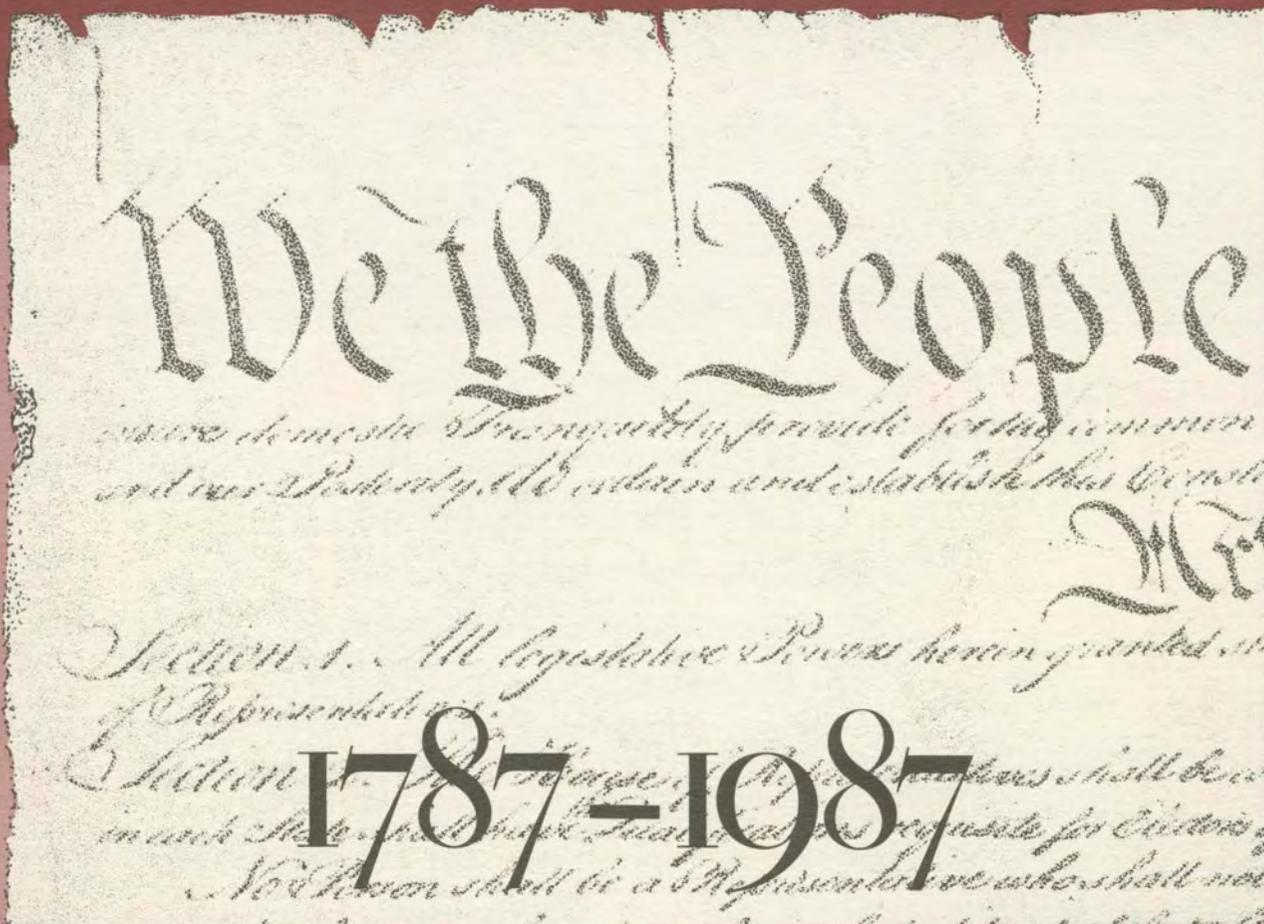


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Duke Law Magazine

WINTER, 1987



The Constitution

Duke Law Magazine

Contents

-
- 2** *Editor's Column*
-
- 3** ***The Constitution***
- 4** *Implied Powers / William Van Alstyne*
- 9** *Speedy Trial / A. Kenneth Pye*
- 11** *George Sutherland / Francis Paschal*
- 13** *Trial by Jury / Paul D. Carrington*
-
- 22** ***Affirmative Action***
- 23** *Affirmative Action / Arthur Larson*
-
- 26** ***About the School***
- 27** *Duke Law School Annex*
- 29** *Duke in Denmark*
- 31** *The Deans' Advisory Council*
- 33** *Women's Law Society*
- 35** *The Duke Legal Research Program*
- 36** *The Duke Prisoner Rights Project*

DEAN

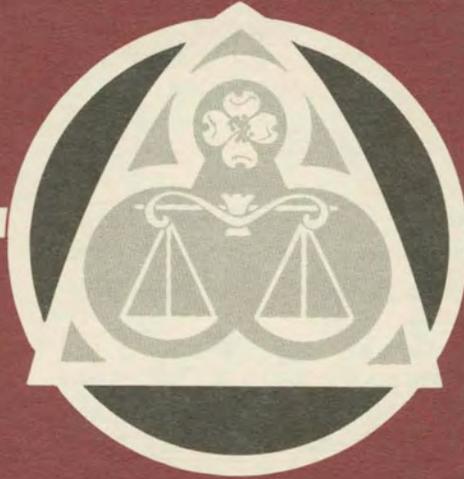
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-
- 38** *The Docket*
- 39** *Francis Paschal Retires*
- 40** *Duke Hosts National Sports Forum '86*
- 42** *Duke Law School in the 1930's: A Retrospective*
- 48** *Duke Law Alumni in the Pacific Northwest*
- 52** *Duke Alumni Prominent in the North Carolina Bar Association*
- 54** *Book Review: Suing the Press by Rodney Smolla*
- 56** *Specially Noted*
- 62** *Upcoming Events*
- 64** *Law Alumni Association Commissions Alumni Directory*

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Editor's Column

Duke Law School is celebrating the bicentennial of the Constitution along with the rest of the country. As part of that celebration, the *Duke Law Magazine* is publishing a series of articles written by members of the Law School faculty for the recently published *Encyclopedia of the American Constitution*. Also of interest to students of the Constitution is Arthur Larson's article on Affirmative Action.

Several articles on student organizations currently operating at the Law School are featured in the About the School section. These articles are part of a series on student organizations which began in the summer 1986 issue and will continue in the next summer issue. A significant change in the physical facilities of the Law School is reported in the article on the Pickett Road Annex, where the Alumni/Development and Admissions Processing Offices are now located. Ranging still further afield, that section also includes a report on last summer's Duke in Denmark program.

The Docket continues to expand. That section will continue to highlight the personal and professional accomplishments of Duke Law

School faculty and alumni. In this issue, there is a report on the retirement of Francis Paschal and a report on the first National Sports Forum, which was organized and moderated by John Weistart and held at Duke University.

In honor of our Duke Law alumni from the classes of the 1930's who are reaching a significant milestone in their lives and careers—the fiftieth anniversary of their graduation from law school—this section includes a retrospective article on the Law School in the 1930's. This period was an exciting time in the life of the Law School and an important time in building its reputation. Illustrative of the fact that those who came before us were successful in establishing a national law school, there is also an article about some of our alumni who practice in the Pacific Northwest.

Though Duke Law School has established itself as a national law school, its ties with its home state remain strong. Another article in that section highlights several Duke Law alumni who have recently taken on important positions in the North Carolina Bar Association.

The remainder of that section focuses on the activities and accom-

plishments of our alumni and on upcoming programs or events sponsored by the Law School and/or the Law Alumni Association. The Alumni Activities section (including Personal Notes and Obituaries) will be a regular Docket feature. We hope that our alumni will continue to send us news of the milestones in their personal and professional careers so that we can share the news with the Duke Law alumni family.

As I assume the role of editor of *Duke Law Magazine*, I wish to thank Joyce Rutledge for the fine job she did in creating the *Duke Law Magazine*, the successor to the *Duke Docket*, and in serving as its editor for its first four years. I also thank her for soliciting the articles from the faculty for this issue in accordance with the schedule we developed for the changeover of editorship. I also wish to thank the students and alumni who have so enthusiastically contributed material to the Docket and the About the School sections and to encourage all our readers to communicate with us so the *Magazine* can respond to the needs and desires of its readership.

THE CONSTITUTION

Implied Powers

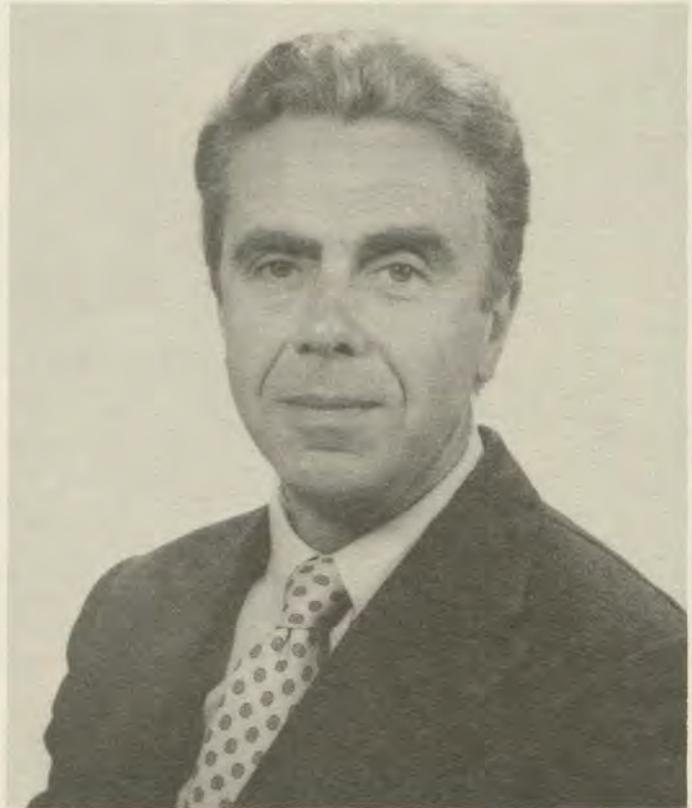
William Van Alstyne*

“**L**oose and irresponsible use of adjectives colors . . . much legal discussion. . . . ‘Inherent’ powers, ‘implied’ powers, ‘incidental’ powers are used, often interchangeably and without fixed ascertainable meanings.” Justice Robert H. Jackson’s remark in *Youngstown Sheet and Tube Co. v. Sawyer* in 1952 was correct. The vocabulary of “implied powers” is frequently used indiscriminately with other terms. It is associated with not less than six different usages.

The original use of “implied powers” was to contrast, rather than to explain, the powers that would vest in the United States. The national government would not automatically possess all the customary attributes of sovereignty, but only those expressly provided. As to these, James Madison declared in *The Federalist #45*: “The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite.” Writing for a unanimous Supreme Court in 1804, Chief Justice John Marshall, in *United States v. Fisher*, agreed that there were no implied-at-large national powers: “It has been truly said, that under a constitution conferring specific powers, the power contended for must be granted, or it cannot be exercised.” More than a century later, Justice David Brewer in *Kansas v. Colorado* in 1907 confirmed the conventional wisdom: “The proposition that there are legislative powers [not] expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers.”

In this original sense, then, it may be said that the Constitution does not imply a government of general legislative, executive, and judicial powers; it establishes a government of limited, express, enumerated powers alone.

In 1936, in *United States v. Curtiss-Wright Export Corporation*, Justice George Sutherland, in an obiter dictum for the Supreme Court, suggested that the national government need not rely upon any express power to sustain an assertion of executive authority prohibiting American companies from foreign trade which (in the president’s view) might compromise the nation’s neutral status at international law. Sutherland observed that the United States, as a nation within an international community of sovereign national states possessed “powers of external sovereignty” apart from any one or any combination of the Constitution’s limited list of powers respecting foreign relations. Accordingly, Sutherland declared: “The broad statement that the federal government can exercise no powers



William Van Alstyne

except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs.” Such an extraconstitutional power may informally be described as one derived from the status of being a sovereign nation or as implied by the fact of national sovereignty.

The soundness of this view has been seriously questioned, and its acceptance has not been necessary to the outcome of any case. Rather, its principal positive law use has been as a reference in support of very broad interpretations of the several provisions in the Constitution which expressly enumerate executive and congressional powers respecting foreign affairs. It has also been relied upon to uphold extremely permissive delegations of power by Congress to permit the president to determine conditions of trade between American companies and foreign companies, or conditions of American travel and activity abroad.

Not inconsistent with the general view that any claim of implied-at-large national powers is precluded

by the text and presuppositions of the Constitution, such specific powers as are conferred by the Constitution have been deemed to carry with them exceedingly wide-ranging implications. Partly this results merely from the doctrine of broad construction that every specific grant of power is to be deferentially interpreted, rather than narrowly construed. For instance, the power vested in Congress to "regulate" commerce among the several states might have been interpreted quite narrowly, in keeping with the principal objectives of enabling Congress to provide for a nationwide free trade zone, as against the tendency of some states to enact discriminatory taxes, and other self-favoring economic barriers. Instead, the power was construed in no such qualified fashion. The power to regulate commerce among the several states is "the power to prescribe the rule by which such commerce shall be governed," which therefore includes the power to limit or to forbid outright such commerce among the states as Congress sees fit to disallow. The result has been that to this extent, the express power to regulate commerce among the states gives to Congress a limited national police power.

Beyond adopting an attitude of permissive construction respecting each enumerated power, the Supreme Court took an additional significant step. It accepted the view that acts of Congress not themselves direct exercises of conferred powers would be deemed authorized by the Constitution if they facilitated the exercise of one or more express powers. An Act of Congress establishing a national bank under a corporate charter granted by Congress, vesting authority in its directors to set up branch banks with general banking prerogatives, may arguably facilitate borrowing on the credit of the United States, paying debts incurred by the United States, regulating some aspects of commerce among states, and serving as a place of deposit for funds to meet military payrolls. Each of these uses is itself identified as an express, enumerated power vested in Congress although the act establishing such an incorporated national bank may itself not be regarded as legislation that borrows money, pays debts, and so on. Nevertheless, insofar as provision for such a bank might usefully serve as an instrument by means of which several expressly enumerated powers could be carried into execution, the Supreme Court unanimously concluded that the congressional power to furnish such a bank was "implied" "incidentally" in those enumerated powers. The opinion by Chief Justice Marshall in *McCulloch v. Maryland* in 1819 was crowded with the repeated use of both terms. In tandem with the principle of generous construction, this view of "implied" incidental powers has had a profound influence in assuring to Congress an immense latitude of legislative discretion despite the conventional wisdom that the national government is one of the specific, enumerated powers alone. Laws not probably within even a latitudinarian construction of specific grants of power, but nonetheless instrumentally relatable to such grants,

Not inconsistent with the general view that any claim of implied-at-large national powers is precluded by the text and presuppositions of the Constitution, such specific powers as are conferred by the Constitution have been deemed to carry with them exceedingly wide-ranging implications.

are thus deemed to be adequately "implied" by those grants as incidents of grants.

A contemporary example is furnished by *Wickard v. Filburn* (1942). Although some of the "commerce" regulated by the act upheld in that case was not commerce at all (because it was not offered for trade, but was used solely for the farmer's personal consumption), and although the activity regulated was entirely local (growing and consuming wheat on one's own farm), insofar as the regulation of these local matters was nonetheless instrumentally relatable to an act fixing the volume of wheat permitted to be grown for purposes of interstate sale, the power to include local growing and consumption, as part of the larger regulation, was deemed to be implied by the express power to regulate commerce among the several states. The imaginative capacity of Congress to relate the aggregate interstate effects of local activity, thus bringing it within a uniform and integrated national economic policy, has made the principle of incidental implied power at least as important as the principle of broad construction in respect to enumerated national power. Indeed, the combination of the two doctrines has led Justice William H. Rehnquist, in *Hodel v. Virginia Surface Mining* in 1981, to suggest:

it is illuminating for purposes of reflection, if not for argument, to note that one of the greatest "fictions" of our federal system is that the Congress exercises only those powers delegated to it, while the remainder are reserved to the States or to the people. The manner in which this Court has construed the commerce clause amply illustrates the extent of this fiction.

However that may be, the notion that express powers imply an authority to undertake action instrumentally relatable to the use of those powers, albeit action not itself an exercise of any express power, has given to the national government a flexibility and discretion that it would not otherwise possess.

The bank case (*McCulloch*) and the wheat quota case (*Wickard*) are examples of implied powers incidental to *specific* enumerated powers. Each involved

acts of Congress establishing an enterprise or furnishing a regulation instrumentally related to one or another express power. Different from this kind of "incidental implied power," but resting on much the same sort of constitutional justification, are implied powers common to each of the three branches of the national government. These powers, sometimes called inherent powers, are deemed to be implied as reasonably necessary to each department's capacity to discharge effectively its enumerated responsibilities. Because they are regarded as effecting that capacity generally (and not merely in respect to one or another specific enumerated power alone), however, they are generically implied, incidental powers.

A prominent example is the unenumerated (but implied) power of each house of Congress to hold legislative hearings, to subpoena witnesses, and otherwise to compel the submission of information thought useful in determining whether acts of Congress on particular subjects need to be adopted, repealed, or modified. The power to conduct legislative investigations, nowhere expressly conferred, is deemed to be implied as a reasonable incident of the legislative function. Similarly, a power of federal courts to maintain order in adjudicative proceedings, independent of any act of Congress providing such a power (pursuant to the necessary and proper clause), rests on the same ground; and although never challenged, presumably the power of the Supreme Court to exclude all but its own members from its private conferences in which discussion is held and votes are taken on pending cases is an example.

A qualified power of executive privilege, enabling the president to interdict discovery of advice,

Federalist, #74, commenting briefly upon the express power vested in the president by Article II, authorizing the president to "require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices." As to this express provision, Hamilton suggested, "I consider [it] a mere redundancy in the plan; as the right for which it provides would result of itself from the office." So, undoubtedly, it would, especially as the Supreme Court was subsequently to hold that the president has an implied power to dismiss any executive subordinate at will, though no express clause so provides, and the clause respecting appointment of such officers requires the consent of the Senate.

We may phrase the matter variously, as power "resulting" from the establishment of the executive, legislative, and judicial branches, or as powers "incidental" to their designated powers. The point is the same: instrumental powers deemed reasonably necessary generally to each department's independent capacity to exercise its express, vested powers are treated as generically implied by Articles I, II and III.

As noted in *McCulloch* an act of Congress establishing a national bank in corporate form may be useful as a means of carrying into execution the several specific fiscal powers of the United States. Equally, a regulation of local commerce may be necessary to keep a regulation of interstate commerce from frustration. In either case the Court has upheld such exercise of congressional power when instrumentally relatable to the exercise of an express, enumerated power. In neither case, however, is it necessary to describe the power to adopt such instrumentally relatable laws as "implied" power. Rather, all such laws are themselves specifically and expressly authorized by an enumerated grant of enabling power vested in Congress: "Congress shall have power to make all laws necessary and proper to carry into execution the foregoing powers, and all other powers vested in the government of the United States or any officer or department thereof." This clause, located at the end of the enumerated powers of Congress in Article I, section 8, is known as the "necessary and proper" clause. Originally, in anticipation of its elasticizing effects, it was known as "the sweeping clause," vesting in Congress discretion to carry into effect its own enumerated powers, and those of the executive and judiciary as well by means of its own choosing. Consistent with that background, and consistent also with the general doctrine of generous (or loose) construction, the sweeping clause has been construed by the Supreme Court very liberally: "necessary and proper" are regarded as synonymous with "reasonable." Thus, whatever acts of Congress may reasonably relate to a regulation of commerce among the several states are authorized by this clause. Likewise, whatever acts of Congress may reasonably relate to the conduct of the judicial power of the United States, or the conduct of the executive powers (as described in Article II), as an aid to those departments to carry into

The notion that express powers imply an authority to undertake action instrumentally relatable to the use of those powers, albeit action not itself an exercise of any express power, has given to the national government a flexibility and discretion that it would not otherwise possess.

memoranda, and other internal executive communications is conceded by the Supreme Court to be implied as an incident of executive necessity and power. The principle common to these several examples was illustrated in a remark by Alexander Hamilton, in *The*

execution the executive or judicial powers, are authorized by this clause.

Because of this interpretation of the sweeping clause, it is not clear why the Supreme Court developed the notion of incidental implied powers. From one point of view, the latter doctrine is both redundant, because it duplicates a power already provided in the Constitution, and illogical because insofar as there is a clause expressly providing for such an instrumental power vested in Congress, to speak of such a power as "implied" rather than as "express" makes little sense. Had there been no necessary and proper clause, the innovation of a doctrine of implied power, incidental to enumerated powers, might be rested on the felt necessity of rendering the national government equal to ultimate growth and needs of the nation. But insofar as the necessary and proper clause was itself construed to provide for such flexibility, no need remained to be filled by the additional innovation of "implied, incidental" power. The doctrine of generous construction (respecting the scope of enumerated power) and the necessary and proper clause (itself generously construed), would in combination grant a vast instrumental latitude to Congress in respect both to its own powers and to those of the executive and the judiciary.

One consequence of this partial redundancy is that there is no particular consistency in the pattern of Supreme Court decisions respecting unsuccessfully challenged acts of Congress. Sometimes they are sustained as but implied incidents of one or more enumerated substantive powers. Sometimes, as happened in *McCulloch*, they are sustained on both grounds at the same time.

Were it not for a related problem, the question whether an exertion of national power not within an express enumerated power (but nonetheless instrumentally relatable to such a power) properly rests on the necessary and proper clause, or instead merely represents an implied power instrumentally incidental to an express power, would be merely academic. Unfortunately, it is not always so. The necessary and proper clause vests its power in Congress. It implies, by doing so, that if Congress believes it appropriate to facilitate the executive and judicial enumerated powers, it may do so by enacting legislation helpful, albeit not indispensable, to those departments. Merely "helpful" instrumental powers assertable by the executive or by the judiciary will depend, therefore, on whether Congress has, by law, acting pursuant to the necessary and proper clause, provided for them. Correspondingly, the absence of any such act of Congress providing for such incidental executive or judicial powers would be a sufficient basis for a successful challenge to any such unaided assertions of executive or judicial power.

On the other hand, if the mere enumeration of executive and judicial powers (in Articles II and III) are themselves deemed to imply incidentally helpful (but not indispensable) ancillary powers, then the absence of a supportive act of Congress is not fatal to such

claims. In this instance, it does make a difference to resolve the relationship between the necessary and proper clause (addressed solely to what Congress may provide) and the doctrine of implied, incidental powers.

Interestingly, two centuries into the positive law history of the Constitution, this particular question has not been addressed by the Supreme Court. Rather, an uneasy accommodation has been made. Each department of government has been regarded by the Court as possessing a range of incidental powers implied by its express powers, and such assertions of authority have been generally upheld. Nonetheless, insofar as Congress has legislated affirmatively, and by statute has

The pragmatic accommodation of the doctrine of implied incidental powers and the necessary and proper clause has been to treat Congress as first among equals.

found that such an assertion of incidental executive (or judicial) authority is not necessary or proper, the tendency of the Supreme Court is to defer to the authoritative judgment of Congress and, correspondingly, rule against the assertion of "implied" incidental executive power.

The pragmatic accommodation of the doctrine of implied incidental powers and the necessary and proper clause has been to treat Congress as first among equals. Each department of the national government has separate enumerated powers of its own, not subject to abridgment by either of the other two departments. In addition, each may assert implied incidental powers, instrumentally relatable to its enumerated powers albeit not literally within those enumerated powers as even generously construed. But a specific determination by Congress with respect to this latter class of powers is regarded as virtually conclusive of the subject. If the act of Congress confirms such power, it is virtually certain to be sustained. If the act of Congress either expressly or implicitly denies the appropriateness of such incidental executive or judicial power, then that determination also is likely to govern. The case best known for this view is *Youngstown Sheet & Tube Co. v. Sawyer*:

The Constitution enumerates express war powers and express powers enabling Congress to insure each state against domestic violence. Curiously, it has no express clauses directed to the internal security of the national government. Nevertheless, the authority to provide for laws punishing attempts of violent over-

throw has been sustained as an implied power of self-preservation. Depending upon how deeply such laws may affect certain freedoms to criticize the government or to bring about fundamental changes in its composition by peaceful means, these acts of Congress may be vulnerable to challenge under the First Amendment or other provisions of the Constitution. Nevertheless, a considerable implied power of self-preservation is deemed to vest in Congress, essentially on the common-sense inference that its express enumerated powers imply a residual existence of the government possessing those powers and thus, of necessity, a power of self-preservation. The Sedition Act of 1798 was sustained in the lower federal courts partly on this rationale.

Less frequently drawn into litigation, but presumably resting on similar grounds, is the implied power of Congress to provide for incidents of national status. The adoption of a national flag rests on no particular enumerated power. Rather, like other acts of Congress identifying symbols of national status, it is but an implied incident of an expressly established government—of the United States of America.

In sum, the phrase "implied powers" houses a half-dozen discrete meanings. They are bound together by but one common element, namely the obviousness of contrast with express powers. Beyond that, they speak to distinct (and not always completely reconcilable) propositions. One is an implied residual sovereign power of national self-preservation and the incidental power to adopt ordinary insignia of nationhood. In addition, there are implied powers peculiar to each of the three branches of the national government, incidental to the exercise of all enumerated powers expressly vested in each branch. Such generic implied powers apart, there are also implied cognate powers incidental to each expressly enumerated power, extending the reach of those enumerated powers even beyond what might otherwise be their

In sum, the phrase "implied powers" houses a half-dozen discrete meanings. They are bound together by but one common element, namely the obviousness of contrast with express powers.

scope under a doctrine of loose or generous construction. Then, too, although the usage seems inept in reference to an enumerated general enabling power, the necessary and proper clause of the Constitution has often been used to anchor the textual source of extensive instrumental powers. Last, there is also the claim of implied, extraconstitutional power in respect to the external sovereign relations of the United States, standing over and apart from the several enumerations of power provided by the Constitution.

The solidness of the foundations respecting these several varieties of implied powers are not all of a piece, that is, quite plainly they are not all of equally convincing legitimacy. Rather, they but illustrate in still one more way how two centuries of history have operated to show what has followed from Chief Justice Marshall's observation that it is a Constitution we are expounding.

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Speedy Trial

A. Kenneth Pye*

The sixth amendment provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial." The Supreme Court in *Klopper v. North Carolina* (1967) held that the guarantee is applicable to the states through the due process clause of the fourteenth amendment. The origin of the right can be traced back at least to Magna Carta (1215) and perhaps to the Assize of Clarendon (1166). On different occasions, the Supreme Court has described it as "fundamental," "slippery," and "amorphous."

Denial of a speedy trial may result in prolonged incarceration prior to trial and exacerbation of the anxiety and concern that normally accompany public accusations of crime. Prolonged incarceration before trial inevitably involves a disruption of normal life and imposition of a substantial sanction at the time when innocence is still presumed. It causes loss of productive labor, normally without opportunity for training or rehabilitation, and frequently interferes with preparation of a defense.

Pretrial release can ameliorate these conditions, but a defendant who achieves pretrial release may be subject to significant restraints on his freedom of action, his job may be threatened, his resources may be dissipated, and he and his family may suffer from understandable concern about his future while his reputation in the community is impaired. For these reasons, courts have enforced the right in a variety of contexts. Charges were dismissed in *Smith v. Hooly* (1969) when a state failed to bring a defendant to trial on state charges while he was serving a federal sentence despite demands for trial by the accused, and in *Klopper*, when a state suspended prosecution indefinitely although the defendant was not in custody.

Not all defendants want a speedy trial; many want no trial at all. Delay is a common defense tactic and in some cases an accused may benefit from prolonged delay, particularly when pretrial release has been achieved. In such cases, although only the defendant has a right to demand a speedy trial, the state may desire a speedy trial. Prolonged delay contributes to court backlog and places pressure on prosecutors to make concessions in plea bargaining. Defendants released pending trial may commit additional crimes. Witnesses may die. Memories fade. The risk of escape or bail-jumping cannot be ignored.

Not infrequently, delay may serve the interests of both an accused and a prosecutor for different reasons. Even if public interest would be better served by a prompt trial, there may be no effective way of expediting trial. Nor is the public interest served by dis-



A. Ken Pye

missing charges if a trial is not held promptly.

One answer to the problem would be a requirement that trial take place within a specified time. The variety of factual situations confronting prosecutors and defense counsel has prevented agreement on an appropriate time interval between charge and trial that should govern all cases. The absence of such a litmus test has deterred the Court from proclaiming any single period of delay as the maximum permitted by the constitutional imperative.

There are good reasons for requiring a defendant to make an appropriate demand before he can complain of a denial of his right to speedy trial, but the Court has also declined to place such an obligation upon a defendant as an absolute requirement. Instead, in *Barker v. Wingo* (1972), it chose to consider the facts of each case, examining the length of the delay, the prejudice it might cause, the presence or absence of a demand for trial by the defendant, and the justification asserted by the state for its failure to try the accused earlier.

Courts have been remarkably receptive to government justification for significant delays. For example, in

The variety of factual situations confronting prosecutors and defense counsel has prevented agreement on an appropriate time interval between charge and trial that should govern all cases.

Barker a delay of five and one-half years and sixteen state-requested continuances was permitted because of the need to convict a co-defendant before proceeding against the accused, illness of the chief investigating officer, and acquiescence by the defendant during most of the period. The willingness of a court to accept government assertions of good cause may be influenced by recognition that a dismissal of pending charges is required by the Supreme Court holding in *Strunk v. United States* (1973) if it decides a speedy trial has been denied. Unlike the exclusionary rule or other sanctions for violation of rights, dismissal resulting from a finding of a deprivation of the right to speedy trial may fully immunize a defendant from prosecution.

According to the Court's holding in *United States v. Marion* (1971) only "an accused" may assert a right to speedy trial and a prosecution must have been initiated by arrest and filing of charges before the right attaches. The period between the charge and trial is crucial. Delay between commission of the crime and formal charge is not significant to a claim of a sixth amendment violation, although the identity of the accused was or might have been known and probable cause for arrest or indictment may have existed. In *United States v. MacDonald* (1982) the Supreme Court held that prosecutorial delay between dismissal of initial charges by military authority and reassertion of the charges in a civilian forum at a later time was beyond the purview of the sixth amendment.

Many of the disadvantages caused an accused by

unreasonable delay between charge and trial also ensue when there is an unreasonable delay before charges are brought against him. In *United States v. Lovasco* (1977), the Supreme Court indicated that, in unusual cases, an accused may be able to establish a violation of the due process clause as a result of oppressive pretrial delay where actual prejudice can be demonstrated and inadequate justification exists. Government "bad faith," as when a charge is delayed, or dismissed and subsequently asserted at a later time in order to "forum shop," stockpile charges, or achieve some other tactical advantage, might also constitute a denial of due process. But the degree of protection afforded to an accused against unreasonable delay between commission of an offense and formal charges will depend on the applicable statute of limitations in most cases.

Statutory provisions implement the constitutional provision in many states and in federal prosecution. Encouraged by the *American Bar Association Standards for Criminal Justice, Speedy Trial* (1968), many jurisdictions have set specific legislative time limits within which a defendant must be brought to trial. Perhaps the most important of these statutes is the federal Speedy Trial Act of 1974, defining in detail permissible time periods in different types of cases and setting forth grounds for dismissal of charges with and without prejudice. Assertion of rights under these statutes is more likely to provide effective protection to an accused than reliance on the Constitution except in extraordinary cases.

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George Sutherland

*Francis Paschal**

George Sutherland, Supreme Court Justice from 1922 to 1938, was born in England in 1862. A year thereafter, he was brought by his parents to Brigham Young's Utah.

Although he himself was never a Mormon, Sutherland attended a Mormon academy; in 1882-1883, he studied at the law school at the University of Michigan. On leaving the University, Sutherland was admitted to the Utah bar. He attained immediate prominence, both professionally and politically. He was elected to the House of Representatives as a Republican in 1900 and to the Senate in 1905, where he remained until 1917.

Sutherland's tenure in Congress forced him to confront issues in a political context that he would later deal with as a Supreme Court Justice. Generally, he supported a conservative position. Yet his most enduring legislative achievements centered on improving conditions for seamen; advancing a federal worker's compensation program; and promoting women's suffrage. Sutherland's congressional tenure enabled him as early as 1910 to establish his credentials for appointment to the Supreme Court. The 1920 election of Warren Harding, attributed in considerable part to Sutherland in his role of principal confidential adviser to the candidate, virtually assured him the nomination. The nomination was sent to an approving Senate on September 5, 1922.

Anyone interested in the new Justice's approach to legal and political problems had not far to look. In the five years since his retirement from the Senate, Sutherland had delivered major addresses setting forth his conservative philosophy. In his Presidential address to the American Bar Association in 1917, he chose to speak on "Private Rights and Government Control." The message was clear. "Prying Commissions" and "governmental intermeddling" were unnecessary and at war with the "fundamental principle upon which our form of government depends, namely, that it is an empire of laws and not of men." Four years later Sutherland was telling the New York State Bar Association "that government should confine its activities, as a general rule, to preserving a free market and preventing fraud." He further explained that "fundamental social and economic laws" were beyond the "power of official control."

Once on the Court, Sutherland readily joined his conservative colleagues invoking substantive due process to strike down exertions of governmental power. His first major opinion was directed at the minimum wage. (*Adkins v. Children's Hospital*, 1923) Here, in the area of freedom of contract, no presumptive validity could be accorded to the exercise of legislative power.



Francis Paschal

Rather, its legitimacy could be established only by "exceptional circumstances" and certainly not by considerations of a worker's needs or bargaining power. In short order, state attempts to regulate prices of gasoline, theater tickets, and employment agency services were similarly condemned. Other forms of state regulation fared no better. Nor was substantive due process the sole doctrinal reliance. In the Court's continuing battle with state legislatures, Sutherland led his colleagues in discovering hitherto unrealized prohibitions in the equal protection, commerce, and contract clauses. And, under his hand, the privileges and immunities clause of the fourteenth amendment, neglected and forgotten for decades, sprang to life as a restraint on state power in *Colgate v. Harvey* (1935).

Eventually, of course, the Court repudiated the Sutherland approach to state legislative power and little of it remains. Yet, in at least two respects, his contribu-

tion in this area is of continuing significance. The first has to do with his seminal opinion in *Frost and Frost Trucking v. Railroad Commission* (1926) where he elaborated the theory of unconstitutional conditions. This theory destroyed the notion that a state's power to withhold a privilege somehow gives it authority to discriminate without check in granting the privilege. The second is his opinion for a divided court in *Euclid v. Ambler Realty* (1926) which furnishes the constitutional foundation for the modern law of zoning.

When Sutherland came to deal with the actions of Congress and the President, he exhibited the same jealousy of authority that characterized his response to state legislatures. Accordingly, he remained to the end unconvinced of the constitutionality of many of the New Deal enactments and in time was overwhelmed by the arrival of our modern-day Constitution of "powers." Even so, Sutherland's lasting impact will be found on close examination to have been highly significant. Particularly, he made highly personalized contributions

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to our *structural* Constitution; he had a distinctive role in shaping our Constitution as a guarantor of civil rights; and he, more than anyone else, has supplied the intellectual underpinnings for the foreign affairs power.

As for the structural Constitution, Sutherland's opinion in *Massachusetts v. Mellon* (1923), and its companion case of *Frothingham v. Mellon* (1923), is still, despite scores of intervening qualifying decisions, the basic starting point in determining when a federal "taxpayer" has standing to raise a constitutional question in actions in the federal courts. Here plainly is one of the most telling limitations on federal judicial power. In a number of cases, Sutherland wrote opinions enforcing restraint on Supreme Court review of state decisions that were found to rest on independent and adequate state grounds. In still others, he resisted

effectively the pleas of reformers to whittle down guarantees of the right to trial by jury, in civil as well as criminal cases. And in the highly technical matter of the relationship between state and federal courts, Sutherland's influence continues. (*Kline v. Burke Construction Co.*, 1922) Finally, Sutherland's views have been decisive in regard to the President's power to remove federal office holders. Early in his judicial career he concurred in Chief Justice William Howard Taft's unnecessarily wide-ranging opinion in *Myers v. United States* (1926) sanctioning a presidential power to remove without restraint. In *Humphrey's Executor v. United States* (1935) he started the Court on the way to new doctrine. The removal power must take account of the nature of the office involved.

Sutherland's tenure on the Court spanned the years in which the Court began to take the Bill of Rights seriously as a check on state action. His role in this development was not all of one piece. But he did write a leading opinion condemning a state tax on the press because of the levy's impermissible *motive* to make costly the criticism of public officials. (*Grosjean v. American Press Co.*, 1936) And in *Powell v. Alabama* (1932), he charted for the Court the first steps a state must take to assure counsel in legal proceedings. His problem there was counsel in a capital case. But Sutherland's opinion was not so confined in its implications and has proved influential even beyond the bounds of the criminal law.

Long before he went on the Court, Sutherland was given to speculation about the foreign relations powers, producing in 1919 a book on the subject, *Constitutional Power and World Affairs*. In his book and elsewhere, Sutherland developed the theory that the powers of the United States in respect to foreign affairs were largely unrelated to any grant from the states and existed as an incident of sovereignty devolved directly on the United States from Great Britain. Their employment and their distribution were to be governed by rules not applicable to the specific delegations of the Constitution. In 1936, in *Curtiss-Wright Export Corp. v. United States*, Sutherland was able to incorporate these views in an opinion for a unanimous Court.

Sutherland retired from the Court in 1938. He died in 1942.

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Trial by Jury

*Paul D. Carrington**

The right to jury trial is provided in three clauses of the Constitution of the United States. Jury trial in federal criminal cases is required by Article III, which is otherwise given to defining the role of the federal judiciary: "The Trial of all Crimes, except in Cases of Impeachment shall be by Jury." This provision is repeated in the sixth amendment, which is otherwise given to the rights of the accused: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and Public Trial, by an impartial jury . . ." The Bill of Rights also included a provision for jury trial in civil matters; this right is embodied in the seventh amendment: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ."

The federal Constitution makes no explicit provision regarding the right to trial by jury in proceedings in state courts. State constitutions contain many similar provisions, although the interpretations of the right in state courts have varied significantly from the standards applied in federal courts. Substantial variation survived the enactment of the fourteenth amendment, which for the first time subjected the state courts to the strictures of the due process clause. It was early held, and appears still to be the law, that the fourteenth amendment does not incorporate the seventh, that there is no federal constitutional requirement of a right to jury trial in civil cases in state court. (See *Walker v. Sauvinet*, 1875.) More recently, the Supreme Court has held that due process does require some form of access to a jury in major criminal prosecutions in state courts. (See *Duncan v. Louisiana*, 1968.)

Although the institution of jury trial has been known to American and English courts for a millennium, there have been significant changes in its form and nature over that period. Indeed, the origins of the institution are shrouded in the uncertainties of prehistory. Germanic tribes, like most stable societies, made early use of laymen in official resolution of disputes. Such practices were well known to Saxons and their neighbors at the time of the Norman Conquest in 1066. Nevertheless, at that time and place, more common resort was made to various ordeals, which were essentially religious services purporting to reveal the will of the deity. One variation on trial by ordeal was trial by battle, in which the Saxon disputants, or their champions, waged a ritual struggle to determine the side of the deity. Yet another variation was trial by wager of law, which engaged the services of the neighbors as oath helpers. By their willingness in numbers to risk salvation to



Paul Carrington

stand up for a disputant, the oath helpers were perceived to express a divine will. In some sense witnesses and in some sense decision makers, these laymen can be viewed as early jurors. The nature, origin, and extent of the use of such institutions in the several shires of Saxon England doubtless varied and are the subject of some uncertainty.

The royal judges appointed by Norman kings embraced Saxon traditions, including trial by ordeal, oath helping, wager of law, and the use of laymen to share responsibility for official decisions. A papal decree in 1215, which withdrew the clergy from participation in trial by ordeal, had the effect of withdrawing the imprimatur of the deity from the decisions of the royal courts. This apparently stimulated interest in alternative methods of trial that might deflect some of the odium of decision from the royal surrogate. Thus, the petit jury (to be distinguished from the grand jury) emerged in more nearly contemporary form in the thirteenth century as a feature of the Norman royal courts.

Thirteenth-century jury trial emerged chiefly in

proceedings of trespass, a form of action in which the lash of royal power was applied to maintain the peace of the realm. As trespass and its derivative forms of action came to dominate the common law, so trial by jury became the dominant method of trial in civil matters coming before the royal law courts. Thus, jury trial was associated with the various forms of trespass on the case (from which the modern law of torts emerged), of assumpsit (from which the modern law of contracts emerged), and of replevin, an action important to the development of personal property rights. Indeed, one reason for the demise of some of the earlier royal writs, such as the writ of right, or even the writ of debt, was dissatisfaction with the mode of trial that accompanied the use of such writs.

A concurrent evolution led to the emergence of the jury as an important element of criminal justice in the royal courts. The royal inquest was a feature of early Norman royal governance; it was an important device for centralizing power in the royal government and was a proceeding for calling local institutions and affairs to account. The grand jury was a group of local subjects of the crown who were called upon to investigate, or answer from their own knowledge, regarding the observance by their neighbors of the obligations imposed upon them by royal command. By stages, the inquest came to be followed by a further proceeding to impose royal punishment on apparent wrongdoers. In the latter half of the twelfth century, the royal government was initiating such enforcement proceedings, thus supplementing the trespass proceedings which had earlier provided protection for the peace of the realm, but only on the initiative of a victim of wrongdoing. By 1164, there was a clear beginning of the use of petit juries in crown proceedings. By 1275, it was established that the petit jury of twelve neighbors would try the guilt of an accused, provided the accused consented to such a means of trial, which he was coerced to do.

One major theme in the evolution of the right to jury trial in royal courts was the development of a system of accountability to constrain lawlessness by juries. For some time, the only method available to royal courts to deal with such behavior was to prosecute (or, more precisely, to attain) the jurors for rendering a false verdict. If a second jury so decided, a jury could be punished for this offense. The harshness of this remedy led to its demise, for the attain jurors were reluctant to expose an earlier jury to disgrace and punishment. In the seventeenth century the writ of attain was gradually replaced by the practice of granting a new trial when the first verdict was against the weight of the evidence. This practice came to be equally applicable to criminal as well as civil proceedings, except insofar as an accused could not twice be placed in jeopardy of conviction.

A second major theme in the evolution of the right to jury trial in civil cases was its confinement to the common law courts when the Chancery emerged as an alternative system of adjudicating the use of the royal

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power. English chancellors were exercising a form of judicial power as early as the fifteenth century. An important feature of the Chancery (or proceedings in equity as they came to be known) was the absence of the jury. Another important feature was the use by the chancellor of a broader range of judicial remedies, most prominently including the injunction, which were personal commands of the judge under threat of punishment for contumacy.

Nineteenth-century English law reform ultimately brought about the demise not only of equity as a separate judicial system, but also of the right to jury trial in civil cases. In a search for greater efficiency and dispatch, the jury system in the law courts was modified and limited, so that the jury trial is now seldom used in the United Kingdom, or in other parts of the Commonwealth, except in criminal cases.

The right to jury trial took quite a different turn in the United States. At the time of the Revolution, that right came to be celebrated as a means of nullifying the power of a mistrusted sovereign; hence the several constitutional provisions guaranteeing the continued exercise of the right. Moreover, there was a special mistrust of equity (where the English recognized no right to jury trial) in eighteenth-century America, based in large part on its close connection to the royal power. Accordingly, some of the states abolished it, others conferred its powers on their legislatures, while only some retained its colonial forms or created state chanceries to continue the English tradition.

In many parts of the early United States, there was a widely shared mistrust of professional lawyers and of judges drawn from that profession. Mistrust of officials in general and professional judges in particular was a feature of the Jacksonian politics of the first half of the nineteenth century, which was reflected in provisions for the election of judges and the reaffirmation of the importance of jury trial as a means of deprofessionalizing the exercise of judicial power. These political impulses were magnified in the populism of the late nineteenth century.

Indeed, the American legal profession came to be shaped in important degree around the institution of the jury; jury advocacy became in the popular mind the central activity of the American lawyer. During much of the nineteenth century, the most powerful intellectual force in American law was the work of William

Blackstone, an English scholar of the previous century. Blackstone's *Commentaries* (1776) was the one book read by almost all American lawyers, and perhaps the only law book read by some. By no coincidence Blackstone was a staunch advocate of the right to jury trial in civil cases, an institution already in decline in his own country; his belief in the institution of the lay jury was one of his strongest links to the frontier society which he so significantly influenced.

Beginning as early as 1848 in New York, most American states adopted "merged" systems of procedure in civil cases. Merger united law and equity in a single judicial system; reformers were careful to retain the right to jury trial in actions "at law" and in some states even extended it to some matters properly described under the former system as "suits in equity." Through most of the nineteenth century, the federal courts played a secondary role in the American legal system, and Congress required their procedures to conform "as near as may be" to the procedural legislation of the states in which they sat. For the most part, this conformity seemed to apply to the forms of jury practice as well as to other details of procedure. It was not until 1938 that the Federal Rules of Civil Procedure were promulgated for the federal courts, for the first time formally merging law and equity in federal courts in accordance with national standards. The Federal Rules of Criminal Procedure soon followed. A national

protection, and the possible nullification or impairment of federal law by locally selected juries.

In the last decade, there may have been some growth in consciousness of the disadvantages of jury trial in civil cases. Increasing attention has focused on trial efficiency, the effectiveness of the law, and alternative methods of dispute resolution. But it is too early to say that we have entered a period in which the distinctly American institution of jury trial will be seriously reexamined.

As much as for any procedural right, the beauty of the right to jury trial is in the eye of the beholder. For as long as there have been lay decision makers, there have been strong-minded critics and devoted defenders who have disputed the wisdom of the system with equal vehemence. The practice rests on values so basic and so unsuitable to proof or disproof that the debate seems unlikely to terminate. It is at least in part for this reason that so many reforms, from the seventh amendment to the Rules Enabling Act, sought to evade debate on the fundamental issues by ostensibly preserving the status quo in regard to the right to jury trial, leaving the issues of the scope of jury trial to other times and other forums. Rarely has Congress or any state legislature been able to address the merit of the right to jury trial without having its deliberative processes impaled on the sharp point of the debate. For the same reason, decisions to expand or contract, preserve or alter, existing practices have been and will continue to be greatly influenced by the predominance of one view or the other of the merits of the institution.

Supporters of the right to jury trial regard it as a keystone of democratic government. It is, indeed, a method of sharing power with those who are governed. It deflects the hostility toward public institutions otherwise engendered by the lash of public power. It is a remedy for judicial megalomania, the occupational hazard of judging. Particularly in regard to criminal legislation, the right to jury trial provides a limit on the power of legislatures who eventually must countenance the nonenforceability of laws which citizens are unwilling to enforce. It is also a means of education: jurors learn about the law and share their learning with families and neighbors. In all these respects, it engenders trust. In general, supporters and critics alike agree that those benefits are more substantial in criminal than in civil litigation.

Critics observe, however, that juries are inefficient and may well be quite inaccurate in their perceptions and decisions. Involving many people in the making of a decision is inherently inefficient. It is necessary to invest time and expense in the selection of jurors. Trials proceed much more slowly because of the shorter attention span of lay persons in courtroom contexts and because additional participants entail additional interruptions and delays for personal reasons. Because of the inexperience of jurors, there has developed a substantial body of rules governing the admission of evidence which have as their purpose the protection of

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system or method of conducting jury trials in federal courts for defining the scope of the jury's power and the judge's responsibility and for prescribing the limits of the right to jury trial at last emerged.

For a period of several decades following the reform era of the 1930's, the Supreme Court made the protection of the right to jury trial in civil cases a major item on its agenda. A number of its decisions enlarged on previous expectations about the scope of the right and increased the authority of the jury, for example, *Beacon Theaters, Inc. v. Westover* (1959) and *Rogers v. Missouri Pacific Railroad Co.* (Justice Felix Frankfurter's dissent, 1957). Interest in the right to jury trial became very intense in the mid-1960s as a result of widespread civil rights litigation, preoccupation with equal

the jury from confusion and inflammation of prejudice. These strictures operate at times to increase the complexity of trials and to enlarge the possibility of mistrial or new trial, which is the result of error in the application of such rules of evidence. For these reasons, jury trials take substantially longer than nonjury trials and are substantially more expensive for the participants.

Moreover, as other critics emphasize, the deliberations of juries are undisciplined. Although jurors tend to be conscientious in the application of the governing law, the controlling rules are often dimly understood and not infrequently sacrificed in order to secure the requisite consensus. Whatever guidance or control the trial judge may supply, the chance of erratic decision is greater in jury than in nonjury trials.

Other adverse factors are less frequently mentioned. Jury service is in many cases a substantial burden to jurors; although they receive token payment, they are coerced to perform a duty that can sometimes be onerous. Particularly in communities characterized by disorder and social disintegration, jurors may even be frequent objects of intimidation and bribery; they are, in general, more difficult to protect from these vices than are judges, and they are perhaps also more vulnerable to such pernicious influences.

To a substantial degree, the perceived merits or demerits of the system will depend on particular features of the system which are designed to respond to the problems the system presents. Unfortunately, techniques for diminishing the demerits of jury trial often tend also to diminish its merits: the more control exercised over juries, the less advantage there is in assembling them. In the final analysis, almost every issue regarding the right to jury trial turns on the degree to which power is to be confided in professional officers of the law. Consensus on that basic issue being so distant a prospect, the contours of the institution as described below must be regarded as an unstable compromise, quite subject to change.

Instability is nowhere more clearly exemplified than in regard to jury size. Perhaps as early as the thirteenth century, Englishmen understood that a jury is a group composed of twelve persons. The method of selecting the jury might have varied, the duties assigned to the group may have been altered, but the one element of stability was their number, twelve. Some states experimented with the use of smaller juries, particularly in the trial of lesser crimes, and the Supreme Court in *Williams v. Florida* (1970) held that the use of such groups as six is not itself a deprivation of due process of law. It was, however, long presumed that a common law jury is twelve and that such a number was required in federal courts by the sixth and seventh amendments, unless a smaller number be agreed to by the parties. This presumption is reflected in the language of Federal Rule of Civil Procedure 48, which authorizes parties to agree to smaller juries.

Nevertheless, a number of federal district courts

have in the last decade adopted local rules of court designating civil juries to consist of six persons. The validity of these local rules was sustained by the Supreme Court in *Colegrove v. Battin* (1973). The Court rested its decision on the absence of any straightforward legislative prohibition on juries of less than twelve and on the dubious assumption that there were no solid data demonstrating that twelve-person juries reach substantially different verdicts from six-person juries. The court also manifested a conviction which is itself not amenable to solid empirical proof. However, in *Ballew v. Georgia* (1978) the Court held that a five-member group was too small to be properly deliberative, representative, and free from intimidation and therefore did not afford due process. The Court's decisions have stimulated increased interest in the scientific examination of judicial institutions; the decisions have also called into question other traditional presumptions about juries, none of which carries more historical weight than did the tradition of twelve.

A second traditional feature of the common law jury has been the requirement of jury unanimity in reaching a verdict. Some states have experimented with the acceptance of verdicts supported by juries that are less than unanimous. In general, such provisions have called for super-majorities, such as a vote of ten or twelve jurors. The Supreme Court held in *Minneapolis and St. Louis Railway Co. v. Bombolis* (1916) that such provisions were not denials of due process for state court proceedings involving issues of federal law, but later, in *Burch v. Louisiana* (1979), it invalidated a Louisiana law that authorized verdicts of conviction on the basis of a five-to-one vote of a six-person jury. Despite these variations at the state level, however, the unanimity requirement remains a standard feature of federal jury practice, unless, as the Federal Rules

Interest in the right to jury trial became very intense in the mid-1960s as a result of widespread civil rights litigation, preoccupation with equal protection, and the possible nullification or impairment of federal law by locally selected juries. In the last decade, there may have been some growth in consciousness of the disadvantages of jury trial in civil cases.

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One effect of the unanimity requirement is to assure that the jury will deliberate on its decision rather than settle for a mere nose count. A secondary effect is to increase the likelihood that no decision will be reached, with the result that a new trial before a new jury will be required, unless the controversy is privately resolved without further litigation. A third effect is to enhance the role and responsibility of each individual juror, making each an important actor with power to control the ultimate outcome of the process. To the extent that the jury is intended to be a representative body, the unanimity requirement tends to protect litigants and interests that are associated with minority groups.

A third important feature of traditional common law jury practice was the mode of selecting the jury. Using the Norman nomenclature, the court administrative arm assembles a venire of citizens from whom the jury will be selected. Veniremen may be excused or disqualified by the judge and those remaining are then subject to a further process of selection by the parties. The latter process, known as voir dire examination, proceeds from a questioning of the jurors to their challenge by the parties on grounds of cause, or peremptorily if the parties would simply prefer other members of the venire. Peremptory challenges have perhaps always been limited in number, a somewhat larger number being allowed in criminal than in civil cases.

In recent decades, this traditional process has been subject to substantial criticism and pressure. Criticism proceeds from the premise that the jury should be in some degree representative of the community it helps to govern. Most of the criticism has been directed at the process of selecting veniremen, the usual earlier practice in this country having been to authorize a court administrator to select prospective jurors by methods that were usually elitist in premise and effect. In many communities, the usual method was the "key man" system, which invoked the assistance of community leaders to identify citizens of stature who would be deserving of the trust reposed in jurors. Such systems were common in federal courts. Indeed, it was not uncommon for a federal court to maintain a blue ribbon list of veniremen of more than ordinary intelligence and experience who might be summoned to decide cases requiring more than ordinary skill on the part of the decisionmaker. Such methods produced juries that were anything but representative, in the proportional sense, of the communities from which they were selected.

In a legal environment favoring egalitarianism, such practices were doomed. As early as 1945, in *Thiel v. Southern Pacific Co.*, the Supreme Court upheld a challenge by a federal litigant to a venire selection method that seemed likely to result in underrepresentation of the working class in local jurors. In *Carter v. Jury Commission of Greene County* (1970), the Supreme

Court refused to declare a state key-man system invalid on its face absent a showing that the scheme was purposefully adopted as a means of preventing some group (usually blacks) from being represented. Nevertheless, when such a scheme underrepresents a group consistently, a prima facie case of jury discrimination is established and the scheme may then be found unconstitutional as applied, as in *Turner v. Fouche* (1970). Congress anticipated these holdings by enacting

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federal jury selection legislation in 1968. Current legislation does repose some authority in local federal courts to administer jury selection, on condition that their methods produce juries that bear proximate resemblances to randomness. Of course, individual litigants are not entitled under the statute or the Constitution to have a jury that actually reflects the demography of the community; all that is assured is that the method of selection be one that is reasonably likely to produce such a panel.

In recent years, mounting attention has been given to the process of peremptory challenge and the practice of some local prosecutors to use these challenges to prevent minority representation on particular juries, especially those called to try minority members on serious criminal charges. The Supreme Court has held that a prosecutor's use of peremptory challenges in any single case is immune from attack; the Court held in *Swain v. Alabama* (1965) that the very concept of peremptory challenges entailed the right to act without explanation. Still, the Court did leave open the possibility that systematic use of peremptories to exclude members of some group might be found to violate the equal protection guarantee of the fourteenth amendment. In subsequent cases, however, proving to the Court's satisfaction that systematic discrimination did exist has been virtually impossible. Some state courts have gone beyond the federal standards and ruled that peremptory challenge of veniremen on the basis of membership in any group violates provisions of their state constitutions, for example, California in *People v. Wheeler* (1978).

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the competence of juries to deal with intricate technical disputes beyond the ken of ordinary citizens. The Third Circuit Court of Appeals held in *Matsushita Electric Industrial Company v. Zenith Radio Corporation* (1980) that the seventh amendment is subject to the fifth amendment, that the use of juries in very complex civil cases may be a denial of due process of law. This question, also, has not reached the Supreme Court.

Litigants having a right to jury trial are entitled to a jury decision only on questions of fact, not on matters of law. The distinction between questions of fact and law can be stated clearly enough: the former pertain to the specific events in dispute; the latter to the legal principles to be applied. But the application of the distinction is often problematic. For this reason, juries often have to deal with issues containing substantial elements of legal interpretation. The classic example, which arises in both civil and criminal contexts, is a decision applying a general standard of negligence to the conduct of the accused or the defendant; the general standard takes more specific shape in the minds of jurors as they apply it to the events at hand.

Since the seventeenth century, it has been the responsibility of the trial judge to assure that the controlling law is obeyed by the jury; the trial judge is accountable to the appellate court for the effective performance of this duty. There are several steps in the usual common law jury trial at which the trial judge is obliged to perform this function.

A major function of the judge at a jury trial is to instruct the jury on the controlling law. This instruction is usually the last event before the jury retires to deliberate. If either party makes a timely objection to the judge's statement of law in his charge to the jury, any error in the instructions will be a solid ground for reversal.

In a civil trial, the judge should not instruct the jury at all unless there is a dispute in the evidence presented which might raise some doubt in a reasonable mind or about which jurors might reasonably differ. If the judge finds that there is no such dispute, he should direct the jury to find a verdict for the party entitled under the law to judgment. In cases of doubt about the application of this standard, the judge may prefer to reserve his ruling on a motion for directed verdict until after the jury has rendered a verdict. If the verdict is rendered contrary to the law, the judge may then enter a judgment notwithstanding the verdict in favor of the verdict loser. The Supreme Court has held in *Baltimore and Carolina Line v. Redman* (1935) that the judge may not take this latter step unless the motion for directed verdict was timely and the question properly reserved; otherwise, there is a violation of the seventh amendment because the judgment notwithstanding the verdict was unknown to English practice at the time of adoption of the amendment.

In a criminal case, the judge should direct a verdict for the accused when the prosecution has failed to offer proof of one or more elements of the offense charged.

But the trial judge may not direct a verdict of guilty in a criminal case; to this extent, the sixth amendment assures the role of the jury as a bulwark against punishment deemed oppressive by the community, even if the punishment is required by the positive law. An element of natural justice is thereby introduced to the legal system.

In addition to his role as law officer, the trial judge also has some responsibility for the quality of fact finding done by the jury. In either civil or criminal cases, he may set aside a verdict as contrary to the weight of the evidence. When exercising this prerogative, the trial judge is obliged to order a new trial before a second jury. In a criminal case, the power to order the new trial is confined by the constitutional constraint against double jeopardy. In a civil case, the power to grant a new trial may be exercised conditionally, but this power is subject to constitutional limitations. A conditional order of new trial is likely to occur where the trial judge regards a jury verdict as correct on the matter of liability but excessive in regard to the award of damages.

Some factual issues arising in jury-tried cases may be reserved for the judge. For example, in civil cases, issues of fact arising in a determination of the jurisdiction of the court must be decided by the judge. In criminal cases, sentencing is a function of the judge, not the jury, although the wisdom and propriety of the sentence often require factual determination.

With the exceptions noted, the division of function between judge and jury in federal courts has not been deemed a matter for constitutional adjudication. *A fortiori*, state practice in respect to these issues has not generally been regarded as presenting any constitutional problems of due process of law. The Supreme Court, however, has on occasion intervened to reverse state court judgments in actions arising under federal law on the ground that the federal law posed an issue for a jury which under the state practice was incorrectly left to the decision of a judge. Particularly in cases arising under the federal Employers Liability Act, the Court was strict in limiting the role of the trial judge. Its decisions, based upon statutory ground, may indicate that state jury practice must meet federal standards when state courts are called upon to enforce federal law. It is even possible that the seventh amendment will be found to be applicable to litigation of federal claims in state courts, not by reason of the fourteenth amendment, but by an inference of congressional intent.

The sixth amendment applies only to criminal proceedings that could have been tried by a jury at the time of its adoption in 1791. Even at that time, it was well understood that "petty" offenses might be tried without a jury. Federal legislation gives specific meaning to such offenses as those involving a punishment of imprisonment for six months or less and fines of \$500 or less. In *Baldwin v. New York* (1970), the Supreme Court held that due process requires jury trial in state court

prosecutions for offenses involving imprisonment for more than six months. In *Bloom v. Illinois* (1968), the court applied a similar standard to punishments imposed for contempt of court, although it conceded that there was some historical basis for treating contempt as a matter between litigant and judge, particularly where the contumacious act is committed in the presence of the court. In *McKeiver v. Pennsylvania* (1971), however, the Court held that the right to jury trial is not applicable to a proceeding to determine the delinquency of a juvenile, even though a decision adverse to the juvenile might result in imprisonment for a period significantly in excess of six months; such proceedings, the Court said, are not strictly criminal because they involve less moral judgment about the conduct of the juvenile.

The seventh amendment has proved much more complex and troublesome. One major question has been the applicability of the amendment to claims brought under federal legislation enacted after the adoption of the amendment. A narrowly historical view would preclude the application of the right to such legislation-based claims, since they are not strictly actions "at common law." The Court has, however, generally extended the right to jury trial to statutory actions where the remedy pursued in the judicial proceeding was one that resembled a common law remedy. Thus, in *Pernell v. Southball Realty Co.* (1974), the Court held that there was a right to jury trial in a statutory action of eviction that was closely analogous to a common law action for ejectment. And in *Curtis v. Loether* (1974) the court held that there was a right to jury trial in an action brought under the fair housing provisions of the Civil Rights Act of 1964 because the remedy sought was compensatory damages of the sort that might have been recoverable in a common law action of trespass on the case.

In other cases, however the Court has approved legislation creating administrative procedures and remedies that displace common law rights and thus eliminate jury-triable actions. In *National Labor Relations Board v. Jones Lughlin Steel Corp.* (1937), the Court upheld the award of back pay in proceedings before the board, despite the close analogy to common law contract actions. This decision was extended in *Atlas Roofing Co. v. Occupational Safety and Health Administration* (1977), in which the Court upheld legislation providing for the recovery by a government agency of a civil penalty in a court proceeding where there was no right to jury trial. The Court emphasized that the case involved a "public right," to be distinguished from common law rights of private parties. In *Lorrillard v. Pons* (1978), the Court interpreted the legislature to intend a statutory right to jury trial in proceedings brought under the Age Discrimination Act. In that case, as in *Curtis*, the Court avoided any indication of the applicability of the seventh amendment to the employment discrimination provisions of the Civil Rights Act, which, like the Age Discrimination Act, provides for

back pay awards to be made by courts, not administrative agencies.

The most complex issues of the scope of the right to jury trial arise in complex litigation where matters that are within the compass of the seventh amendment coincide with other matters outside that compass. In general, the Supreme Court has tended to insist upon protection of the right to jury trial in such situations, even at the risk of submitting to a jury matters that would not be jury-triable if litigated alone. Illustrative is *Dairy Queen, Inc. v. Wood* (1962), in which the plaintiff sought both an injunction and compensatory damages. Injunctive relief, unlike compensatory damages, is an equitable rather than a legal remedy and so is not subject to the right of trial by jury. The trial court deemed the injunction to be the primary relief sought and undertook to try the case without a jury, albeit with the intention of seating a jury to decide the measure of damages should it appear that a wrong had been committed. The Supreme Court reversed, holding that the jury-triable claim for damages must be tried first in order to protect the constitutional right to jury trial, leaving it for the judge later to decide on the availability of injunctive relief if the jury should determine that a wrong had been committed. Similarly, in *Beacon Theaters, Inc. v. Westover* (1959), the Court held that a jury-triable counterclaim would have to be tried first, before a determination could be made on a related claim by the plaintiff that was not jury-triable.

These cases illustrate that the constitutional right to jury trial now tends to depend on the specific substantive right and remedy involved in the litigation, not on the general (common law or equity) context in which that right is disputed. This approach was illustrated in *Ross v. Bernhard* (1970), in which the Court held that a claim brought by a shareholder on behalf of the corporation was jury-triable when the claim would have been triable by a jury had it been brought by the corporation itself; this decision would seem to be applicable as well to claims for damages brought by class representatives. This is so even though the procedures of stockholder suits and class actions are derived from the equity tradition, not from the practices of law courts. Thus, the increasingly widespread use of complex procedural devices that unite equitable and legal

Thus, the scope of the constitutional right to jury trial in civil cases is a complex question, drawing heavily on historical analogues but also influenced by considerations of contemporary practicality.

matters may in fact operate to enlarge the practical scope of the right to jury trial. This seems true despite the disclaimers set forth in such law reforms as the Federal Declaratory Judgment Act and the Federal Rules Enabling Act, which express the intent not to alter the existing scope of the right. That intent was not practically attainable consistent with achieving the other aims of the procedural reforms, which include efficiency and dispatch.

On the other hand, a rule that the seventh amendment right to jury trial depends on the substantive right and remedy involved in the litigation is not always applied. Illustrative is *Katchen v. Landy* (1966), which upholds the power of the court to determine without a jury claims brought against a bankrupt estate, whether or not the claims might have been jury-triable if asserted directly against the bankrupt. The Court emphasized the practical needs of the bankruptcy system for dispatch in making such decisions; it was said that these considerations justified Congress in directing that they be made without juries. Thus, the scope of the constitutional right to jury trial in civil cases is a complex question, drawing heavily on historical analogues but

also influenced by considerations of contemporary practicality. It is not a static right, but it is likely to take on new dimensions in the hands of future courts.

It may be concluded that the right of accused persons to a trial by jury has become a deeply entrenched feature of criminal litigation in the United States, broadly protected by the sixth and fourteenth amendments, with the selection and role of the jury being aspects of the right that are themselves subject to constitutional control. The right to jury trial in civil cases, on the other hand, rests upon a different constitutional provision, which is inapplicable in state courts and may be somewhat less rigidly maintained even in federal courts, for the reason that it is less assuredly beneficial to the citizens to be protected.

**Dean and Professor of Law, Duke University School of Law. This article is reprinted with permission of Macmillan Publishing Company from the Encyclopedia of the American Constitution, vol. 4, pages 1913-20. Copyright © 1986 by Macmillan, Inc. All rights reserved.*

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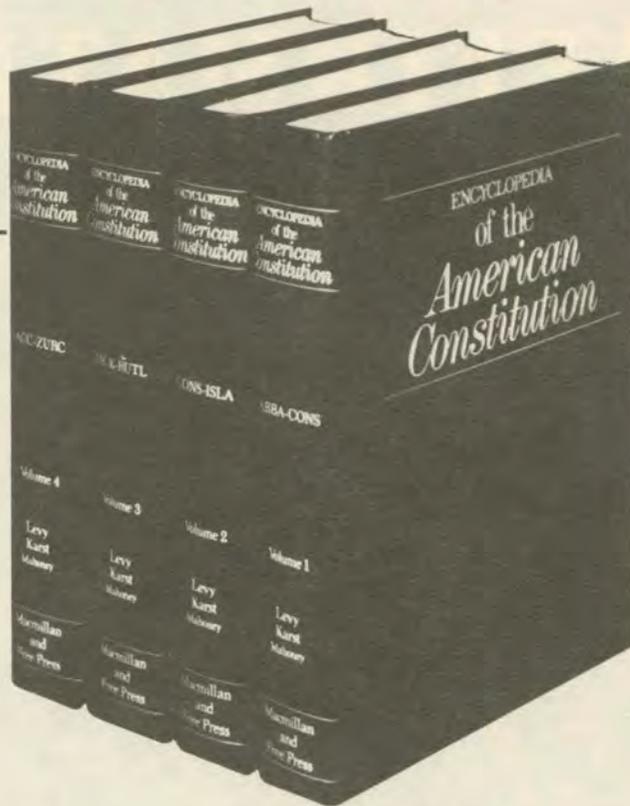
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AFFIRMATIVE ACTION

Affirmative Action

Arthur Larson*

Affirmative action in discrimination law means taking measures that go beyond merely ceasing or avoiding discrimination; it means taking measures that attempt to undo or compensate for the effects of past discrimination.

The principle is encountered in several major categories of discrimination—most notably employment and education, but also such areas as housing and government contracting.

The concept is a relatively recent one in U.S. law. The nearest thing to it, for many years, was an occasional concession to American Indians, such as the Minnesota statute granting them the exclusive right to gather wild rice within reservations. The first major application of the principle was in public school desegregation. After *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483, 74 S. Ct. 686, 98 L.Ed. 873 (1954), established the substantive constitutional right to a nonsegregated education, there ensued a decade or more in which it became apparent that, if the law said no more than “stop your past illegal segregating,” almost no visible change occurred in the actual racial composition of classrooms. Finally, in 1964 the Supreme Court decreed in *Green v. County School Board*, 391 U.S. 430, 88 S. Ct. 1689, 20 L.Ed.2d 716 (1968), that the only thing that counted was measurable results. There followed the enforced adoption of an array of devices such as redistricting, majority to minority transfers, school pairings, “magnet schools,” new school constructions, abandonment of all-black schools, and, of course, busing. The full weight of the Supreme Court was thrown behind a massive busing plan in *Swann v. Charlotte-Mecklenburg Board*, 402 U.S. 1, 91 S. Ct. 1267, 28 L.Ed.2d 554 (1971).

In employment, two basic categories of affirmative action can be identified: (1) coercive and (2) voluntary. Coercive plans, in turn, fall into two groups: (a) plans imposed as a condition of government contracts or grants under Executive Order 11246 (42 U.S.C.A. § 2000e note [1965]) and to benefit the handicapped under the Rehabilitation Act of 1973 (29 U.S.C.A. § 701 et seq.); and (b) court-imposed remedies under Title VII of the Civil Rights Act of 1964 (42 U.S.C.A. § 2000e et seq.). Voluntary plans are those adopted by an employer, university, or the like, when under no direct legal compulsion to do so.

The earlier affirmative action plans were concerned with race, but plans now frequently extend to sex, national origin, and religion.

The first major legal setback to voluntary affirmative action was *Regents of University of California v. Bakke*,



Arthur Larson

438 U.S. 265, 98 S. Ct. 2733, 57 L.Ed.2d 750 (1978). By a closely split vote, the Supreme Court struck down a university admissions plan that set aside a specific number of places for minority applicants. The key opinion, that of Justice Lewis Powell, recognized that affirmative action might sometimes be appropriate to undo past wrongs but held that it had to be based upon proved constitutional or statutory violations found by an authorized body—a condition not satisfied here. The next landmark case, *United Steelworkers v. Weber*, 443 U.S. 193, 99 S. Ct. 2721, 61 L.Ed.2d 480 (1979), was expected by many to extend this same reasoning to the area of employment but did not. Kaiser Aluminum Company had voluntarily adopted a plan under which blacks were given preference over more-senior whites in a special training program. For various reasons, including the absence of Justices Powell and John Paul Stevens from the case, the Court upheld the plan. The third landmark case was *Fullilove v. Klutznick*, 448 U.S. 448, 100 S. Ct. 2758, 65 L.Ed.2d 902 (1980), in which the Court, in an opinion by Chief Justice Warren E. Burger, upheld a congressionally enacted 10 percent set-aside for minority business enterprise. Significantly, however, six of the justices agreed that in affirmative action cases, there must be a finding by a competent body of past constitutional or statutory violations.

Legal issues surrounding affirmative action can be reduced to three main questions. If the past injustice has given rise to a debt that should be paid: Who decides? Who pays? Who receives?

In the school desegregation cases, the answers were satisfactory: the courts decided; the offending school district itself paid; and the very students who had been deprived received. But in *Bakke* the answers were all unsatisfactory: the university had no authority to decide; the students who were favored might or might not have suffered from past discrimination; and, as to "who pays?" why should Bakke shoulder society's debt by perhaps losing the benefit of a medical education? In *Weber*, the same difficulties appeared, but the court sidestepped them and relied on broad consideration of obtaining a desirable result. Finally, in *Fullilove*, the "who decides?" was easier, since it was Congress, and the "who pays?" and "who receives?" answers were not so disturbing.

The future of affirmative action is uncertain. The Reagan transition team report favored, in effect, abolishing affirmative action, especially quotas. Senator Orrin G. Hatch sponsored a constitutional amendment forbidding federal and state governments to require racial quotas. Since the only employment affirmative action embedded in a statute is that for the handicapped, the executive has it in its power to abolish or drastically curtail the elaborate system of affirmative action plans based on its own executive order.

Opposition to complex university employment quota plans has been intense and increasing. The Berkeley plan, for example, was a book four inches thick in which each of seventy-five academic departments was analyzed as to race and sex of its faculty. For example, 178 positions held by white males in a total staff of 1,489 were to be taken over during a thirty-year period by 97 women, 20 blacks, 42 Asians, 10 Chicanos, and 9 other persons—but no native American males.

Critics of affirmative action in employment can also point to the disappointing results of the original

In view of the inherent vulnerability of the legal underpinnings of affirmative action, as well as the strength of opposition to affirmative action among those in a position to change it, the best prediction is that affirmative action will be a diminishing factor in American law for some years to come.

"Philadelphia Plan" and other city plans designed particularly to increase the proportion of blacks in the building trades. In Washington in 1981, after ten years of such a plan, with a population 70 percent black, only 10 percent of building trades journeymen were black.

In view of the inherent vulnerability of the legal underpinnings of affirmative action, as well as the strength of opposition to affirmative action among those in a position to change it, the best prediction is that affirmative action will be a diminishing factor in American law for some years to come. See also Louis H. Pollak's essay on *Brown v. Board of Education of Topeka, Kansas*; J. Harvie Wilkinson, III's essay on the *Bakke Case* and on the *Weber Case*.

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Editor's Note

The Supreme Court continues to address the issue of affirmative action. Although the major themes sounded by Arthur Larson's article remain, several recent cases summarized below have added details to the overall scheme.

In *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 104 S. Ct. 2576, 81 L.Ed.2d 483 (1984), after consent decrees had been entered in district court with the stated purpose of remedying a Tennessee Fire Department's hiring and promotion practices with respect to blacks, the district court modified the decree to enjoin the department from following its seniority system in determining who would be laid off, since the proposed layoffs would have a racially discriminatory effect. The Supreme Court held that the district court's amended order could not be justified because a trial court can only disregard a seniority system in fashioning a remedy after an employer has followed a pattern or practice having a discriminatory effect. Here,

there was no finding that any of the black employees had been a victim of discrimination.

In *Wygant v. Jackson Board of Education*, — U.S. —, 106 S. Ct. 1842, 90 L.Ed.2d 260 (1986), a collective bargaining agreement between the board of education and a teacher's union which extended preferential protection against layoffs to some minority employees was struck down by the Court on the grounds that the Board's interest in providing a minority role model for its minority students was insufficient evidence to justify a conclusion of prior discrimination.

In *Local 28 of the Sheet Metal Workers International Association v. EEOC*, — U.S. —, 106 S. Ct. 3019, 92 L.Ed.2d 344 (1986), after a district court found the union in contempt of a court ordered affirmative action plan, it issued new orders imposing a fine to be placed in a fund to be used to increase nonwhite membership and implementing a new affirmative action

plan. The Supreme Court affirmed, holding that the remedies provision of Title VII does not preclude the district court from ordering preferential relief benefitting individuals who were not the actual victims of discrimination.

In *Local 93 International Association of Firefighters AFL-CIO C.L.C. v. City of Cleveland*, — U.S. —, 106 S. Ct. 3063, 92 L.Ed.2d 405 (1986), a district court adopted a consent decree to redress alleged discrimination against black and Hispanic firefighters. The Supreme Court affirmed the order, holding that the Title VII enforcement provision which precludes entering an order requiring an employer to give relief to an employee who suffered adverse job action, if the action was taken for any reason other than discrimination on account of race, color, religion, sex or national origin, does not preclude entry of a consent decree that may benefit individuals who are not the actual victims of the employer's discriminating practices.

ABOUT THE SCHOOL

Duke Law School Annex

Duke Law School at Pickett Road! As recent graduates of the Law School and those who have returned to the Law School recently—such as interviewers during placement recruiting season—well know, office space at the Law School is difficult to come by these days. Therefore, two administrative offices—the Alumni/Development Office and the Admissions Office—have been moved off campus to leased space on Pickett Road. These offices share an office building with the Private Adjudication Center and several Duke University offices.

The Alumni/Development Office moved to Pickett Road in the summer of 1985, although that office had been housed outside the Law School building for several years. That office was the first to be moved out because it deals less with students on a day-to-day basis than other administrative offices at the Law School. "Though I laughingly accuse the dean of putting us three miles away from the Law School so that I can wholeheartedly endorse the need for more space at the Law School when talking with our alumni," says Evelyn Pursley, Assistant Dean for Alumni/Development.

The space is appreciated, as there are now three staff members to accommodate in addition to the assistant dean. Margaret Cates, who joined the staff in July of 1985 as Coordinator of Development, supervises the Annual Fund and tends the computer data base. Lynda Horton McBroom, who also joined the staff in the summer of 1985, serves as administrative secretary and handles the heavy volume of mailings produced by the office in addition to serving as personal secretary to Dean Pursley. The newly arrived Coordinator of Alumni Affairs, Maria Isikli, will organize alumni social events and serve as liaison for the Law Alumni Association and the growing number of local alumni associations.

"Though we appreciate the space,

it is difficult to be so far away from the building for a number of reasons," says Dean Pursley. "The Alumni Office should be a resource for everyone at the Law School. We help the alumni stay in contact with each other and with the faculty and student body for a variety of professional and social purposes. Being outside the Law School makes it a little harder to provide that service. It also makes it more difficult for the new staff members to get to know people at the Law School and vice versa." Dean Pursley also has an office in the Law School building so that she can meet with students regarding classwork and/or alumni projects, with other faculty members and administrators, and with visiting alumni. "Though it is necessary for me to have an office in both buildings, it can be very frustrating," says Dean Pursley. "We do have to spend sometime calling and driving back and forth with information and materials. And, I am sure that it is also frustrating for alumni and others who often have to track me from one office to the other."

At least the decision as to which office to use is made easier during the fall placement season as Dean

Pursley has relinquished her office at the Law School three days a week to visiting interviewers. This year all on-campus interviews have taken place in the Law School building. Given the crowded nature of the facilities, it was necessary for some faculty members to relinquish their offices certain days of the week in order to accommodate all the recruiters in this building. However, Cynthia Peters, Director of Placement, prefers to have the interviews take place at the Law School. "While it has been difficult juggling which offices are available which days and deciding which interviewers will have to interview in windowless rooms, it is still easier having all the interviewers in this building rather than in the business school or at a local hotel."

During the summer of 1986, the Admissions Office moved to the building on Pickett Road. Three staff members will be officed there, including the new Assistant Director of Admissions, Debra O'Reilly. This position was created this year to provide some administrative assistance to Assistant Dean Gwynn Swinson, as she took on the responsibility of supervising Admissions and Student Affairs programs.



The Assistant Director of Admissions will be responsible for supervising the processing of applications. The Law School receives approximately 2,000 applications each year for the 175-180 places in the entering class. Ms. O'Reilly will read the files on these individuals and make recommendations to the Admissions Committee. She will also supervise the mailing of responses.

The Assistant Director of Admissions will also be responsible for coordinating the new Alumni Admissions Interviewing project. This project, which began as a pilot program in 1985-86, is being expanded this year as it proved to be very successful and rewarding to the prospective students and the alumni who participated. The program involves alumni in recruiting, interviewing, and communicating with potential students. Some alumni are being asked to interview applicants to identify those who particularly merit financial aid or to help the Admissions Office in making difficult choices regarding borderline applicants. Other alumni are recruiting potential students at nearby undergraduate schools. It is helpful for Ms. O'Reilly to be at Pickett Road for this purpose because all of the admissions files as well as all the alumni files are now housed there, and because the Coordinator for Alumni Affairs, who is officed at Pickett Road, will serve as Alumni Office liaison for the project.

The Assistant Director of Admis-

sions will also supervise the other two Admissions staff members who office at Pickett Road. Margaret Musser, Staff Assistant, is responsible for keeping information regarding the applicants and the approximately 10,000 inquiries updated on the office computer equipment. An administrative secretary is responsible for the mailings sent out by the office.

Assistant Dean Swinson will retain her office at the Law School, although she will continue to recruit prospective students and generally oversee the admissions process. Her responsibility for the Student Affairs programs—the offices of Financial Aid, Student Records, and Placement—and her role in counseling students regarding their academic programs, require her presence in the Law School. It is also important for her to be available to greet prospective students who come to the Law School. She does, however, plan to rotate offices with the Assistant Director for Admissions a couple of afternoons a week during the peak of the admissions season so that Ms. O'Reilly can get to know the Law School staff and be available to meet with applicants. Dean Swinson said that "the move to Pickett Road creates some logistical problems for the Admissions Office. However, we hope to lessen these difficulties by purchasing new computer equipment that will facilitate long range communication between the two offices and by holding regular staff meetings."

Pat Delaney, Staff Assistant for the

Admissions Office, will also remain at the Law School. Ms. Delaney serves as personal assistant to Dean Swinson and to Judy Horowitz, Assistant Dean for International Students. She sets up Dean Swinson's recruiting calendar and schedules recruiting visits to undergraduate schools for other faculty members. Ms. Delaney organizes orientation for the international students and for the summer entering joint degree students. She also organizes the fall orientation program for the entering first year class with the help of the other Admissions Office staff members. She greets prospective students when they visit the Law School. She greets new students as they arrive in Durham in the fall and helps them get settled in the city by dispensing information about available housing in the city and by keeping a roommate list. She also assists in organizing special events sponsored by the Admissions Office. For example, Mrs. Delaney assisted Dean Swinson in planning and organizing the fifth annual conference of the Southeastern Association of Pre-Law Advisors, which the Law School hosted in October.

If you need to reach one of the offices at Pickett Road, you may write to that office at 3024 Pickett Road, Durham, North Carolina, 27705. If you are calling, the Alumni/Development Office can be reached at (919) 489-5089 or (919) 489-5096, and the Admissions Processing Office is at (919) 489-0556.

Duke in Denmark

From July 6 through August 1, 1986, Duke Law School conducted a program in cooperation with the University of Copenhagen Law Faculty. The program, "Duke in Denmark," offered several courses on American law for the European participants and on European and EEC law, primarily for the American participants.

The thirty-five students in the program were divided about equally between Americans and non-Americans. Practicing lawyers as well as law students were enrolled. Among the Americans were several Duke Law School students and alumni, as well as students from other American law schools. Among the Europeans and Asians were several from Japan, Germany, Belgium, Scotland, Sweden, and Finland. Ten Danish lawyers attended all or part of the program, as did two Danish publishers.

A distinguished faculty of scholars and practitioners was assembled. From the University of Copenhagen, Dean Claus Gulmann taught an introduction to EEC law; Professor Joseph Lookofsky, who holds a J.D. from New York University and two law degrees from the University of Copenhagen, taught international commercial transactions; and Professor Bernhard Gomard collaborated with Gulmann on the introduction to EEC law.

Duke Law School faculty members were also well represented. David Lange taught American intellectual property. Pamela Gann and James Cox were joined by Atlanta alumnus, William (Pat) Patterson, '50, to teach a course on investment in the United States. Donald Horowitz taught an introduction to American law for European participants by using labor law as a vehicle for studying the U.S. legal system. Tom Kauper of the University of Michigan and a former assistant attorney general of the Antitrust Division of the Justice Department presented the U.S. antitrust law course.



Copenhagen Canal

Three German faculty members also joined the Duke in Denmark faculty. Professor Wernhard Moschel of the University of Tübingen conducted the course in EEC antitrust, and Professor Ulrich Immenga of the University of Göttingen and chairman of the West German Monopolies Commission offered a one-week course on comparative U.S. and EEC antitrust law. EEC intellectual property was taught by Washington lawyer, Jon Baumgarten, who is the former general counsel of the U.S. Copyright Office, and Dr. Theo Bodewig, who is a researcher at the Max Planck Institute in Munich.

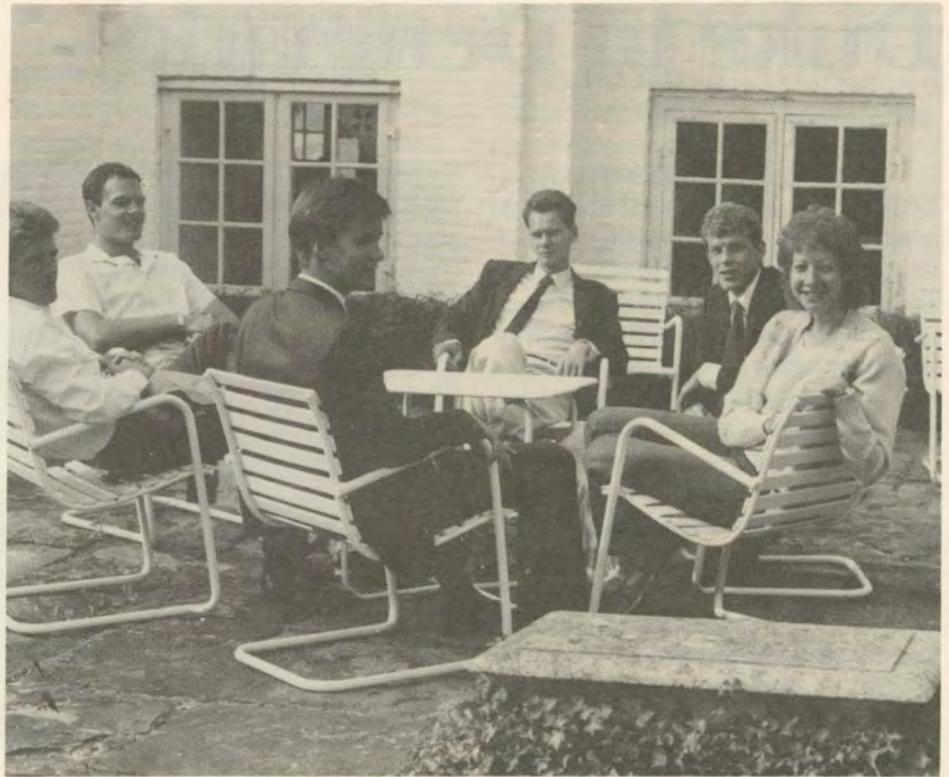
The program also included a number of extracurricular activities. The participants visited the Supreme Court of Denmark, where Justice Else Mols presented a lecture on the history of the court, the procedure for selecting judges and conducting court business, the nature of the court's jurisdiction, and the extent of constitutional judicial review permitted the court. The Danish Law Association hosted a reception for the program participants so they

could meet members of the local Danish bar. At the University of Copenhagen, the Pro-Rector invited participants and faculty to a reception honoring the Duke in Denmark program. Students and faculty also spent a day on a guided bus tour of Frederiksborg Castle, the Viking Museum, and Roskilde Cathedral. Three group lunches were held at local restaurants and the University canteen so faculty and students could have opportunities to interact in informal settings.

Of special interest to Duke students and alumni was the reunion of Duke Law Alumni in Europe held at the home of Marianne Philip, '83 and Per Schmidt, '83. Two dozen people assembled at their home to share cocktails and dinner, to hear about current happenings at the Law School, and to reminisce about experiences at Duke. Alumni came from as far away as Berne, Switzerland; Paris, France; and Helsinki, Finland.

Duke in Denmark will be held again from July 12 through August 7, 1987. The course will be appropriate for lawyers and students interested

in international business transactions law. Six courses will be offered, and participants may take up to three courses for a maximum of six credits. Classes can also be taken for continuing legal education credit for many states. All participants will receive a certificate of attendance regardless of whether they wish to pursue the courses for credit. For more information about Duke in Denmark, call Duke Law School at (919) 684-2850.



European Duke Law Alumni enjoyed socializing together



Per Schmidt, '83, hosted reception for European Duke Law Alumni

The Deans' Advisory Council

The Deans' Advisory Council is an honorary service organization of Duke Law students and alumni. The work of the Council is to assist the administrators of the Law School with their public contacts. Its members serve at the direction of an executive committee, which includes the Assistant Dean for Student Affairs and Admissions, Gwynn Swinson; the Assistant Dean for Alumni and Development, Evelyn Pursley; and the Director of Placement, Cynthia Peters, and a student board which includes a coordinator for each of the three offices involved. Coordinators are third year students who have already served one year on the Council. The student coordinators for Placement, Admissions, and Alumni/Development set the schedules and assignments for the various activities DAC members perform for each office.

Members are selected by the Executive Committee, and selection reflects the collective judgment of the Committee members that the student is deserving of trust and respect and manifests traits for which Duke Law School would like to be known. Some students are chosen because they have manifested an interest in promoting the Law School either directly to one or more of the Committee members by offering to help with various programs sponsored by the Admissions, Alumni/Development, or Placement Office; others have been recommended by good reports from faculty members or other students. Membership involves a substantial commitment of time and energy to the welfare of the Law School. Members represent the School to the public, including admissions applicants, placement interviewers, supporters, alumni, and other distinguished guests.

During the fall recruiting season, members are kept particularly busy as they greet interviewers each morning, get them oriented to the



Telethon recruit, Ray Davis

building, and show them to their interviewing rooms. The Law School has been complimented by recruiters for providing this personal touch during the busy recruiting season. This service by DAC members also relieves the beleaguered Placement Office staff at one of the busiest times of day during the recruiting season. "The DAC members are essential to the function of the Placement Office during the recruiting season," says Cindy Peters, Director of Placement. "We couldn't do it without them. Not only do they help the recruiters' day get off to a good start, but they relieve some of the pressure on the Placement Office staff to get everyone in place and started on time."

DAC members aid the Alumni/Development Office in several ways. In the fall and spring, they participate in the Annual Fund Telethon. They place calls to alumni requesting their support for the Law School annual fund and recruit other students to do the same. While practicing their persuasive and negotiating skills, they also have an opportunity to talk with alumni about the ways in which the

Law School has changed and how it has remained the same.

DAC members also provide assistance to the Alumni/Development Office during Alumni Weekend and Barristers Weekend by greeting alumni and directing them to the various events. Members then socialize with the alumni at some of the events. "The response from both alumni and students has been very positive," says Evelyn Pursley, Assistant Dean for Alumni and Development. "The alumni enjoy the chance to find out what it is like to be a student at the Law School nowadays, and the students enjoy the opportunity to hear about the professional lives of our diverse alumni. And, I think they all enjoy discovering that good feelings for Duke Law School run strong and deep across the years."

DAC members serve the Admissions Office in a variety of ways. They recruit first year students to take prospective students to first year classes during on-campus visits. They also may take the prospective students to lunch so they can chat with them about the Law School and answer any questions the undergraduates might have about Duke Law School and/or about law school in general. Some DAC members also visit undergraduate schools to attend pre-law fairs or to meet with prospective students individually or in small groups.

Members of the DAC are encouraged to suggest new projects. In 1985-86, the DAC organized the program in which faculty members explained the second and third year curriculum and suggested core courses for various career paths. In the fall of 1986-87, the DAC organized the program which allowed third years who had worked in various cities to discuss those cities informally with second years before they begin to go through the recruiting process.

Membership on the Council con-

tinues for a five year term after graduation. Alumni members of the DAC are sometimes called upon to represent the school by recruiting new students in their area, helping students who are interested in finding jobs in the area, or organizing alumni associations and alumni meetings.

Members of the Deans' Advisory Council serve a valuable function for the Law School and their work is appreciated by the Law School administrators. Their service becomes more valuable each year as the Executive Committee, the student coordinators, and other members plan new projects for the Council to implement.



DAC member, Steve Segreto greets a recruiter in the Placement Office

Women's Law Society

Women's Law Society (WLS) provides a central organization through which women law students can meet to form friendships and explore issues of particular interest to women entering the legal profession. Within the law school, WLS works with the Admissions and Placement Offices to enhance the recruitment and placement of women and minorities. In 1985-86, the group prepared a brochure on the WLS for the Admissions Office to use when talking to prospective students. The brochure informs them about WLS and its activities and encourages them to attend Duke Law School.

The group works as a clearinghouse for information in areas of particular concern to women through bulletin board notices and informal presentations at faculty-student gatherings. For example, last year the group sponsored a presentation on pornography awareness. It also put together panel discussions on the Legal and Social Ramifications of Rape and on The Ethical Responsibility of the Legal Profession in the Recruitment and Placement of Women and Minorities.

Members are actively involved with the Duke Women's Studies Department and the Duke Graduate and Professional Women's Network. They also communicate with women's groups in other law schools throughout North Carolina and the nation. WLS seeks to inform the law school of local and national workshops, rallies, public interest job opportunities, and court decisions which impact significantly upon women.

WLS provides opportunities for members to meet women attorneys active in the community. This past year, for example, North Carolina Supreme Court Justice Rhoda Billings gave a lecture on "Law and Morality" and afterwards met with students at a wine and cheese recep-

tion in her honor. Angela Bryant, President of the North Carolina Association of Women Attorneys, attended an informal lunch and spoke on "The Role of Bar Associations." Informing students is a major function of WLS. Meeting women leaders in the legal profession and learning more about their activities supplies law students with needed role models.

Networking is achieved on a national level by WLS membership in various organizations, including: the National Association of Women Attorneys, Advocates for Basic Legal Equity, The National Women and the Law Association, and The National Center on Women and Family Law. WLS actively participates in the annual National Conference on Women and the Law and is working with Durham area attorneys and student groups in neighboring law schools to bring the 1987 Conference to the Triangle area.

In addition, WLS is working in conjunction with the Alumni Office and the Duke Law Alumni Association to sponsor a panel featuring women attorneys discussing their career choices. This presentation will

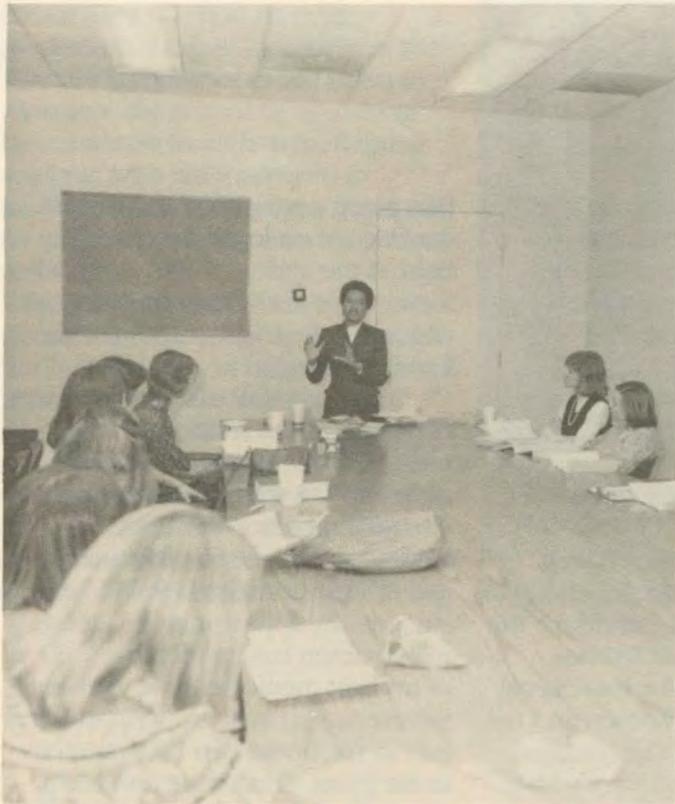
take place during the schoolwide conference on legal careers to be held in the spring of 1987, and will focus on professional and personal concerns of particular interest to female attorneys.

Duke Law School has a number of distinguished women faculty members who are remarkably accessible and are willing to offer career advice and personal insights to students. Informal faculty-student gatherings sponsored by WLS offer students an opportunity to interact with women faculty members. "One of my best memories of law school is the evening a small group of students met in the home of a WLS member to eat pizza, drink beer, and learn more about legal careers. As we listened to the decisions two women professors had made in their lives, I realized how many options would be available after I graduated," said Suzanne Bryant '86, former WLS President.

WLS members teach an undergraduate course entitled "Women and the Law." Topics covered include equal protection, reproductive rights, comparable worth, and employment discrimination. "The history of



The WLS sponsors panel discussions on topics of interest to its members.



The Women's Law Society often invites speakers to "brown bag" luncheon meetings.

women's issues is eye-opening since the Supreme Court did not decide any significant cases in this area until the 1970's. As a law student, I find it refreshing to be involved with undergraduates who approach the subject matter from a non-legal background," said Karis Hastings '87, WLS member who teaches "Women and the Law." WLS members lecture on the substantive law issues, engaging undergraduate students in policy-oriented discussions. Course projects

emphasize active community involvement such as touring a women's prison or hearing a court decide a family law case.

The organization gives first-year students a significant opportunity to interact with second and third-year students. "As an entering law student, I wanted to be active in a forum that discussed both women in the law and the law's effect on women. WLS has been successful in helping meet these goals while at the same time

providing me personally with a needed support group," said Martha Hall '88, WLS Treasurer.

Membership in WLS is open to law school students of both sexes. The diversity among the student body is reflected among the membership—members represent different political viewpoints, geographical areas, age groups, and ethnic backgrounds. Such flexibility allows the organization to plan its own agenda and activities on a year-to-year basis.

Women's Law Society

The Women's Law Society (WLS) is a student organization at Duke University that focuses on women's issues in the law. It provides a forum for students to discuss legal topics and engage in community service. The organization is open to all law school students, regardless of gender. WLS members participate in various activities, including lectures, panel discussions, and community projects. The society aims to promote equality and justice for women in the legal profession and society at large.

The Duke Legal Research Program

The Duke Legal Research Program is a completely student-operated service producing legal memoranda for practicing attorneys nationwide. In 1964, the Program was established as one of the first of its kind. In the past twenty-two years, the Program has researched and written memoranda for lawyers in the fifty states, the Virgin Islands, and Hong Kong. The Program has also served as the model for scores of other law schools which subsequently established similar services.

The Program is managed by third-year law students. For 1986-87, Robert J. Gleason is the Program's Editor-in-Chief. David E. Hodges is the Managing Editor. This year's Board of Editors, third-year students who assist in the editing of memoranda, includes: Erika A. Chilman, John W. Domeck, Thaddeus S. Gauza, Jasper A. Howard, David P. Jones, Wendy B. Oliver, and Karen S. Wallach.

The Program solicits assignments from law firms and sole practitioners around the country. Annually, the Program advertises its services in legal periodicals and mailed solicitations. Each year, the number of attorneys using the Program has increased. Most of the assignments come from medium to small sized law firms. Editor-in-Chief Gleason claims, "It's more efficient and economic for

small law firms to use the Program than to have an associate spending her time researching and drafting a memorandum." Gleason adds, "Lawyers using the Program have access to resources at Duke Law School that they don't have ordinarily."

The Program, which does not receive any funding from Duke Law School or the Duke Bar Association, is a completely self-supporting, non-profit organization. It charges client law firms a fee (\$18 per page), a percentage of which is used for operational costs.

Participating students are paid \$10 per page for the completed memorandum. Typists are provided by the Program so that students do not have to type their own memoranda. Any student contributing to the Program is eligible for consideration for an editor's position in the next academic year.

When an assignment is received from a law firm, it is abstracted and placed in *The Herald*, the Law School newsletter. Second- and third-year law students with an interest in particular assignments then contact the Program.

Once an assignment is taken, a student has the responsibility to complete the assignment. The student must also keep the assigning attorney apprised of progress in the research.

There is a maximum six-week turn around time. The average time from start to finish is four weeks.

There are two major benefits for students working in the Program. First, it is an opportunity to make money to help defray the cost of law school. Second, the Program affords a second- and third-year law student an opportunity to practice and develop her legal writing skills. Editor-in-Chief, Robert J. Gleason, says, "It's a good way for a second-year law student to practice and hone her research and writing skills before the all-important second-year summer clerkship."

The work done by the Board of Editors affords its members the opportunity to write and edit extensively. The Board checks each memorandum to insure that the discussion of the substantive law is relevant and accurate. The Board also examines each memorandum to make sure the product is stylistically succinct and clear. Finally, the Board checks the citations to insure the case law cited is properly cited and on point. Gleason believes, "The Program offers the editors valuable experience in writing and editing that prior to the Program could only be gotten on a law journal."

The Duke Prisoner Rights Project

The Duke Prisoner Rights Project (PRP) was organized in 1984 to provide a service to prison inmates and to offer an alternative extracurricular program which could expand the horizons of law students at Duke. The PRP is one of the few purely service organizations at the law school. It provides free legal assistance to prisoners who would otherwise be without or be very limited in their access to legal resources. In spirit, the PRP is akin to the *pro bono* programs many firms support.

The PRP is involved in three areas: prisoner inquiries, criminal trial research, and prison tours.

Prisoner Inquiries. Currently, most of the work done by the PRP involves responding to letters from prisoners asking for assistance and advice. The substantive issues in the prisoners' requests are varied. Issues frequently seen include ineffective assistance of counsel, negligence of prison officials, and *pro se* appeal procedures. In order to respond, a volunteer might have to: research relevant statutes and case law; ask the prisoner for more precise information; talk to an attorney who represented the prisoner; and draft a memorandum discussing relevant points of law to be sent to the prisoner. Although the students are

not authorized to act as lawyers and give legal advice, they can prepare a statement of the relevant law in the area of inquiry. Responses, therefore, state the relevant law but do not state a professional judgment as to the existence of a claim.

Criminal Trial Research. Projects available in this area include legal research and writing projects, attendance at depositions, and attendance at trials. For example, in the spring of 1986, several members worked with a local law firm briefing issues for a death penalty murder trial.

Prison Tours. The PRP also sponsors tours to the state prisons. Last year students visited both the Central Correctional Unit for men in Raleigh and the Women's Prison.

Executive Committee. Six executive committee members oversee the PRP. This year's committee members are: David Berger, Philip Belcher, Brian Gilbert, Bob Nagy, Bart Patterson, and Laura Britton. Each volunteer works as a member of a group headed by an executive committee member. The executive committee member distributes the files and tracks the progress of work on prisoner requests. Although each member works independently, responses are reviewed by other group members so that all members

will become familiar with recurrent issues. Committee members also keep regular office hours to be available to answer questions. In the office are closed files of prior research requests which can be referred to when answering similar requests. An index of these files, by subject matter, has been developed. The PRP is also developing short memoranda to respond to recurrent inquiries. To date, the files contain memoranda on ineffective assistance of counsel, habeas corpus appeals, and *pro se* appeals. The PRP also maintains a small library of resource materials in the office, which includes copies of relevant statutes and administrative code chapters, books on prisoner litigation and Section 1983 civil rights suits, and a bibliography of books available in the law library which address prisoner concerns.

The Executive Committee meets every two weeks to discuss upcoming projects, problems, ideas for new projects, and the progress being made on prisoner files. The group is committed to remaining open to new suggestions and new directions and to maintaining flexibility so the organization can continue to be shaped by the interests and energies of its members.

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THE DOCKET

Francis Paschal Retires

After thirty-two years as a law professor at Duke, J. Frances Paschal, a native of Wake Forest, North Carolina, has retired. Professor Paschal received his A.B. in 1935 and his LL.B. in 1938 from Wake Forest College. He received his A.M. in 1942 and Ph.D. in 1948 from Princeton University.

Following his graduation from Wake Forest, Professor Paschal taught law briefly at both Wake Forest College and Princeton University. In 1940, he commenced the study of politics, which was interrupted for four years of service in the Navy. Following the war, he completed his doctorate in politics in 1948, and returned to law as Research Director for the North Carolina Commission for Improvement of the Administration of Justice. From 1949 to 1954, he entered into general practice with a private law firm in Raleigh. In 1952, Professor Paschal served as the State Chairman for the North Carolina United World Federalist, an organization whose interest was to further the idea of world federalism.

In the 1953-54 academic year, Professor Paschal came to Duke Law School as a visiting professor. During that year he conducted a program of study for German law school graduates which introduced them to the American legal system. The following year he joined the faculty at Duke. During his thirty-two years at Duke, Professor Paschal taught primarily in the areas of civil procedure, admiralty, and federal courts.

Since 1954, Professor Paschal has served as Chairman of the North



Francis Paschal will miss interacting with students.

Carolina Advisory Committee to the Civil Rights Commission and as a consultant during the drafting of the North Carolina Rules of Civil Procedure. He has been Chairman of the University's Academic Council and President of the Duke Chapter of the American Association of University Professors. He has written on a variety of legal subjects, including a

full length biography of Justice George Sutherland of the United States Supreme Court.

Professor Paschal considers the highlight of his career his years at Duke and will most miss his associations with the students. Now that he is retired he is writing several articles and hopes to practice from time to time.

Duke Hosts National Sports Forum '86

For the first time since the 1920's, there seems to be general agreement about the need for reform in intercollegiate athletics. Numerous incidents during the past several years have indicated that major college athletics has separated itself from its educational origins:

—The tragic death of University of Maryland basketball player, Len Bias, led to subsequent revelations of drug abuse and poor academic performance among that university's athletes and the resignation of the school's long-time basketball coach, Charles L. "Lefty" Driesell.

—The state of Georgia agreed to pay \$1.08 million to professor Jan Kemp and reinstate her at the University of Georgia in settlement of a lawsuit by Kemp in which a federal court had held that she was unlawfully dismissed by that university for protesting preferential treatment afforded athletes in the school's remedial Developmental Studies Program.

—A 1985 study by the N.A.A.C.P. revealed that no black basketball player had graduated from Memphis State University in the last twelve years.

—The Texas Christian University and Southern Methodist University football programs were placed on probation by the National Collegiate Athlete Association (NCAA) after it was revealed that some of the teams' star players and recruits had received up to \$20,000 from boosters through cash payments, gifts of automobiles, and "no-show" jobs.

While educators, athletic directors, coaches, and commentators agree that serious problems exist in collegiate athletics, there is less agreement on what specifically is wrong, and almost none on the cure.

In order to facilitate objective analysis of what has been termed "the crisis of college sports," a distinguished panel of sports personalities gathered at Duke on April 7, 1986, to participate in the *National Sports Forum '86—Education and Athletics: Winners and Losers* (the *Forum*). The *Forum*, a major cooperative project between Duke and the University of North Carolina at Chapel Hill, was conceived by Duke Law School Professor John C. Weistart and Chauncey G. Parker, IV, J.D. '86. According to Professor Weistart, "The *Forum* was meant to provide a nonpartisan discussion of the problems in collegiate athletics, and the university setting—detached from athletic departments and administrators—proved to be most appropriate for such an inquiry." Weistart continued, "The media dwells on the views of those coaches and administrators



John C. Weistart

whose programs are in trouble. We wanted to provide an environment in which persons with broader perspectives could freely exchange their ideas for dealing with the pressures on universities and their athletic programs."

The panel for the *Forum* included several of the leading authorities on issues of sports in society. Participating were sportscaster and commentator Howard Cosell; former Senior Writer for *Sports Illustrated*, John Underwood; Cal-Berkeley sociologist, Dr. Harry Edwards; University of Maryland Chancellor and chairman of the NCAA President's Commission, Dr. John B. Slaughter; College Football Association (CFA) Executive Director, Charles M. Neinas; University of Notre Dame basketball coach, Richard "Digger" Phelps; and Duke basketball player and member of the NCAA Long Range Planning Committee, Jay Bilas. Professor Weistart, whose treatise, *The Law of Sports*, is generally recognized as the leading academic treatment of the interac-

tion of law and sport, moderated and produced the *Forum*.^{*} Commentator George F. Will will introduce the *Forum* when it is broadcast by the Public Broadcasting System (PBS) on Sunday, January 18, 1987, at 10:00 p.m. EST.

Professor Weistart used the hypothetical cases of Coach Hooker Rogers and Coach Rogers' top high school recruit, Tommy Mason, as the vehicles for guiding the panel's discussion. "The use of the hypothetical scenario is particularly appropriate for public policy debates," explained Weistart, "because it yields a much more lively interchange than the typical panel discussion." He continued, "By having the panel focus on scenarios which could be easily refined or modified, we were able to get candid observations on a vast range of important issues." Issues addressed by the panel included the pressures placed on a college coach by boosters clubs and other outside influences, and the role that the university president should assume to assure that the appropriate ethical and educational standards of the university are maintained by those associated with its athletic program. In addition, the panel discussed the need for more clearly defined academic expectations for student-athletes both before and after their matriculation. Finally, the panel examined the influence of the media, especially television, on collegiate athletics.

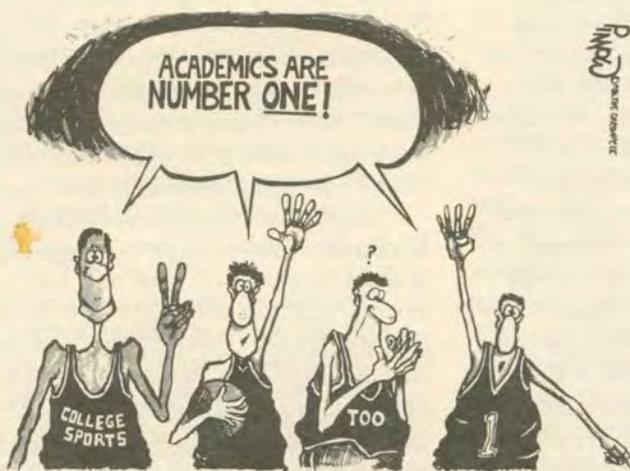
Professor Weistart feels that the *Forum* provides an informative debate about the reform needed in collegiate athletics. The *Forum* was attended by various college administrators and coaches, including both the past and current presidents of the University of North Carolina, North Carolina State football coach Dick Sheridan, and Duke basketball coach Mike Krzyzewski. The *Forum* received national exposure through the Associated Press and newspapers such as *USA Today* and *The Atlanta Constitution*, in addition to being taped for broadcast by PBS.



Jay Bilas & Howard Cosell

Professor Weistart found the *Forum* particularly rewarding, however, because it presented "the opportunity to utilize the talents of a number of extremely able students." Weistart observed that "law schools provide tremendous human resources which often are not adequately tapped. I believe we underestimate the depth of student interest in promoting public discussions of issues of current legal and social concern."

Despite the present problems of college sports, Professor Weistart is a proponent of the continuation of university involvement in the endeavor. He believes, however, that "achieving academic integrity in big-time athletic programs is very difficult." Weistart points to the exclusivity of colleges' control over the pre-professional career of a football or basketball player as a source of much of the problem, because, he says, "The higher [a college] raises its admissions standards, the more it denies promising young athletes the opportunity to pursue their sport. We need to begin thinking seriously about non-collegiate alternatives." Weistart concludes, "The main issue, then, may not be 'whether' there should be change, but rather from 'where' the initiative for change should come. The *National Sports Forum '86* was intended to address precisely that question."



^{*}In addition to writing *The Law of Sports and producing the National Sports Forum '86*, Professor Weistart is a frequent commentator on contemporary issues in sports. He has written a series of guest editorials for *The New York Times* and *The Washington Post*, entitled "The Unnatural Athletic-Academic Link," "Will College Sports Reform be Business as Usual?," "A College Sports Commissioner: The Time is Now," and "National Commissioner Needed to Improve College Athletics." He has appeared on network television and before numerous university panels to discuss related topics.

Duke Law School in the 1930's: A Retrospective

In October 1984, the classes of 1932, 1933, 1934 and 1935 gathered for a joint 50-year reunion at Duke Law School. In September 1986, the classes of 1936 and 1937 returned for their joint 50-year reunion. This article is dedicated to them.

The 1930's were an exciting time in the history of Duke Law School. They saw the founding of two law journals, including *Law and Contemporary Problems*; the formation of student organizations such as the Duke Bar Association; the creation of one of the few law school sponsored legal aid clinics; and the gathering of a mix of brilliant faculty and talented students. The genesis of this creative period was in the reorganization of the law school and the arrival of Justin Miller.

JUSTIN MILLER AND THE REORGANIZATION OF DUKE LAW SCHOOL

In 1930, when the Main Campus of the newly christened Duke University neared completion, University administrators decided to reorganize the Trinity College School of Law, and Duke University School of Law was created. In 1930, the administration hired Justin Miller, the dean of the University of Southern California School of Law, with the objective of making Duke a national law school. The University gave Miller a large budget for faculty salaries, student scholarships, and library expenses. In remarks made at the presentation of his portrait to the Law School, Miller recalled coming to Duke:

[T]here is one period in my life as to which I have definite certainty . . . and an unalloyed feeling of great happiness and satisfaction. Of course, I speak of the years which I spent with you at Duke Law School.

Going there from the deanship of an old established law school to head a new one, with the assurance

of the Duke University administration it was to be a great national law school, that was a challenge which any man with a spark of pioneering enthusiasm might well have envied me. When I arrived on the Duke campus, the then new Law School Building was just ready for occupancy—so new indeed, that the workmen were still chiseling away the out cropping of stone which had been uncovered in preparing the sight for it.

Then followed the exciting days of building a faculty of young but well-seasoned professors; starting a library for their use and for the use of the brilliant young students whom we were so fortunate as to gather together from all sections of the country.¹

Miller did gather together a brilliant, mostly young, faculty that included professors of the former Trinity College School of Law and distinguished faculty from other law schools. William Bryan Bolich and Judge Thaddeus D. Bryson remained from the Trinity Law School. Bolich had attended the Trinity Law School for two years before going to Oxford as a Rhodes Scholar. He taught Possessory Estates, Future Interests, Conveyancing, and Landlord and Tenant. Judge Bryson had served on the North Carolina Superior Court and taught Code Pleading, Practice Court, Criminal Procedure, and North Carolina Statutes. Malcom McDermott came in 1930 from the University of Tennessee College of Law where he had been the dean since 1920. He taught Evidence, Wills and Administration, Municipal Corporations, and Legislation. John S. Bradway came in 1931 from the University of Southern California where he had been a professor of law and director of the legal aid clinic at that law school. H. Claude Horack came in 1930 from the University of Iowa School of Law where he had been a

professor of law for over twenty years. Horack later became law school dean in 1934.

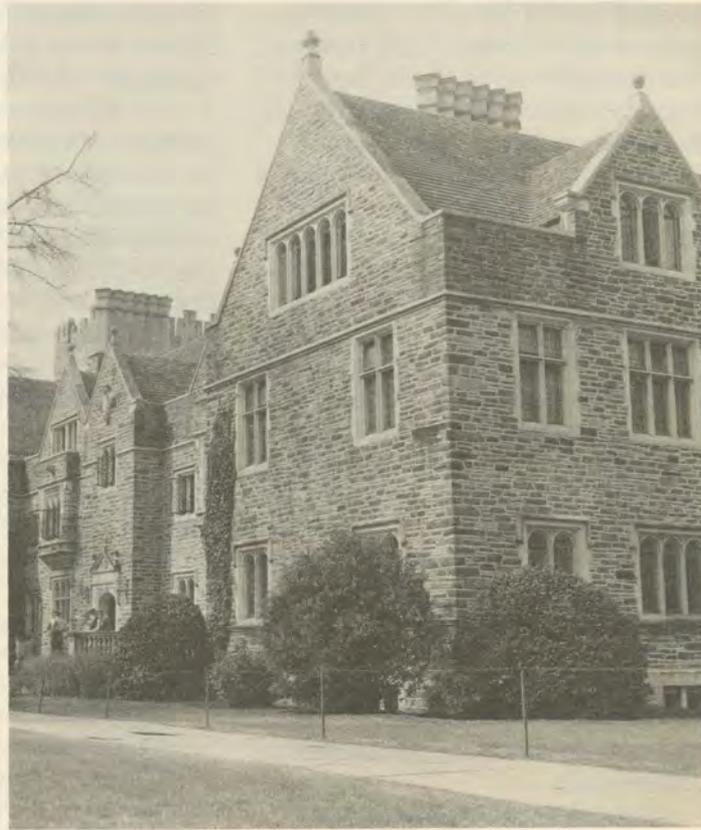
Among the young professors were Douglas Maggs, David Cavers, and Lon Fuller. Maggs was a 1926 graduate of Harvard Law School and had taught at the University of California, the University of Southern California, Columbia, and Yale before coming to Duke. He taught Constitutional Law, Administrative Law, and Torts. Cavers, also a 1926 graduate of Harvard, had taught at Harvard and West Virginia before coming to Duke in 1931. He taught Conflict of Laws, Public Regulation of Business, and Current Decisions I and II. Cavers remembers coming to Duke from West Virginia where he was an assistant professor. He chose to come to Duke because West Virginia was depressed economically and Duke "was just getting rolling. Miller was building up the faculty." Cavers thought Duke would give him the chance to be involved with student writing, which was an interest of his because he had been the president of the *Harvard Law Review*. Within two years of arriving at Duke, Cavers founded *Law and Contemporary Problems*. Fuller also came in 1931. He was a 1926 graduate of Stanford Law School and had taught at the Universities of Oregon and Illinois. He taught Contracts, Damages, Comparative Law, and Jurisprudence.

Miller also brought William R. Roalfe from the post of Law Librarian at the University of Southern California. Starting with the collection that the Trinity College School of Law had accumulated, Roalfe increased Duke's Law Library five-fold by 1937, giving Duke the largest law library, by volumes, in the South. In 1937, Duke's library stood thirteenth among the 97 ABA-approved law schools.

In addition to bringing together a group of extremely talented profes-



The Old Law School Building under construction



The First Law School Building

sors, Miller also used scholarships to enable bright students from across the country to attend Duke. He offered approximately 20 regional scholarships a year of around \$300 to first year students. A smaller number of scholarships were offered to second and third years who had done outstanding work in the law school. As this was during the Depression, the scholarships were the only means for many of the students to attend law school. Leon Rice, Class of 1936, was a recipient of one of those scholarships. He had applied to both the University of Virginia and Duke, and he recalls:

As it turned out, I was offered a scholarship at both schools but Duke came through first in the form of a letter signed by Dean Justin Miller, and I promptly accepted. The scholarship amounted to \$300.00 a year and covered tuition, fees and basics. As I dictate this, I have before me a copy of the Bulletin of the School of Law, dated March 1935, from which I quote the following:

"Tuition and registration fees are due at the beginning of each semester. The matriculation fee is \$25.00 a semester. The tuition fee is \$100.00 a semester. A damage fee of \$1.00 is collected at the beginning of the first semester only, and after that a fee of \$5.00 at the beginning of each semester, a library fee of \$5.00 each semester, and a medical fee of \$5.00 each semester."²

The scholarships attracted students to Duke from across the country and some came from as far as Washington and California, although the majority were from the South and the Northeast. Duke's ability to draw students nationwide is apparent when Duke's enrollment is compared to other schools. During the 1937-38 school year, the 110 Duke students came from 32 states and foreign countries. During the same year, Yale Law School with 394 students had 36 states represented; Columbia Law School had 36 states represented with 536 students; and the University of Pennsylvania had 14

states represented with 386 students.

Despite the scholarships, however, many had to make extraordinary efforts to come to the law school. Paul H. Sanders, Class of 1934, hitchhiked from Texas to Durham in 1931. He later became a professor at the Law School.

Miller also increased the required years of undergraduate preparation from two to three years and added additional requirements to the curriculum, including Legal Ethics.

The Law School grew in stature. In 1930, the Law School resumed membership in the Association of American Law Schools and in the spring of 1931 it was approved by the American Bar Association. In February 1933, the Law School was granted a charter for a chapter of the Order of the Coif.

LEGAL AID CLINIC

Although students in a few law schools participated in the work of independent legal aid organizations, clinics for legal aid were not an

integral part of the instructional program of law schools in 1930. However, Miller had brought John S. Bradway from the University of Southern California where he had been a professor of law and director of the legal aid clinic at that law school, and Duke Law School became part of a movement to provide legal aid through law schools. In 1931 the Law School established the Duke Legal Aid Clinic. The clinic's aim was to render service to indigent clients while providing legal education to third year students. Under the supervision of members of the North Carolina Bar the students participated in the conduct of cases presented by eligible clients. The clinic accepted both civil and criminal cases. In its first year, the clinic had 211 applicants for assistance. During the 1930's the clinic handled about 300 cases a year. By 1937 the clinic had handled its 2000th case.

The Legal Aid Clinic was a required course for third year students. The clinic's objectives in the providing of legal education were to: (1) give the student a picture of a case in action; (2) provide a means for developing creative skills, techniques, and mental habits in law practice; (3) provide an opportunity for the student to develop a mental picture of a lawyer as a public servant. In addition to the case and trial work for the clinic's clients, the students were also required to write briefs for local attorneys.

FOUNDING OF *Law and Contemporary Problems*

In 1887, Harvard Law School established the first law school periodical. It was emulated by other law schools, and by 1932 over fifty schools had founded reviews following the Harvard pattern with little or no variation. All placed emphasis solely on the doctrinal problems of law rather than focusing on the broader implications of the problems presented.

In 1933 two periodicals were started at Duke Law School: the *Duke Bar Association Journal* and *Law and Contemporary Problems*. The *Bar Journal* was modeled after the

journals of state bar associations and carried as one department the proceedings of the Duke Bar Association. A second department, comparable to the departments of student work in the law reviews, published comments on current court decisions of consequence. The comments were prepared in the course, Current Decisions, which was open to second and third year students of high standing who were also invited to write articles on legal topics for the quarterly.

Law and Contemporary Problems (L&CP) was a new type of journal. Cavers conceived the idea and expressed his reasons for a journal different from the Harvard model in a memorandum to Dean Miller in 1932.

[T]here is under consideration the establishment of a Law Review at this school of law next year. . . . It seems to me, therefore, opportune to proffer suggestions which may at least stimulate discussion as to the best form which may be adopted.

[I]t does not follow that because one formula has operated with a reasonable degree of success it is the best which can be devised for all times and in all places. Here at Duke we are unencumbered by any traditions in this field. It seems appropriate therefore to examine the entire matter afresh and to do so first in the light of the purposes which the university legal periodical is designed to fulfill.³

When interviewed in September 1986, Cavers recalled that he felt a small new school would have difficulty putting out a first class law review and saw the opportunity to break away from the typical law review format and allow scholars from other disciplines more opportunity to influence law and legal analysis.

The formula for a new journal which Cavers proposed was different in many respects: it was to focus on only one topic or "symposium" per issue; it would solicit articles from a variety of scholars, including those outside the legal field; it would not be student edited; and it would not

contain student authored work, except when a student was invited to contribute a note or article to a symposium. Cavers recommended in his memorandum that the new journal not be called "*Duke Law Review*" or "*Duke Law Quarterly*" and suggested "Contemporary Legal Problems." Douglas Maggs proposed the title now in use and, after Dean Miller approved this new journal, *Law and Contemporary Problems* was born.

In December 1933, the first issue of *Law and Contemporary Problems* appeared. The first issue was "The Protection of the Consumer of Food and Drugs." Cavers served as editor of *L&CP* for the first ten years. He was also the editor of student writing for the *Duke Bar Association Journal*, and he recruited student notes and articles for *L&CP*. Cavers recalls that because each issue was a symposium, he had a market for each issue. He had a large flow of orders for single issues, and orders were important because the journal had a limited budget. At the time, single issues were 75¢ a copy and subscriptions were \$2 each.

As subjects, Cavers chose important economic and social problems of the time which involved developing legal issues. He sought advice from experts in other fields and made a variety of new contacts with each issue. He solicited articles from the faculty and from scholars and experts he contacted in his travels and by writing. He asked someone to serve as advisor for each issue:

It is patent that the supervision of work of this sort would require the attention of a man with special training in the field. Therefore, it would seem necessary that a special editor be appointed to work in collaboration with whatever permanent editorial staff the periodical might have for each number published. He should, of course, be chosen from the ranks of the faculty as the one best equipped to conduct a study in the selected field. This, of course, would require a rotation of topics, but such a program would enhance the interest in the publication.

The Special Editor would solicit articles on such topics from those members of the profession who, he believed, might be induced to write. Here, of course, he would encounter difficulties similar to, although I believe not as great as, those encountered in the solicitation of contributions to the common or garden variety law review. There is, however, another source of legal writing which lends itself exceptionally to exploitation by a periodical of the type projected, viz. the graduate schools of the larger law schools.⁴

Law and Contemporary Problems has since established itself as a highly respected legal and interdisciplinary journal.

FORMATION OF STUDENT ORGANIZATIONS

In October of 1930, the Charles Evans Hughes Law Club (named after the Chief Justice of the Supreme Court) was organized. The club was professional and social in nature. In 1931 the club was granted a chapter of Phi Delta Phi, and the Richard Pearson Chapter of Sigma Nu Phi was created.

In the spring of 1931, under the direction of Dean Miller, students began organizing the Duke Bar Association. Patterned closely after the American Bar Association, this organization was one of two such student organizations in the country at the time. The objects of the Association were stated by its Constitution: (1) to foster legal science; (2) to maintain the honor and dignity of the legal profession among law students; (3) to cultivate professional ethics and social intercourse among its members; and (4) to promote the welfare of the Law School of the University.

The major part of the work of the Association was carried on by nine committees or sections. There were four administrative sections: Publications, Public Relations, Law School Affairs, and Grievances and Professional Conduct. The fourth section administered the honor system in the Law School and handled disci-

plinary matters affecting law students. The Law School's honor code—the Professional System—was accepted in December 1932 by the Bar Association. The remaining five sections were Legal Economics, Law Reform, Legal Education, Bar Organization, and the Practice and Profession of the Law. Each of these groups studied a problem of particular interest to law students and young lawyers. The results of the studies were embodied in reports presented to the Association at its regular meetings and later reprinted in the *Duke Bar Association Journal*. At the regular meetings, in addition to section reports, outside speakers, frequently of national prominence, addressed the Association.

In the summer of 1934 Dean Miller took a leave of absence to serve as Special Assistant to the United States Attorney General. Professor Horack became the acting Dean. In March 1935, Miller formally resigned to become Chairman of the National Advisory Committee on Crime, and Horack officially became Dean. Miller had laid a firm foundation for the Law School's continued growth in stature and in size, and Horack continued in Miller's tradition of excellence.

ALUMNI RECALL THE 1930'S

Paul Coie, Class of 1933, came to Duke from Pullman in Washington. He had gone to Washington, D.C. to try to find a job but without success. When he received word that he had a scholarship from Duke Law School, he decided to come down to Durham because he thought he "might as well be broke down there." He hitchhiked most of the way to Durham. Although he had a scholarship and a job in the Law Library, Coie remembers that money was tight. Coie lived in a dormitory, and he and two of his friends, Sam Winstead and Coming Gibbs, shared a meal plan. With only one meal ticket among the three of them, they alternated meals during their first year. Coie married in 1931, the same year the banks failed, and he remembers that he and his wife kept all their money in a bureau drawer.

Thomas Stoel, Class of 1937, also remembers that money was tight. His entering class had 51, one of the largest classes at that time, but there was heavy attrition. Though some students left because of low marks their first year, others left because they had money problems. Most people worked during the summers



in jobs provided by the National Youth Administration that paid 40¢ an hour. Stoel recalls that the top man in his class sold Bibles in the summer.

Coie also has very clear memories of his classes and the faculty members who taught them. Coie had Maggs for Torts and Constitutional Law. "The Torts book was shot through with typos and we had to put forth the typos before speaking. Maggs was thought to be brutal. I can still remember Constitutional Law citations. He tested us on how each of the nine justices would decide a case." Coie had Lon Fuller for jurisprudence and he loved him as a teacher. At the time Coie was at Duke, Fuller was quite sought after by other law schools. The University of Chicago kept offering Fuller a salary that Duke matched and once, in the space of six months, Fuller's salary went up by several thousand dollars. Coie had a probate class with David Cavers that met for four to five hours at a time. Each student was assigned a state and was required to analyze all

the relevant probate cases. Coie recalls "Cavers had the most facile mind. He and Fuller could not speak to each other when they were working, and students carried written messages back and forth between their offices." Coie had Horack for Equity. He recalls that although Horack could spend an entire semester on two cases, he expected the class to know all of the cases for an exam.

During Coie's first year at the Law School, buildings on the main campus were still under construction and there were no walks or trees. He remembers watching the crews plant the campus, singing and working in unison. He also recalls listening to the sculptors singing Italian arias while adding the carvings to the buildings.

Stoel also remembers that the faculty at the law school was very good. He was pleased to find that the law school was small enough for the door to be open for students to associate with faculty.

EXPERIENCE OF WOMEN IN LAW SCHOOL

The Law School was one of the few top national law schools that accepted women at that time. In the 1930's two to five women students enrolled each year. While many of them graduated and several did extremely well academically, few practiced. Coie remembers that there was a woman in the class behind his who found work editing a legal publication. In the 1930's, however, it was difficult for women to find positions in firms.

Caroline Phillips Stoel, Class of 1937, was an undergraduate at Duke before she entered the law school. She was the oldest child of an attorney from Lexington, North Carolina, and he encouraged her to go to law school. She remembers that it was fun to be a woman in the law school. There were five women out of a class of 50, and she felt perfectly at home. She also served as a member of the *Duke Bar Association Journal*.

After graduation Caroline Stoel

Law and Contemporary Problems Endowment

For over half a century, the journal, *Law and Contemporary Problems*, has brought honor to Duke Law School as an interdisciplinary journal whose scholarly reputation is well known and highly respected. It is also a unique legal journal in that each of the quarterly issues is a symposium which covers the broad interdisciplinary spectrum of a socio-economic and legal area. Over the last few years these symposia have been enhanced by the introduction of the editorial conference. Each issue is now the focal point for a small conference which assembles the authors to share drafts, criticisms, and ideas with each other and the editors. These conferences not only contribute greatly to the quality and timeliness of the issues, but also to the intellectual life of the School and to the ability of the General Editor to

engage the support of faculty colleagues.

Several years ago, friends of *Law and Contemporary Problems* noted rising costs occasioned by the editorial conferences and by technological development and suggested the need to subsidize the journal by establishing an endowment fund. Following the leadership of Edward Rubin, Class of 1936, who fondly remembers writing for the journal as a law student, a number of alumni and other friends of the journal had contributed over \$8,000 to the *Law and Contemporary Problems* fund by the summer of 1986. At that time, Leon Rice, Class of 1936, who was reunion coordinator for the fiftieth reunion of the Classes of 1936-37 along with Lyman Brownfield, '37 and Horace Bomar, '36, suggested that those classes make the endow-

ment fund a special fund raising project for their fiftieth reunion. After soliciting and receiving approval from other class members, Leon Rice energetically pursued the project, and by Alumni Weekend in September, he was able to announce that class members had pledged over \$17,000 to the fund, bringing the total of the fund to over \$25,000.

Those at the Law School appreciate the generosity of these friends of *Law and Contemporary Problems* who have established this endowment fund for the journal which will help ensure its survival and continued excellence. Others who would like to contribute to the fund may send contributions specifically designated for that fund to the Law School Development Office.

practiced for a year with her father in Lexington but then moved to Oregon to be with her husband, Thomas Stoel, Class of 1937. In Portland she was unable to find a job. Her husband's firm would not hire her because they had a policy against nepotism, and they told him that if she found a job with a rival firm they would dismiss him because of the potential conflict. Caroline did secretarial and administrative work until she had children. Now she teaches legal history at Portland State University.

Caroline Stoel's roommate, Helen Lanier McCown, Class of 1937, also returned home after graduation and practiced for a year in her hometown of Walla Walla, Washington. She recalled trying a case during which opposing counsel told her that she would never win. To the opposition's surprise, she won. It was the only case she was able to try, however, and

she eventually moved to Nebraska with her husband, Hale McCown, also Class of 1937.

CONCLUSION

Many things have changed at Duke Law School since the 1930's—the size of the classes and the tuition, the names of the students and teachers, the building in which they learn and teach "the law," and the experiences its women graduates can anticipate. Other things, however, remain the same. Those at the Law School still take pride in and enjoy the diversity of the student body. The 1986 entering class of 196 students represents 36 states, the District of Columbia and three foreign countries, as well as 112 colleges and universities. Students still enjoy easy access to faculty members when they want to follow up on a thorny problem from class discussion. And,

graduates of the Law School still seem to come away remembering Duke Law School as a very special place.

The author wishes to thank the following people for their help in preparing this article: Carmon Stuart, Class of 1938; Leon Rice, Jr., Class of 1937; Thomas Stoel, Class of 1937; Paul Coie, Class of 1933; Caroline Phillips Stoel, Class of 1937; Helen Lanier McCown, Class of 1937; and special thanks to David Cavers, Duke Law Faculty, 1931-45.

1. Justin Miller, remarks for the ceremony presenting his portrait to the Duke Law School, (April 30, 1966).
2. Leon Rice, "I Recall Justin Miller," (Nov. 13, 1984).
3. Memorandum to Dean Miller from David F. Cavers, (Suggestion with Reference to the Proposed Duke Law Review) [1932], as printed in *Law and Contemp. Probs.*, Spring 1977, at 167.
4. *Id.*

Duke Law Alumni in the Pacific Northwest

During the fall interviewing season at Duke, when second years stand in rows in corridors waiting to knock at the doors of interviewers who come from around the country, one hears a great deal about doing "sophisticated legal work," having a practice that is on the "cutting edge of the law," and working at a firm dealing with "complex legal issues." Law students grapple with many choices at this time. For many, which city to choose is among the most difficult. For them it is not as easy as for a Duke law professor, talking to a law student who had chosen to practice law in Seattle, who said "Lifestyle? Who makes a choice based on lifestyle? If you want to practice law, you go to New York."

Despite the fact that Duke Law School is on the East Coast and the majority of Duke students still come from east of the Mississippi, a surprising number of its graduates are choosing to practice law in the Pacific Northwest. In fact, Duke sends more people to the Northwest than it receives. There are currently 63 Duke Law Alumni in Washington and 21 in Oregon. We asked some of them why they chose to practice in the Pacific Northwest.

Most Duke Law alumni in that area live and work near Portland and Seattle, as do all the alumni interviewed. There are, however, also Duke Law alumni in towns such as Stanwood and Yakima, Washington and Eugene, Mount Angel, and Medford, Oregon. The majority of Duke Law alumni in Oregon and Washington have chosen to go to large firms, but some have gone to smaller firms and some have even started their own firms. In fact, the largest firms in Oregon and Washington bear the name of Duke Law alumni. Perkins Coie in Seattle was founded by Paul Coie, Class of 1933,

and Stoel, Rives, Boley, Fraser and Wyse in Portland has as a name partner Thomas Stoel, Class of 1937.

SEATTLE

Named after an Indian chief, Seattle has a population of over half a million. The entire metropolitan area, including Tacoma and booming Bellevue, has a population of over a million and a half. Sometimes known as the Emerald City, Seattle is a city of water and mountains. Originally built on seven hills, Seattle sits between the Puget Sound and Lake Washington, with some smaller lakes within the city. Many people live in houseboats on the lakes, and in the summer the water is dotted with brightly colored sails, and rowing shells glide gracefully over the water. To the west of the city lies the snow covered Olympic Mountain Range. To the East lies the dramatic Cascade Mountain Range that includes glacier covered Mount Ranier.

Seattle is also a city of live theatre, movies, and bookstores. Seattle boasts more live theatre per capita than any American city except New York and a population hungry for books. Seattle has a symphony orchestra, an art museum set in a beautiful park, and an opera company that recently presented Wagner's Ring Cycle.

Llewelyn Pritchard, Class of 1961, is a partner in the Seattle firm of Karr, Tuttle, Koch, Campbell, Mawer & Morrow, where several Duke Law alumni practice. Pritchard is a native of New York and attended Drew, a small liberal arts university in Madison, New Jersey. He came to Duke for law school because he was offered a good scholarship and because he saw Duke as an emerging school.

Pritchard's wife was born in Seattle, and he decided that he would

like to try working in the Northwest. During Pritchard's second year, Jack Latty, then Dean of the Law School, wrote to Washington State Supreme Court Justice Finley, Class of 1934, and asked him to help Pritchard find a summer job in Washington. Pritchard spent the summer in the southeastern Washington town of Walla Walla and made frequent trips to Seattle. However, Pritchard had decided to work for Donovan, Leisure in New York after graduation. Instead, he was drafted and served six months in the Army. While in the Army in South Carolina, he decided he wanted to go back to Seattle.

Although Pritchard had no job waiting for him in Seattle, he and his eight months pregnant wife boarded a train in New York bound for Seattle. At that time there were only two other Duke attorneys in Seattle: Paul Coie, Class of 1933, and Clifford Benson, Class of 1949. Pritchard arrived in Seattle on a Friday night and called on Paul Coie, a founding partner of what is now Seattle's largest firm: Perkins Coie. Coie made calls to friends; on Saturday morning Pritchard went to see Payne Karr; and fifteen minutes later he had a job. He has been with Karr, Tuttle ever since, and he has never regretted it.

Pritchard's practice areas are officer and director liability, and family law. He enjoys practicing family law and feels that many large law firms make a big mistake by sending away clients' family law cases because for many clients it is the most important legal problem they will have. He feels challenged by his practice because it is varied, and he enjoys being of benefit and service to his clients.

Pritchard has found Seattle to be a city where newcomers are welcome to become involved in civic and political activities. Soon after



moving to the city, he worked with others to reform the city council. He has served on the Board of Trustees of the University of Puget Sound since 1971, and was Chairman of the Board of the Seattle Symphony from 1980 to 1982. Pritchard has also been involved in professional organizations. He was Chairman of the Seattle-King County Bar Association Young Lawyers Section in 1967-68, Chairman of the Washington State Bar Young Lawyers Committee in 1970-71, a member of the Washington State Bar Board of Governors from 1972 to 1975, in the ABA House of Delegates in 1975, and a State Delegate to the ABA in 1983. Pritchard has been on the Board of Editors of the American Bar Journal since 1981. He has also been an active alumnus of the Law School, serving in 1984 as Chairman of its Board of Visitors.

V. L. Woolston, Class of 1979, is another native New Yorker who settled in Seattle. Woolston is now a partner at Perkins Coie in aviation litigation. A graduate of Amherst, Woolston came to Duke because he was ready to leave New England. After his second year in law school, he worked in both Seattle and Washington, D.C. He clerked in Seattle because he had been impressed with the city when he passed through on his way to work on the Alaska pipeline for two summers during college.

In the end Woolston based his

decision to live in Seattle on lifestyle. He describes Seattle as a city of people who make it on their own, which means that people have a better chance of succeeding without connections in Seattle than in many other cities. He also believes people in Seattle are more open-minded and tolerant. However, he admits that, because he was aware that his decision was based on limited information, during his first few years there he constantly reviewed his decision and asked himself whether he was getting to do the work that he wanted. Now, seven years later, it would be difficult to persuade him to leave. At Perkins Coie, Woolston has found a challenging practice that makes intellectual and imaginative demands on him.

David Tarshes, Class of 1981, keeps quite busy practicing as an associate at Davis Wright & Jones in Seattle. He still finds time, however, to do pro bono work through the legal clinic that is operated by Seattle lawyers. The attorneys listen to people's problems and advise them as to whether they have a legal claim. He has also taken some pro bono cases through the Seattle-King County Bar Association's Volunteer Legal Services.

Tarshes is a native of Indiana and studied as an undergraduate at Indiana University. He chose Duke because it was strong academically and because he was favorably impressed when he visited the school

his senior year of college. He felt that the Duke experience was unlike other top law schools in that there was less cut throat competition. He also found that the student body at Duke included a variety of interesting people.

Tarshes had decided not to stay in his hometown of Indianapolis. As he began to consider other cities, he found Seattle highly recommended by other people and from the reading he was doing. The city appealed to him because of the many activities available—sports, theatres, and a large university—and because the surrounding area was beautiful. He also found Seattle to be a tolerant city which encouraged variety and was forward looking. Lots of little things stood out as Tarshes learned more about Seattle. For example, people in Seattle tend to honk less in traffic.

After accumulating information about the city for a period of four or five years, Tarshes finally chose Seattle as his new home town. When he moved there after spending two years in Kansas City clerking for Judge Howard E. Sachs of the Western District of Missouri, Seattle felt more like home than Indianapolis; he felt as if he belonged. Now, as a third year associate, it is hard for him to picture going anywhere else, though he admits that the traffic is getting worse.

Bernard Friedman, Class of 1982,

practices at Karr, Tuttle, Koch, Campbell, Mawer & Morrow. Originally from South Dakota, Friedman went to college at the University of California at Berkeley and was later drafted into the Air Force. He spent thirteen years in the Air Force as a meteorologist and lived in Europe, the Phillipines, and all over the United States. Friedman first came to the Pacific Northwest with his wife, who was from Olympia, and fell in love with the area. He clerked in Seattle after his second year at law school and decided to return after graduation. He said that he chose the Pacific Northwest because of the climate—cool summers and warm winters—and because of its natural beauty.

Friedman is still very happy in Seattle. As a litigator, he has been given a good deal of responsibility. Yet his work load allows him to spend time with his wife and two daughters and to become involved in the community, including working for the nonprofit Seattle Children's Theatre. Friedman has found both his practice and his lifestyle in Seattle to be congenial.

Although originally from New York, Bruce Firestone, Class of 1984, went to graduate school at the University of North Carolina at Chapel Hill and stayed in the southeast to teach English at Clemson before coming to Duke Law School. Firestone looked at his second year summer clerkship at Perkins Coie as the opportunity to work in a new city. He found that he liked having the advantages of living in a metropolitan area and the easy access to near-by mountains and water. He also found Seattle to be a progressive community and he liked the mixture of neighborhoods.

Firestone also has found the challenging work he was seeking in Seattle. He works in the corporate finance section of Perkins Coie. Although the choice was made somewhat by chance, it has worked out well for him. He observes that his situation at Perkins Coie is probably not so different from practice in other large firms with a national practice in cities across the country. In his practice, Firestone represents large

corporations in deals with New York counsel and New York underwriters who are doing the same work that he is and with the same level of expertise. However, he has noted that when he stays late, his counterpart in New York is usually still there also—only three hours later on the east coast. He appreciates the balance between work and other parts of his life he has found in Seattle. So, although he has had opportunities to leave Seattle, he plans to stay.

PORTLAND

One hundred and eighty miles to the south of Seattle is Portland, Oregon, nestled in Oregon's lush Willamette Valley, sitting on the Columbia and Willamette rivers. Portland's metropolitan population totals around 1.3 million, with the city accounting for 380,000. To the east of the city is the graceful spire of Mount Hood and on clear days one can see the still active Mount St. Helens to the west and look beyond to the other tall volcanic peaks of the Cascades, including Mount Adams and Mount Ranier. Year round skiing on Mount Hood is less than an hour away and a walk on the Oregon coast is 90 minutes away from the city. Although not as dramatic visually as Seattle, Portland has created its own beauty with 138 parks (covering 7,000 acres), public art, and a variety of architecture from Victorian to post-modern. Its smaller city blocks give an unexpected feeling of openness within the downtown area.

Thomas Stoel, Class of 1937, is a partner in Portland's largest law firm: Stoel, Rives, Boley, Fraser & Wyse. Originally from northern New York, Stoel came to Duke because of a large scholarship. Justin Miller, then the Dean of the Law School was building a national law school and ensured a diverse student body through a judicious use of financial aid. When Stoel was in law school, it was rare for law students to clerk in the summers, and firms did not pay the students who did work for them. Students, therefore did not have the opportunity to "try out" cities during the summer as they do now.

After graduating from Law School,

Stoel and a classmate decided to move to Oregon because they read about the completion of the Bonneville Dam and the predictions of resulting growth in the Oregon economy. This prediction was especially attractive during the Depression when jobs were scarce. The two friends bought a second hand car and drove out to Oregon. At that time, Stoel had never been west of the Mississippi, and it was something of an adventure for him.

When Stoel arrived in Oregon, however, he found the region depressed economically. His classmate returned home, but Stoel stayed. As Portland grew, Stoel's career progressed. Stoel said that Portland was a town where "a young man did not have to wait to advance." Although Portland still has the atmosphere of a small town, Stoel sees that the practice of law has changed a great deal since he started practicing. The greatest change is specialization; it is now almost impossible to be a generalist. Many departments in Stoel's firm are larger than the firm was when he joined. He feels that this change may make practicing law less fun today because no one attorney is "doing the whole job for any client."

Donald Burns, Class of 1973, is a partner at the Portland firm of Miller, Nash, Wiener, Hager and Carlsen. Burns was originally from Michigan, and he went to Michigan State. He chose Duke because he had never lived in the South and he thought he might want to relocate to the area. He started law school in 1968 but was drafted during his first year. When he started, his class had approximately 90 students, but when he returned two years later class size had swelled to almost 170. Burns clerked in Detroit after his second year but decided to look in Portland and Denver for permanent employment. He was particularly interested in Portland because he had spent the four summers during college working there for the Forest Service.

Burns likes the size of the city and the legal community. He does employee benefits work for companies throughout the country, even

those without Oregon employees, and finds a great deal of interaction among attorneys in that field. The practice in Portland has changed since Burns came to the city, however; it was once local and has now become more regional.

Burns believes there is more opportunity to be creative in law in Portland, for example, getting involved in politics or drafting of legislation. Access to politicians in Oregon is easier than in other states with larger populations. Portland is not so huge that an individual is dwarfed and one can have an impact on the community. There is a great deal of social and political mobility, and, because it is difficult to be anonymous in Portland, one has a sense of responsibility to the community. Burns has been involved in local government in the county adjacent to Portland; he sat on the Washington County Planning Commission for four years and served as its chairman for three years.

Burns says that he would never conceive of moving from Portland, and he hopes his family stays in Portland. His children should feel that they are part of the community

as their names have been inscribed in bricks in Pioneer Square, a park in downtown Portland across from the Pioneer Courthouse, where the Ninth Circuit sits.

Aaron Jay Besen, Class of 1985, is from Massachusetts, went to college at Colgate, and did graduate work at Columbia University before coming to Duke Law School. He chose Duke because of the size of the law school and because he wanted to spend time in another part of the country. During his second year of law school he thought he was interested in practicing in Boston. Something about Portland attracted him, however, and he decided to clerk at Stoel Rives for the summer. He found the people at the firm stimulating and the level of practice to be sophisticated. He found that he also liked the city and, although it was somewhat scary for him to leave all that was known and familiar in the East—cities, family, and friends—he decided to go to Portland after graduation. He is now an associate at Stoel Rives.

Besen's choice has not always been easy. Sometimes he wishes he were closer to his family and friends, and he regrets that there are no

nonstop flights to the East Coast to make travel easier. He is happy with his decision to practice in Portland, however, and he has enjoyed taking the time to explore the city and make trips to the mountains and the coast.

The Pacific Northwest offers a great deal to those who choose to practice law there. The primary theme sounded by Duke Law alumni is that they have found "balance" in the Northwest: the opportunity to combine a challenging legal career with time for family, civic involvement, and relaxation. The Northwest is still attractive to Duke students; last summer six second years clerked in Portland and two in Seattle.

The author of this article is a current third year student at Duke Law School who clerked in Seattle and Portland last summer and will be returning to Portland after graduation. She appreciates the time these Duke Law alumni spent talking with her and only regrets that she could not meet with all of our alumni in the Pacific Northwest.

Duke Alumni Prominent in the North Carolina Bar Association

Duke Law alumni have recently been elected to several important positions in the North Carolina Bar Association (NCBA). JOHN Q. BEARD, '60, is the new president of the organization. G. GRAY WILSON, '76, is Chairman of the Young Lawyers Division. DONALD H. BESKIND, '77, and YVONNE MIMS EVANS, '76, have both been named to the Board of Governors for a term expiring in 1989. Beskind and Evans thus join JOHN R. WESTER, '72, of Charlotte, whose term on the Board of Governors runs through 1988. All four were elected to these positions on June 22, 1986 during the annual meeting of the Association.

The North Carolina Bar Association, founded in 1899, is the state-wide voluntary organization open to all North Carolina attorneys. More than 7,200 North Carolina attorneys are members of the Association, representing roughly three-fourths of the state's practicing attorneys.

John Beard, the new NCBA president, is also a senior partner in one of Raleigh's largest law firms, Adams, McCullough & Beard, where



John Q. Beard

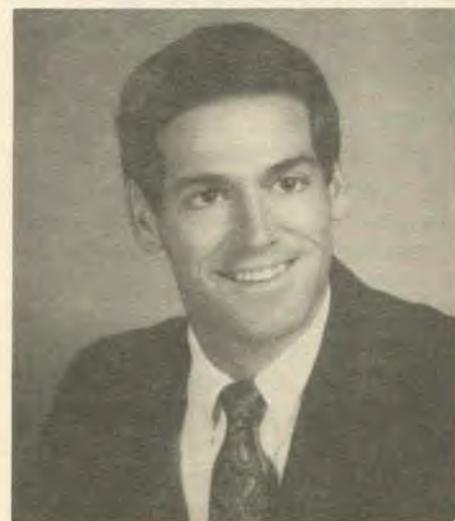
he specializes in bankruptcy, utilities, taxation, health care, and civil rights law. Beard professes that he is occasionally awed by his transformation from mill town child to prominent attorney. His roots are in Erwin, North Carolina, a small Sandhills town that was dominated by Erwin Mills, which is now part of Burlington Industries, Inc. Beard left Erwin for Duke University where, after spending two years in France with the U.S. Army Signal Corps., he received his undergraduate degree in 1958 and his law degree in 1960. He practiced tax law with a firm in Kansas City for two years, but left in 1963 because "nobody in Missouri understood the significance of Duke beating Carolina." Back in North Carolina, he was with Poyner, Geraghty, Hartsfield & Townsend—now Poyner & Spruill—until 1970 when he joined his present firm.

Beard first became involved in the North Carolina Bar Association about ten years ago, when he helped found the Lawyers' Mutual Liability Insurance Company of North Carolina, which provides malpractice insurance for attorneys. Since that time, he has been quite active in the organization, prompting Robert C. Vaughn, Jr., the NCBA president for 1984-85, who helped nominate Beard as his successor, to state, "He earned his nomination by working hard in the trenches, serving on committees and so on."

Beard plans to continue the general functions of the North Carolina Bar Association. "Unlike the North Carolina State Bar, which is a regulatory body and has mandatory membership, we are voluntary. Our approach to upholding high standards comes through programs like the one for continuing legal education. We also serve as supports for each other in the practice of law."

However, he also plans to promote heavier involvement by the bar association in state legislation. "In the past, rather than be pro or con on an issue, we've just taken no position on legislation that really impacted on the public," he says. "That's not going to continue. We're going to be involved."

Gray Wilson, the new Chairman of the Young Lawyers Division of the North Carolina Bar Association, is a partner in the Winston-Salem firm, Petree, Stockton & Robinson. Wilson joined that firm in 1976 after receiving his law degree from Duke Law School and his undergraduate degree from Davidson College. His primary area of practice is defense trial litigation.



G. Gray Wilson

Wilson has been an active member of the North Carolina Bar Association. Before taking on his present position, Wilson served as secretary and chairman-elect of the Young Lawyers Division. He also has served on several NCBA committees, including the Medical Legal Liaison Committee, the Appellate Rules

Committee, and the Bar Leadership Conference.

Wilson is also active in other legal organizations. He is a member of the Tort and Insurance Practice Section of the American Bar Association where he has been a delegate to the Young Lawyers Division Assembly since 1974. He is past chairman of the Forsyth County Bar Association's young lawyers group. Also a member of the North Carolina Association of Defense Attorneys, Wilson has served as its newsletter editor.

The Young Lawyers Division (YLD) of the North Carolina Bar Association includes all NCBA members under the age of thirty-six and all those who have practiced law for less than three years. Nearly half of the NCBA's membership falls within this category.

The YLD concentrates its efforts on public service. It has been so successful in this area that it has received the American Bar Association Award of Achievement for Public Service for the last three years. The twenty-five committees of the YLD support a number of public service programs. Among the most visible are the Law Day programs in the public schools and the essay and moot court competitions which they sponsor in the high schools. The YLD is also active at the college level. Its Pre-Law Counseling Committee is producing a videotape depicting a day in the life of a lawyer, which will be presented with panel discussions in North Carolina colleges.

The YLD also sponsors the Law Student Division of the NCBA, which has approximately 250 members. Activities sponsored for this division include seminars and publications for law students. This Division also sponsors a Law Employment Fair each February to which they invite the Placement Directors from the five law schools in North Carolina. The fair offers students an opportunity to explore job opportunities in North Carolina after the fall recruiting rush.

In response to the farm debt crisis, the Young Lawyers Division of the North Carolina Bar Association formed a Special Projects Committee



Donald Beskind

to address problems concerning the availability of legal counsel for farmers in financial distress. In response to the need of an increasing number of farmers who will require legal counsel on bankruptcy avoidance and alternatives within bankruptcy, the Special Projects Committee of the Young Lawyers Division, working together with the Lawyer Referral Service Committee, will add a new category to the Lawyer Referral Service entitled "Farm Credit/Bankruptcy." North Carolina attorneys who are interested in being listed under the Farm Credit/Bankruptcy category should contact Joni Worthington by calling 1-800-662-7407 or by writing to the North Carolina Bar Association, P.O. Box 12806, Raleigh, NC 27605 for more information.

A particular focus of the Young Lawyers Division for the coming year grew from a needs assessment program involving stress management. The first step for the program is to identify areas in the professional and personal lives of lawyers which produce stress. Using that information, programs will then be developed—including Stress Management Centers—to help teach lawyers to deal with the stress.

Donald Beskind, new member of the Board of Governors of the North Carolina Bar Association, is a partner in the Durham firm of Beskind and

Rudolph, P.A. Beskind graduated from George Washington University before earning law degrees from the University of Connecticut and Duke Law School. Prior to entering private practice in Durham, he was an associate professor and director of clinical studies at Duke Law School. He still serves as a Senior Lecturer in Law at Duke Law School, teaching courses in trial practice.

Beskind is an active member of the North Carolina Bar Association. He has been active in the NCBA Litigation Section and has been a frequent lecturer in the Association's continuing legal education courses and bar review courses. Beskind has also been a past president and is a current board member of Prisoner Legal Services and serves on the board of the North Carolina Civil Liberties Union.

Yvonne Mims Evans, new member of the Board of Governors of the North Carolina Bar Association, is a partner in the Charlotte firm of Ferguson, Stein, Watt, Wallas & Adkins, P.A. A native of Hendersonville, Evans graduated from Wellesley College before earning her law degree from Duke Law School in 1976.

Evans has been active in bar activities. She is currently serving as co-chairperson of the NCBA Minorities in the Profession Committee. In addition, she is a member of the North Carolina Academy of Trial Lawyers, the North Carolina Association of Black Lawyers, and the North Carolina Association of Women Attorneys.



Yvonne Mims Evans

Book Review

Suing the Press: Libel, the Media, and Power Rodney A. Smolla (Oxford, hardcover, \$18.95)

Rodney Smolla, '78 is now teaching law at the University of Arkansas, and has just published a new book, *Suing the Press: Libel, the Media, and Power*. It is an enlightening look at the recent history of libel suits in this country. Rather than simply detailing the state of the law, however, the book also examines prevailing societal attitudes to show how they have affected libel law. The result is an insightful analysis of the current state of libel law, which, although geared toward the general reader is also of interest to attorneys concerned with the first amendment and libel law.

Smolla dates the beginning of modern libel law to the U.S. Supreme Court's decision in *New York Times v. Sullivan*. There, the Court held that when a public official alleged libel, the official would be required to show "actual malice" in order to recover damages. Later cases expanded this rule to apply to almost all figures in the public eye. *Sullivan* was the first case to hold that libel law was restricted by the first amendment, and it weighed the balance heavily in favor of freedom of the press.

In recent years, libel suits have been brought by public figures seeking enormous sums for alleged damage to their reputations. Smolla discusses most of these recent cases, including Jerry Falwell's suit against *Penthouse*, Lillian Hellman's suit against Mary McCarthy, Ariel Sharon's suit against *Time*, Mobil Oil President William Tavoulaareas' suit against *The Washington Post*, and William Westmoreland's suit against CBS. Most of the book deals with these cases, examining the reasoning behind them, and the reasons why juries are now likely to award large verdicts in favor of plaintiffs. In Smolla's opinion, much of this is



Rodney A. Smolla

caused by the growing power of the media.

Earlier in this century, it was common for newspapers to have an acknowledged political view, and to report the news based upon this view. Although a newspaper might make outrageous statements in criticizing an official, there was generally another paper willing to take the other side. Now, however, the media is more monolithic, and if CBS, for example, presents a slanted story, another network may not present the opposing view. In addition, the media has grown so powerful that it presents itself as the arbiter of truth. As Smolla puts it, while people expected William Randolph Hearst's papers to reflect his opinions, they believe that *Time* magazine is printing the truth, untainted by politics.

Because of this situation, public figures and juries become outraged when they find that the media does have political opinions and that these opinions sometimes affect how a story is written or investigated.

Smolla believes that the current fascination of Americans with celeb-

rity is also causing an increase in suits against the media. Now that image is everything, it is more important to prevent any possible damage to it.

One of Smolla's main criticisms of the libel system is that courts have allowed plaintiffs to recover for factual errors in the context of what really is the expression of opinion. Libel law does not cover opinions, but some cases have allowed recovery for inaccuracies in the context of an expression of opinion. One example of this is the suit by Lillian Hellman against Mary McCarthy for McCarthy's remarks on the Dick Cavett Show. McCarthy accused Hellman of being dishonest and said that every word Hellman wrote was a lie, including "and" and "the." The suit was ended by Hellman's death, but not before a judge had ruled that there was sufficient evidence of libel to take the case to trial. Smolla argues that here McCarthy was clearly expressing an opinion of Hellman as a writer, and she should not be held liable for technical factual errors in the context of what was clearly only her opinion.

Although he finds numerous problems with the current system, Smolla does not advocate abolition of the law of libel. He sees the law as the only available check on the power of the press. In closing, Smolla offers some suggestions for reform of the system. One is that the losing party be required to pay the winning party's legal fees. This, he believes, would eliminate the use of a libel suit to punish the defendant when the plaintiff stands no chance of winning. As the law is now, each party pays his own costs and, even if the defendant wins the suit, it could cost millions of dollars in attorneys' fees. The plaintiff, on the other hand, is usually represented on a contin-

gency basis, and need not worry about these fees.

Smolla also suggests that more emphasis be placed on the remedies of retraction and providing equal time. If the publisher printed an equally prominent retraction, or gave the plaintiff equal time to respond to the allegations, then a libel suit would be prohibited. There are retraction laws in some states, but Smolla shows that they have not always been fairly applied. In Carol Burnett's suit against the *National Enquirer*, the court held that the California retraction statute, which mentioned newspapers and radio broadcasters, did not apply to magazines, and that the *National Enquirer* was a magazine rather than a newspaper. Therefore, although the *Enquirer* printed a retraction, Burnett was allowed to recover.

Overall, *Suing the Press* is a thoughtful analysis of libel law and its relationship to American culture.

By presenting the history of many recent cases involving well-known people, the book shows that the current state of libel law, at least on the trial court level, may depend more on our feelings about the media than on rules laid down by the courts. And, although many huge jury verdicts are reversed or reduced on appeal, defendants must still bear the burden of legal fees. Inability or unwillingness to pay these fees may cause defendants to settle cases, or even cause the media to avoid stories they believe may expose them to suits. Thus, contrary to the intent of *New York Times v. Sullivan*, libel law in its current state may indeed be having a chilling effect on first amendment rights.

Janet Sinder
Reference Librarian and
Instructor in Law
Duke University School of Law



SPECIALLY NOTED

Charles S. Murphy Award Presented to Hale McCown

In September 1986, the Duke Law School Alumni Association presented the second annual Charles S. Murphy award to Judge Hale McCown. The Charles S. Murphy Award is to be presented annually to an alumnus or an alumna whose devotion to the common welfare is manifested by public or quasi-public service, or in dedication to education, reflecting ideals exemplified in the life and career of Charles S. Murphy.

Charles Murphy was a North Carolina native who graduated from Duke University in 1931 and received an LL.B. from Duke Law School in 1934. He also received an honorary LL.D. in 1967. Mr. Murphy devoted himself to public service, holding several positions in the administrations of Presidents Truman, Kennedy, and Johnson. He also served as a Duke Trustee and on the Board of Visitors of Duke Law School.

This year's recipient of the Murphy Award was Hale McCown, Class of 1937. The former Nebraska Supreme Court Justice was chosen for his record of public service in his home state of Nebraska, which he began shortly after he returned from service in the Navy during World War II. Justice McCown began a movement to reform the city government of Beatrice, Nebraska and served on the Beatrice City Council during 1954-55. Until his appointment to the Nebraska Supreme Court in 1965, Justice McCown worked in a law firm of which he was co-founder. In addition to his various civic activities, he was involved in many legal organizations and activities. In 1957-58 he served as Chairman of the House of



Delegates of the Nebraska State Bar Association, a position he also held in 1963-64. During 1960-61 Justice McCown was president of the Nebraska Bar Association. In 1957-58 he sat on the ABA-ALI Joint Committee on Continuing Legal Education. From 1953-64 he served on the ABA Ethics Committee and wrote several opinions. Justice McCown is a life member of the ALI and was elected to the Council of the ALI. He is still serving actively.

Justice McCown was also a trustee of Hastings College in Hastings, Nebraska from 1955-65. Hastings was his undergraduate college.

In December 1964, Justice McCown was appointed by the governor to the Nebraska Supreme Court. He was the first merit appointee under a plan adopted by Nebraska in 1962; previously supreme court justices had been elected. Justice McCown served on the Supreme

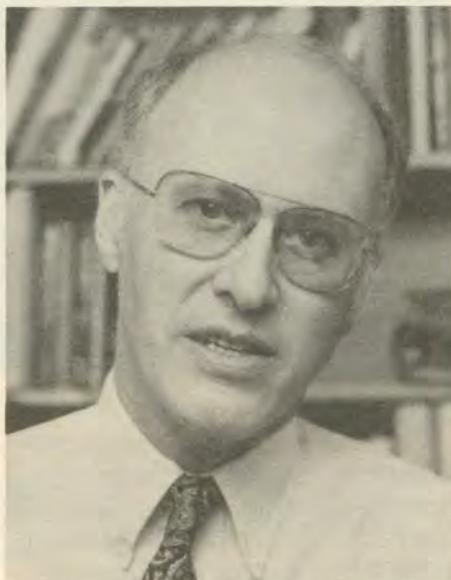
Court until his retirement in 1983. During his tenure on the court, Justice McCown wrote approximately 750 opinions, including around 125 dissents. When interviewed, Justice McCown said that he had enjoyed the challenge of shaping the law. From 1967-73 Justice McCown lectured for the American Judicature Society at statewide citizens meetings on the plan of judicial merit selection.

The award was presented during Alumni Weekend. Judge McCown and his wife, Helen, were attending the joint fiftieth reunion celebration of the classes of 1936 and 1937. Hale and Helen McCown are both members of the class of 1937.

When presented with the award, an original watercolor painting of a North Carolina scene, Justice McCown said that he would be reminded of Duke, the place where he attended law school and the place where he met his wife.

Clark C. Havighurst Named Reynolds Professor

Clark C. Havighurst has been named the William Neal Reynolds Professor of Law. Professor Havighurst began his teaching career at Duke Law School in 1964. He teaches the law of antitrust, economic regulation, and health care. Havighurst, who has a special academic interest in the regulation of the health care industry and in national health policy, is also a professor of community health sciences and director of the Law School's Program on Legal Issues in Health Care. He published a book in the area, *Deregulation of the Health Care Industry*, in 1982. Professor Havighurst has also served as a



Clark Havighurst

Scholar in Residence at, and is a member of, the Institute of Medicine of the National Academy of Sciences and is an Adjunct Scholar in Law and Health Policy of the American Enterprise Institute.

Coordinator for Alumni Affairs

A new staff person joins the Law School Alumni/Development Office on December 8, 1986. Maria Isikli (Īsh-ĭk-lə) will serve as Coordinator for Alumni Affairs.

Many of the duties she will perform were formerly handled by Linda Harris. After spending seven years in the Duke University Development Office and eight years in the Law School Alumni Office, Ms. Harris has taken on a new job in the Development Office of the North Carolina School of Math and Science. Her friends at the Law School and among Duke Law alumni wish her well in this new position.

Ms. Isikli will now be responsible for coordinating Law Alumni Weekend, Barristers Weekend, and Graduation Weekend. She will also assist with the Conference on Career Choices to be held for the first time in February. This program, to be



Maria Isikli

jointly sponsored by the Law Alumni Association and Duke Bar Association, will invite Duke Law alumni in a variety of legal careers to discuss their profession with current Duke Law students. (See notice under upcoming events.)

Ms. Isikli will assist in organizing and administering the local alumni associations which are forming in cities across the country and will coordinate alumni social events in these cities. She will also work closely with the Law Alumni Association and its governing body, the Law Alumni Council, which sponsors these activities.

The Alumni/Development Office is now publishing the *Duke Law Magazine*, and the Coordinator for Alumni Affairs will serve as associate editor of that publication. In that role, she will be primarily responsible for alumni information to be included in the Docket.

For further information regarding any of the Alumni affairs programs, please contact the Alumni/Development Office at 3024 Pickett Road or (919) 489-5089.

Alumni Activities

CLASS OF 1936

W. D. "Pete" Murphy was recently recognized by the Chamber of Commerce in Batesville, Arkansas for 50 years of service in that community. Murphy, who still actively practices law, has played a key role in bringing business and industry to Batesville.

CLASS OF 1937

Sigrid Pedersen (Foley), is retiring from her position with Paramount Pictures in order to form a New York-based law firm. She had been with Paramount Pictures since 1961. Pedersen has been active in the field of entertainment law, being a founding member, trustee, and officer of the Copyright Society of America. She has also chaired numerous copyright committees of the ABA and served as a member of the Copyright, Trademark and Unfair Competition Committees of the Association of the Bar of the City of New York.

CLASS OF 1949

David K. Taylor is retiring from his position with Mobil Oil Corporation after thirty-one years as an international executive. His career with Mobil carried him worldwide. He has lived in Germany, Canada, Portugal, Tunisia, Nigeria, France, and Indonesia as well as in the United States during those thirty-one years. Taylor now lives in Washington, D.C., where he plans to do consulting work.

CLASS OF 1951

Arnold B. McKinnon was elected to the Board of Directors of Norfolk Southern Railway Corporation and then named Vice Chairman of the corporation. McKinnon has been with Southern Railway and its successor, Norfolk Southern, since graduating from Duke Law School in 1951. He is due to assume the office of Chairman and Chief Executive Officer in January, 1987.

CLASS OF 1955

Clarence W. Walker has been reelected as North Carolina State Delegate to the ABA House of Delegates. Walker has held the position since 1980. A former President of the North Carolina Bar Association, he is also a member of the National Conference of Bar Presidents, a Fellow of the Southern Conference of Bar Presidents, and a Fellow of the American Bar Foundation. Walker is a partner in the Charlotte law firm of Kennedy, Covington, Lobdell & Hickman.

William L. Woolard was elected Third Vice President of the International Association of Lions Clubs. He will become International President in 1989. The International Association of Lions Clubs was founded in 1917 and is now the world's largest service club organization. It has approximately 1,350,000 members in over 37,000 clubs located in 161 nations and geographical areas. Woolard is a partner at Jones, Hewson, & Woolard in Charlotte, North Carolina.



William L. Woolard

CLASS OF 1960

John Q. Beard was named the 32nd President of the North Caro-

lina Bar Association. An active member of the NCBA, Beard served on its Board of Governors from 1977 to 1980. He is a partner in the Raleigh law firm of Adams, McCullough & Beard. (See article this section)

CLASS OF 1961

Llewelyn G. Pritchard was elected to the ABA Board of Governors. Pritchard will represent the ABA's 13th district which includes Alaska, Montana, Oregon, and Washington. He also sits on the Board of Editors of the *American Bar Association Journal*. Pritchard is a partner with Karr, Tuttle, Koch, Campbell, Mawer, Morrow & Sax in Seattle.

CLASS OF 1962

John Miller has been active in promoting the Washington, D.C. area as a banking center. Miller, a partner in the Washington office of Squire, Sanders & Dempsey, was recently recognized in an article in *Fortune Magazine* for his efforts.

CLASS OF 1964

Charles E. Burgin has become a Fellow of the American College of Trial Lawyers, a national association of 4,200 Fellows in the United States and Canada. Membership is by invitation of the Board of Regents. Burgin is a partner in the firm of Dameron & Burgin in Marion, North Carolina.

CLASS OF 1965

Thomas W. Graves was elected President of the North Carolina Citizens for Business and Industry. Graves served on that organization's Board of Directors for 10 years before joining the staff as Executive Vice President on March 1. For 17 years, beginning in 1968, Graves worked with Fieldcrest Mills, Inc. in Eden, North Carolina. Graves is also a member of the Research Triangle Institute's Board of Governors and a Trustee of the North Carolina Museum of Art.

John M. Hines, Senior Vice President of A.C. Monk & Co., was named to the Farmville City Board of Directors for the Branch Banking and Trust Co. of Wilson, North Carolina.

Charles B. Mills, Jr. was named "of counsel" for the Columbus, Ohio office of Thompson, Hine & Flory. Mills is a former Assistant Attorney General for Ohio.

CLASS OF 1967

John T. Berteau recently received board certification for estate planning and probate in the state of Florida. Berteau is a partner in the Sarasota, Florida law firm of Williams, Parker, Harrison, Dietz & Getzen.

Nathaniel G.W. Pieper was elected chairman of the Southeastern Admiralty Institute (SEALI) at its annual meeting in Asheville, North Carolina. SEALI is an organization of 620 lawyers from Florida, North Carolina, Georgia, South Carolina, Texas, Virginia, Louisiana, Alabama, and Mississippi practicing maritime law. In conjunction with the Institute of Continuing Legal Education in Georgia, SEALI sponsors an annual seminar on admiralty law.

Wayne A. Rich, Jr. was recently presented with the "Director's Award for Superior Performance by an Assistant U.S. Attorney" for prosecutions of public corruption, fraudulent tax shelters, controlled substances, and white collar crime. Rich serves as the First Assistant U.S. Attorney and Chief of the Criminal Division in the Southern District of West Virginia. Rich is also active in the Judge Advocate Division of the U.S. Marine Corps, in which he was recently promoted to Colonel.

William K. Rogers and *Homer G. Sheffield, Jr.* have recently reorganized their firm in Santa Barbara, California under the name of Rogers & Sheffield.

Lanty Smith is President and a member of the Board of Directors of Burlington Industries with responsibility for all carpet operations, industrial and glass fabrics, Burlington Madison Yarn Company and the Canadian Knit narrow fabrics division. He joined Burlington in 1977 as Executive Vice President and



Lanty L. Smith

Senior General Counsel and was elected President on September 9, 1986.

CLASS OF 1968

Ernest C. Torres, has become a partner at Tillinghast, Collins & Graham in Providence, Rhode Island concentrating in civil litigation, administrative law, and business law. Torres is a former Associate Justice of the Superior Court of Rhode Island and Assistant Vice President of Staff Counsel Operations for the Aetna Life and Casualty Insurance Company.

CLASS OF 1969

Bruce W. Lilienthal, a San Francisco attorney, was elected President of the newly established San Francisco Small Business Advisory Commission.

CLASS OF 1970

Richard Cunningham is currently practicing criminal law in Stamford, Connecticut. He started in this field by successfully defending a client accused of a bombing. Cunningham has also been active in politics. In 1978, he won a seat in the state Senate, the first Republican to win that position since 1956. He now serves in the state House. Cunningham has nine children, ranging in age from 16 years to one year. A tenth is expected soon.

Kenton L. Kuenle is now a partner

at Thompson, Hine & Flory in Columbus, Ohio. Kuenle had previously been a partner with Scott, Kuenle, Grace & Mills before they merged with his present firm.

CLASS OF 1971

John R. Ball was named Executive Vice President of the American College of Physicians, the nation's second largest medical organization, in February, 1986.

Christine M. Durham assumed the position of President of the National Association of Women Judges in November, 1986. Durham is a justice on the Supreme Court of Utah. She is also a member of the Duke Law School Board of Visitors.

Richard Harwood has been teaching advanced estate planning on a part-time basis at American College in Bryn Mawr, Pennsylvania and at the University of Colorado—Colorado Springs. He has also been conducting seminars on the same subject for attorneys and other professionals. Harwood is Vice President and Trust Officer with the First National Bank of Colorado Springs.

CLASS OF 1972

Hugh M. Dorsey, III was awarded an honorary Doctor of Humanities degree from the Savannah College of Art and Design, where he serves as chairman of the Board of Trustees. Dorsey practices law in Atlanta.

CLASS OF 1973

Daniel T. Blue has been named to the NCNB Community Development Corporation Board, which helps to redevelop deteriorating neighborhoods. Blue practices law in Raleigh, North Carolina and serves as a State Representative for the 21st District in Wake County.

Larry J. Rosen was elected to a six-year term as city court judge for Albany, New York.

CLASS OF 1976

Yvonne Mims Evans has been named to the Board of Governors of the North Carolina Bar Association. Evans also serves as co-chairperson of the NCBA Minorities in the Profession Committee and is a member of the North Carolina Academy of Trial Lawyers, the North Carolina

Association of Black Lawyers, and the North Carolina Association of Women Attorneys. She is a partner in the Charlotte, North Carolina law firm of Ferguson, Stein, Watt, Wallas & Adkins. (See article this section)

Thomas A. Hanson has recently moved to the Miami office of Squire, Sanders & Dempsey. He had been with the firm's Cleveland office since 1976. Hanson practices in the area of commercial and corporate law, including real estate, oil & gas, government contracts, and health care.

Eugene M. Schwartz was promoted to Assistant Attorney General and was appointed Assistant Director of the New Jersey Division of Gaming Enforcement.

G. Gray Wilson was elected Chairman of the Young Lawyers Division of the North Carolina Bar Association. The Young Lawyers Division includes all NCBA members under the age of 36 and all those who have practiced law for less than three years. Nearly half of the NCBA membership falls within this category. Wilson is a partner at Petree, Stockton & Robinson in Winston-Salem, North Carolina. (See article this section)

CLASS OF 1977

Donald H. Beskind has been named to the Board of Governors of the North Carolina Bar Association. Beskind is a partner in the Durham law firm of Beskind & Rudolph. In addition, he serves on the boards of

Prisoner Legal Services and the North Carolina Civil Liberties Union. Prior to entering private practice, Beskind was an associate professor and director of clinical studies at Duke Law School. (See article this section)

Donald Etheridge is an attorney and Certified Public Accountant in the Office of the University Counsel at Duke. Etheridge, who has published widely in the area of tax law, will be teaching a continuing education course at Duke this Fall on the implication of tax reform on real estate investments.

CLASS OF 1978

Howard L. Levin has become a partner in the Boston law firm of Brown, Rudnick, Freed & Gesmer.

Sheila M. Markley has been appointed to the Walsh College Advisory Board. Markley is a member of the Canton, Ohio law firm of Day, Ketterer, Raley, Wright & Rybolt.

CLASS OF 1979

Robert E. Henderson became a partner at Murchison, Guthrie & Davis in Charlotte, North Carolina.

Terence M. Hynes was named partner in the Washington, D.C. office of Sidley & Austin.

CLASS OF 1980

Steven Natko is now associated with the New York office of Orrick, Herrington & Sutcliffe.

CLASS OF 1981

Timothy J. Corrigan has become a member of Bedell, Dittmar, DeVault & Pillans in Jacksonville, Florida.

David H. Potel has been named Special Counsel to the Chairman of the United States Securities and Exchange Commission.

CLASS OF 1982

Richard R. Hofstetter is now associated with the firm of Pollen, Brazill & Bennett in Indianapolis, Indiana.

Richard K. O'Donnell was selected to present a paper on the role of a public adjuster in fraudulent insurance claims to the Property Insurance Committee of the Tort & Insurance Practice Section of the ABA. O'Donnell is a partner in the Atlanta firm of Drew, Eckl & Farnham.

CLASS OF 1983

Walker Mayo recently completed a clerkship with Judge G. Wix Unthank of the United States District Court in Pikeville, Kentucky. Mayo will now pursue graduate work at Oxford University in England.

Serena Simons is now an associate with Miller & Chevalier in Washington, D.C.

CLASS OF 1984

Donald Fitzgerald is now an attorney for Syntex (U.S.A.) Inc., an international pharmaceutical corporation in Palo Alto, California. He is concentrating in environmental and administrative law.

Personal Notes

'71

—*William M. Henabray* recently married *Karen Manos Tremblay*, '86. Henabray is currently serving as the Staff Judge Advocate in Alconbury, England, near Canterbury.

'77

—*Andrew J. Peck*, was married to *Karen Gurian* on July 27, 1986. Peck is a partner with Paul, Weiss, Rifkind, Wharton & Garrison in New York City.

—*Mark J. Prak* and his wife, *Robin*, had a daughter, *Suzanne Michelle*, on October 11, 1984.

'80

—*Douglas E. Kingsbery* and his wife *Katherine* had a daughter, *Kelsey Louise*, on February 13, 1986. Kingsbery is a partner at Tharrington, Smith & Hargrove in Raleigh, North Carolina.

'82

—*Reynolds Walker Holding* married *Carol Godwin Pierson* on June 7, 1986. Holding is an associate with Debevoise & Plimpton in New York.

—*Rich Lukianuk* and his wife, *Lee Ann*, had their first child, a daughter named *Jordan Quinn*, on February 8, 1986. Lukianuk is a Senior Staff Attorney with the Automotive Division of United Technologies in Dearborn, Michigan.

—*John Andrew Tucker, IV* married *Julie Hills*, '84, this fall. Tucker is an associate with Bedell, Dittmar, DeVault, Pillans & Gentry in Jacksonville, Florida.

—*Kimberly Hill* and *Craig Hoover* '83, are now married and living in Washington, D.C. Craig is with Hogan & Hartson and Kim is now at Squire Sanders & Dempsey.

—*Kenneth J. Kornblau* and Dr. *Lisa K. Rubin* were married on June 8, 1986. Kornblau is an associate in the New York firm of Brown, Wood, Ivey, Mitchell & Petty.

—*Patrick Navin* married *Pam Kelly* on August 16, 1986. Navin is an associate specializing in tax with Lord, Bissel & Brook in Chicago.

'84

—*Julie Hills* married *John Tucker*, '82 this fall. She is an associate at Martin, Aide, Burchfield & Johnson in Jacksonville, Florida.

'85

—*Dorothy Anne Hurd* married *George Arthur Forsythe* on February 10, 1986. She is an associate at Burns & Levinson in Boston.

'86

—*Chris McDermott* and his wife, *Lucy*, had a daughter, *Amanda Paget*, on June 24, 1986. McDermott is an associate with the New York City law firm of Simpson, Thacher & Bartlett.

Karen Tremblay married *William M. Henabray*, '71. She is in the Judge Advocate General's Corps and will be stationed in Washington, D.C.

Anne T. Wilkinson and *Shrin Rajagopalan* were married on August 23, 1986. Wilkinson is currently serving as a clerk for Justice Mitchell of the North Carolina Supreme Court.

Obituaries

CLASS OF 1933

John Chisman Hanes died April 14, 1986, in Greensboro, North Carolina. Hanes had served as an attorney for the Reconstruction Finance Corporation and as a major in the United States Army before forming the firm of Klagsburn & Hanes in Washington, D.C.

CLASS OF 1950

Daniel M. Williams, Jr. died June 29, 1986. A native of Durham, North Carolina, Williams served with the Navy during World War II and with the Army during the Korean War. He then served as an assistant district attorney and had a private law practice in North Carolina before joining the federal government in 1963. During his career with the government, Williams worked for the Labor Department and the Equal Employment Opportunity Commission.

CLASS OF 1967

Robert J. Moyer suffered a fatal heart attack on July 12, 1986. Moyer had spent the past 14 years as an attorney with the law firm of Hazel, Beckhorn & Hanes in Fairfax, Virginia. Prior to that, Moyer was commissioned in the Judge Advocate General's Corps, serving with the 101st Airborne Division in Vietnam.

UPCOMING EVENTS

Conference on Career Choices

During the 1987 Spring semester, the Duke Bar Association and the Law Alumni Association will co-sponsor a Conference on Career Choices. The conference, which will consist of a series of panel discussions, will be structured to provide the students with first-hand insights into several aspects of the practice of law. The panel discussions will feature Duke Law alumni, who can provide information regarding their various professional careers and can discuss the interrelationship of per-

sonal objectives and career decisions.

The topics addressed in each of the panel discussions will be based on the results of a survey of the law school students taken in September of 1986. The conference will, therefore, focus on areas of greatest student concern and interest. From the survey, the topics gathering the most response were non-legal careers for lawyers, comparisons of firm size and location, interfacing career and personal decisions, international law, corporate law, and judicial clerkships.

The conference has already received the support of students and alumni. A large number of students have already volunteered to assist in the planning and coordination. Their support, combined with the knowledge and expertise of the participating Duke Law alumni, should make the conference a great success.

For more information on the conference, call the Law Alumni/Development Office at (919) 489-5089.

Urban Property Development Conference 1987

The second conference of the Duke Urban Property Development Council, REAL ESTATE DEVELOPMENT AND INVESTMENT UNDER THE NEW TAX ACT, will be held on March 27, 1987 at the University Sheraton Hotel near the Duke campus in Durham. The conference program will include: an overview of the Act

as applied to real estate; a look at the business opportunities in real estate resulting from the new tax structure; and the survival under the Act of opportunities in low income housing and historic preservation. The conference is to begin at 9 a.m. and last until 4:30 p.m. Lunch will be served at the hotel to participants.

The conference is scheduled for the day preceding the 1987 Barristers Weekend and will be available to Barristers* without charge. For others the charge will be \$200. For further information, call the Law School Alumni Development Office: (919) 489-5089 or 489-5096.

Conference on Private Adjudication

The Private Adjudication Foundation will sponsor the first annual Conference on Private Adjudication, on Friday and Saturday, March 27-28, 1987, at the Sheraton University Center, Durham, North Carolina.

A strong program is being prepared by the Planning Committee, headed by Donald H. Beskind. It will include the first annual report on empirical ADR research by Professor Neil Vidmar, the PAC's Vice President for Research.

The Private Adjudication Foundation has been established as a support unit of the Private Adjudication Center ("PAC"), an affiliate of the Duke Law School. Fellows of the Foundation pay dues of \$100 to the Foundation. The PAC has a national reputation as a pioneer in the field of alternative dispute resolution (ADR) and is well on its way toward self-sufficiency.

Fellows of the PAC Foundation and Barristers* will be invited to

attend the conference free of charge. For others, the charge will be \$100. Please mark your calendars. If you would like to know more about the conference, the Foundation, or PAC, please contact Benjamin R. Foster, Executive Director, Private Adjudication Center, Duke University School of Law, 3024 Pickett Road, Durham, North Carolina 27705. The telephone number is (919) 493-7770.

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

Law Alumni Association Commissions Alumni Directory

The Duke Law Alumni Association has commissioned a new general alumni directory to be produced this year. This directory will be distributed free of charge to all law alumni who have paid association dues and/or made a contribution to the Law School Annual Fund for 1986-87.

All law alumni should receive a questionnaire to verify information to be included in the directory. The Alumni/Development Office at the Law School has provided the latest information available regarding your home and business addresses and

undergraduate school and class year where available—the information which will be included in the new directory. When you receive the questionnaire, please check this information for accuracy, make changes where necessary, and return it in the envelope provided.

In a continuing effort to keep strong the ties between the Law School and its alumni, we are asking for some other information regarding your time at Duke and your activities since leaving the Law School. This information is intended

only for the Alumni/Development Office files. If for some reason, you prefer not to answer some of these questions, we hope that you will nevertheless return the questionnaire.

Unreturned questionnaires will require staff in the Law School Alumni/Development Office to research and verify addresses—a time consuming and expensive process. Your early return of the questionnaire, therefore, will greatly expedite the process and would be appreciated.

CHANGE OF ADDRESS

Name _____ Class of _____
Position, firm _____
Office address _____
Office phone _____
Home address _____
Home phone _____

Return to Law School Alumni Office.

PLACEMENT NOTICE

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

Date position(s) available _____

Employer's name and address _____

Person to contact _____

Requirements/comments _____

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

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

Submitted by: _____ Class of _____

Return to the Law School Placement Office.

ALUMNI NEWS

The *Duke Law Magazine* invites alumni to write to the Alumni Office with news of interest such as a change of status within a firm, a change of association, or selection to a position of leadership in the community or in a professional organization. Please also use this form for news for the Personal Notes section.

Name _____ Class of _____

Address _____

Phone _____

News or comments _____

Return to Law School Alumni Office.

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

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