Wishart, Norris, Henninger & Pittman.

'92 Hans J. Brasseler was married to April Chou on March 25, 1993 in Chicago, Illinois. They reside in Brussels, Belgium, where Hans practices in the area of international transportation and admiralty at Stibbe Simont Monahan Duhot.

Jayne E. Powell was married to Chuck Kelley on May 1, 1993. They reside in Staunton, Virginia.

Thomas G.W. Telfer and his wife, Patricia, are delighted to announce the birth of a son, Alexander, on November 25, 1992.

'93 Joelle Keats Belanger and her husband, **Brian S. Belanger '95**, are the proud parents of a son, Connor Joseph, born on August 22, 1993.

Wendy Anne Hartman was married to Juan Carlos del Real on August 28, 1993 in the Duke University Chapel. Wendy is an associate in the Morristown, New Jersey firm of Riker, Danzig, Scherer, Hyland & Peretti.

Obituaries

Class of 1929

Francis W. Davis, 87, died June 9, 1993 in Pompano Beach, Florida. He was the founder of Davis Beverage Co., Inc. in Harrisburg, Pennsylvania, and served in national and state beverage associations. Davis was active in civic and church organizations in Harrisburg and in Fort Lauderdale, Florida.

Davis is survived by his wife, Harriette Davis; a son, Wesley S. Davis, Sr. of Camp Hill, Pennsylvania; a sister, Mary E. Smith of Vine Grove, Kentucky; two grandchildren; six great-grandchildren; and eleven nieces and nephews.

Class of 1942

Nicholas P. Varlan, 76, died October 29, 1993 in Brighton, New York. During over three decades of public service in Monroe County, New York, Varlan had been a district attorney as well as a public defender. During World War II, he was an Army interrogator of Japanese prisoners in Hawaii and also worked in the judge advocate's office reviewing court martial cases.

Varlan was an assistant district attorney from 1947 to 1970, except for an eight-month period when he entered private practice. In 1970, he was named public defender. He retired in 1990, and was an avid golfer.

Survivors include his wife, Pauline; a son, Peter N. Varlan of Rochester; a brother, George P. Varlan of Rochester; and two sisters, Mary Ann Mourtzikos of Rochester and Elvira Scondras of Geneseo, New York.

Class of 1947

Robert Wheaton Walter of Mission Viejo, California, died on May 4, 1993. He was president of Central Pipe and

Supply and Alpine Pipe and Supply in Denver, Colorado for many years. He served in the Marine Corps during World War II.

Walter established a gift annuity fund to benefit the Robert William and Robert Wheaton Walter Law Scholarship Fund at the Law School. The Scholarship Fund was originally created by **Robert William Walter '81** to honor his father, who also contributed to the fund.

Walter is survived by his wife, Charlotte; two sons, Robert William Walter '81 of Denver, Colorado and Bruce Walter; two daughters, Elizabeth and Wendy; two step-daughters, Sarah Marr and Laura Ellinger; a step-son, Charles Marr; a sister, Carolyn; and seven grandchildren.

Class of 1951

Harold I. Lindsey, 72, of Lutz, Florida, died on March 6, 1993 in Tampa. He served for five years as a law professor at Mercer University, was in private practice in Charleston, South Carolina for 15 years, and retired from teaching at Stetson University College of Law in St. Petersburg. He was a member of two square dance clubs.

Lindsey is survived by his wife, Mary; a son, John Lindsey of Lutz; a daughter, Sandra A. Lindsey of St. Petersburg; a step-daughter, Bebe Bradbury Norris of Tampa; a brother, Wilbur M. Lindsey of Charleston; two sisters, Annie Mary Lindsey and Margaret L. Carr, both of St. Petersburg; and three grandchildren.

Class of 1962

Herbert A. Schaffner, 58, of Hummelstown, Pennsylvania, died on October 10, 1992 in the crash of a

small airplane in Schuylkill County, Pennsylvania. He was the only person aboard the plane when it exploded in mid-air. Judge Schaffner was a Dauphin County Common Pleas judge at the time of his death.

Judge Schaffner flew in the Air Force from 1956-59 and in the Pennsylvania National Guard from 1959-68. In 1963, he became an associate counsel with the Pennsylvania Workmen's Insurance Fund. He was a state deputy attorney general from 1963 to 1965, and then joined the Dauphin County district attorney's office. He was the Hummelstown borough solicitor from 1966 to 1976, when he became solicitor for the Dauphin County commissioners. He was elevated to the bench in 1982 to fill an unfilled seat; he was elected to a ten-year term in 1982.

Class of 1964

Anthony B. Hicks, 53, of New Smyrna Beach, Florida died on January 5, 1994. He was a commodities broker for Prudential Securities in Orlando, and was a member of the Citrus Club of Orlando and the New Smyrna Beach Yacht Club.

Hicks is survived by his wife, Sally; his mother, Anna Hicks of Port Orange, Florida; three sons, Douglas A. of Casselberry, Florida, David of Miami, and Douglas M. of New Smyrna Beach; a daughter, Diane of Windermere, Florida; and a sister, Cicely Meaker of Milford, New Jersey.

Class of 1975

Robert H. Bartelt, 66, of Fayetteville, North Carolina, died on January 12, 1993. He was the Cumberland County assistant county attorney at the time of his death. During a

27 year career in the Army, he served in both World War II and in Vietnam. He fought in Europe as an enlisted man; became an officer in 1946, working in counter-intelligence in post-War Germany; and retired as a colonel. He was a Special Forces officer in the early stages of the United States' involvement in the Vietnam War and was the first commander of a counter-insurgency school in Okinawa. His military decorations included a Purple Heart, the Bronze Service Medal, and the Legion of Merit Badge.

Bartelt retired from the Army in 1971, and joined the Fayetteville County attorney's office after graduating from the Law School. In the late 1970s, he worked in the Fayetteville law firm of Clark, Clark, Shaw and Clark. He also taught at Embry-Riddle Aeronautical University at Fort Bragg.

Survivors include his wife, Noemis S. Bartelt; his mother, Hazel Bartelt; and five daughters, Nora Whisnant of Chicago, Illinois, Dana Bartelt of Raleigh, Mara Broadhurst of Sherwood, Oregon, Lily Bartelt of Denver, Colorado, and Coco Bartelt of Groton, New York.

Faculty

Professor emeritus **Bertel M. Sparks**, 75, died January 24, 1994, after a long period of declining health. He was a member of the Law School faculty for 21 years, teaching in the areas of trusts and estates, property, and law and economics. He served for many years on the Drafting Committee of the North Carolina General Statutes Commission, and authored two books.

Sparks was born in Jackson County, Kentucky in 1918. He graduated from

Eastern Kentucky University in 1938 and from the College of Law at the University of Kentucky, where he was editor of the *KENTUCKY LAW JOURNAL*, in 1948. He received an LL.M. degree

Professor Sparks was described by his long-time colleague, Melvin Shimm, as "invariably courteous and considerate in his dealings with everyone." Shimm also noted that "what distin-



Professor emeritus Bertel M. Sparks

Sam Gray

in 1949 and an S.J.D. in 1955, both from the University of Michigan, where he was a Cook Fellow.

During World War II, Sparks was a special agent in the Army Counter-intelligence Corps. He joined the faculty of New York University Law School in 1949, where he taught until 1967, when he joined the Duke Law faculty.

guished Bert particularly as a teacher was the great personal interest he took in his students — not only while in Law School, but also after they had graduated."

Sparks is survived by his wife, Martha, of Durham; two brothers; three sisters; and five nephews.

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