

# *Duke Law Magazine*

WINTER, 1988



*Here and There*

# *Duke Law Magazine*

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## Editor's Column

In this issue the *Duke Law Magazine* focuses on the activities of faculty, alumni and students on national, international and local levels. Deborah Demott gives an overview of similarities and differences in the law regulating corporate takeovers in the western countries where such activity is most prevalent. Percy Luney advises those interested in pursuing negotiations with the Japanese as to differences in the two cultures which may affect such negotiations. On the national front, Donald Horowitz asks the thought-provoking question, "Is the Presidency Failing?" and provides some insight based on contemporary and historical observation. A report from the *Law and Contemporary Problems* conference on Vice focuses on problems and legal issues involved in that subject on both the national and international level.

We continue the series of articles on student organizations currently operating at the Law School in the About the School section. In this issue we report on the "by invitation only" organizations—the Moot Court Board and the scholarly journals published by the Law School. We believe that this information will be of interest to all of our audiences. Alumni should enjoy hear-

ing of how these organizations may have changed since they were at the Law School and how they have remained the same. We hope that potential employers of our students will find this information useful in talking with student members of the organizations and that prospective students will enjoy this foretaste of Law School life. Those at other law schools may enjoy comparing similar organizations, and we believe that friends of the Law School will appreciate this information about important programs at the School.

In the Docket, we continue to highlight the personal and professional accomplishments of Duke Law School faculty, alumni and students. In this issue we report on the Law School's expanding network with Japan. The growth of our international program has increased our interaction with the Japanese legal world through an exchange of faculty and students, and many of our alumni, both American and Japanese, are involved in international transactions between the two countries. Much closer to home, we report on some Law School alumni who are "Lawyers for Duke"—practicing law for their alma mater. Our alumnus profile features Robert

K. Montgomery, who was recently named Chairman of the Law School Board of Visitors by University President Keith Brodie. We also profile a current student in this issue, Kevin Mulcahy '88, who has turned his law school experiences into fun and laughter for himself and others through his own cartoon strip. Our book review reports on a recent book by alumnus Neil McFeely '85 which studies the judicial selection process during the Johnson presidency—a timely subject given the current interest in choosing a Supreme Court justice. That section also reports on Law School news of special note and upcoming events at the Law School.

The Alumni Activities section (including Personal Notes and Obituaries) is an increasingly popular feature of the *Magazine* as attested by the response we have received from alumni and the resulting expansion of the section. We enjoy sharing this news with the Duke Law School family and encourage all of you to continue sending us news of your personal and professional milestones. We also encourage all of our readers to communicate with us so that we can respond to your needs and interests in the pages of the *Magazine*.

## About the Cover

The cover reproduces an ink and watercolor painting by Michael Rigsbee of the Carolina Theatre located in downtown Durham. Many Duke Law alumni will remember the Durham Auditorium/Carolina Theatre from their years in Durham, as it was built in 1926. In 1978, under the auspices of the Carolina Cinema Corporation (CCC) of Durham, the Carolina Theatre began showing

films of particular artistic merit. And, in the past year, regular live performances have reappeared on the theatre's stage. In accordance with its goal to preserve the theatre, the CCC hopes to see ongoing renovations completed in 1989.

The transparency for our use in reproducing the painting was kindly provided by Stephen G. Barefoot, Managing Director of the Carolina

Theatre, at the suggestion of Deborah Christie. The painting has been reproduced as a poster and on notecards, the sale of which benefits the theatre. Anyone interested in purchasing a limited edition, signed and numbered reproduction (\$40); poster (\$10), or notecards (\$5/dozen) should contact the Carolina Theatre at 215 Roney Street, Durham, North Carolina 27702.

# HERE AND THERE

# Five Key Issues in Takeover Regulation

*Deborah A. DeMott\**



*\*Professor of Law, Duke University. Professor DeMott began teaching at Duke in 1975. Her areas of special interest include contracts, corporate law and finance.*

*This article is based upon a public lecture Professor DeMott gave at the University of Sydney in July 1986 in her capacity as Fulbright Senior Scholar. Readers interested in a more extensive discussion will find it in Professor DeMott's article, Comparative Dimensions of Takeover Regulation, to appear in *Knights, Raiders and Targets: The Impact of the Hostile Takeover* (J. Coffee, L. Lowenstein & S. Rose-Ackerman eds., forthcoming 1987) and in 65 Wash. U.L.Q. no. 1 (forthcoming 1987).*

**T**akeovers are controversial events because they involve change in the control of a corporation and thus affect the interests of its shareholders, managers, employees and creditors—and of the larger community as well. Our immediate focus, however, is the regulation of takeovers as they affect the corporation's share holders and its managers or directors. As conventionally understood, a takeover occurs when a person or group of persons purchase enough of a corporation's shares to constitute effective control and thus confer effective control on a person or group of persons that did not have control previously. Of course, the number of shares necessary to accomplish this may be less than a legal majority in a large publicly-held company.

Interestingly enough, even though the basic transaction is the same, the content of the legal regulation of takeovers differs widely in the countries in which many such transactions occur: Australia, Great Britain, Canada and the United States. Nonetheless, each jurisdiction must deal, one way or another, with the same central issues:

- Which transactions should be separately regulated as takeovers?
- What restrictions, if any, should be placed on a person who makes a takeover bid?
- What restrictions, if any, should constrain the directors of the target in defending against the bid if it is unwelcome to them?
- What provision should be made, after a takeover, for the remaining non-controlling shareholders?
- How should the content of takeover regulation be determined and how should it be administered and enforced?

administered and enforced?

Prior to considering these issues, one must review some basic institutional and legal points about the countries under discussion. Australia since 1980 has had comprehensive regulation of corporate takeovers through a cooperative federal scheme. The earlier Australian regulation of corporate takeovers did not effectively cover many transactions because it permitted a major exception for stock exchange transactions. The Australian regulations are interpreted and

enforced by the National Companies and Securities Commission. Canada, unlike Australia, has no comprehensive federal regulation of corporate takeovers; each province has its own regulatory scheme and enforcement agency. The disparities in treatment that might otherwise result are, however, substantially mitigated by the fact that Ontario is the most significant province for these purposes due to the presence in that province of the premier Canadian stock exchange, the Toronto Stock Exchange. As a consequence, large takeovers in Canada are subject to the Ontario rules, which are enforced by the Ontario Securities Commission. The United States has had federal securities regulation since 1933, enforced by the federal Securities and Exchange Commission. Federal regulation of corporate takeovers did not occur in the United States until 1968, with the passage of the Williams Act. To some extent, state law remains significant on some issues concerning takeovers. In the United Kingdom, company law and statutory securities regulation contain no comprehensive treatment of takeover transactions. In the 1970's, participants in the English financial industry formed the City Panel on Takeovers and Mergers. The panel, which has functioned since that time, has promulgated The City Code on Takeovers and Mergers and, through it, regulates takeover transactions in Britain. The British experience thus differs from that of the other three countries because the regulations themselves are not the product of legislation, and the body that enforces them has self-regulatory origins. It is also important to keep in mind that in all of these systems, the listing requirements and rules of stock exchanges may significantly affect the conduct of takeover transactions.

The regulation of takeovers that has resulted in each of these countries differs significantly in its terms. The differences may be attributable to many factors, among them differences in legal systems and financial markets, as well as differences in expectations about the level and type of risk properly borne by equity investors in public companies. Nonetheless, comparative study of each system's resolution of the central questions of takeover regulation is a useful enterprise because it illustrates the advantages and disadvantages of policy choices available to particular jurisdictions.

### **Defining "Takeover"**

The first task to be confronted by any system of takeover regulation is defining the transactions that should be regulated as takeovers. In Australia and Ontario, with some exceptions, a "takeover" is defined by legislation to occur when an acquisition of shares would make the acquiring person the owner or controller of twenty percent or more of the company's voting shares. The key consequence under the Australian legislation and the Ontario Securities Act is that "takeovers" must be made through public offers, that is, the share acquisition must be made through a public bid to all of the company's shareholders. The pol-

*As conventionally understood, a takeover occurs when a person or group of persons purchase enough of a corporation's shares to constitute effective control and thus confer effective control on a person or group of persons that did not have control previously.*

icy rationale for this requirement is to give all shareholders an opportunity to consider whether they wish to accept the offer. Shareholders should value this opportunity because acquiring persons typically are willing to pay a premium over the previous market price for the shares if they can acquire sufficient shares to give them effective control of a company.

In the United States, the response to this basic definitional question differs. Although the federal statute dealing with takeovers regulates "tender offers," it does not define them. Conventionally, a "tender offer" is understood to mean a public offer, made on non-negotiable terms, that is open for a limited period of time for the purchase of a specified number or percentage of a company's shares. Courts in the United States have interpreted the term "tender offer" in the statute to exclude, on the one hand, privately-negotiated acquisitions, and, on the other hand, purchases made on a stock exchange. These exclusions have been justified by pointing to the fact that, in both circumstances, the vendors are not subject to the take-it-or-leave-it terms the typical tender offer presents, in an often frenzied and confused climate. The consequence of the absence of any comprehensive definition of "takeover" in the statute, coupled with the restrictive judicial interpretation of the operative term "tender offer," is that control over a public company can shift without any public bid being made to the company's shareholders. Takeover regulation in the United States consequently is atomistic rather than comprehensive, enabling separate transactions that cumulatively may shift control of a corporation.

### **Bidders' Tactics**

The second central issue is the desirability of limiting the offeror's or bidder's discretion. That is, if an acquiring person makes a public bid, how much discretion should that person have in setting the terms of the offer? To what extent should takeover regulation dictate the terms on which the offer may be made and the tactics an offeror may use? In the absence of such regulation, takeover bids are creatures of contract law, which has as a fundamental assumption the offeror's mastery of the offer's terms. Thus, to the extent takeover regulation restricts the offeror's discretion

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to determine the offer's terms, it displaces and limits contractual norms that would otherwise be applicable. Although all the systems under discussion require some disclosure of information by the offeror at the time the offer is made, only Australia requires advance registration of all offers with the securities commission, which carefully scrutinizes the bid documents prior to their transmission to shareholders. In all four systems, however, the offeror must disclose its identity. Further, all systems explicitly or effectively impose a minimum duration requirement on offerors, to permit shareholders sufficient time to consider whether they wish to accept the bid, and to permit other potential bidders to determine whether to make a competing bid.

These systems vary considerably, however, in other limits imposed on the offeror's discretion. A central question about bidding tactics is whether the bidder should be permitted to offer to buy fewer than all of the target's shares. The bidder might desire to do this if it can acquire sufficient shares to constitute effective control without incurring the cost of making a bid for the remainder of the shares. Partial bids of this sort are sometimes thought to be troublesome because shareholders who do not accept the offer, or shareholders who do accept it but whose shares are not accepted for purchase, remain as shareholders in the company once effective control has shifted to the offeror, a position that is potentially very unattractive. Such shareholders may hold an investment of reduced value in the company, a company controlled by a new controlling shareholder to whose involvement they did not consent. All the systems under discussion regulate partial bids to some extent—to the least extent in the United States and Ontario and to the greatest extent in Great Britain. In this respect, Australia is somewhere in the middle of the regulatory spectrum.

In the United States and Ontario, the principal regulation of partial bids is a requirement that, if a partial bid is oversubscribed by shareholders, acceptances must be taken up by the offeror on a pro-rated basis from each shareholder who accepted so that the same fraction or proportion of shares is purchased from each shareholder who accepted. This gives each shareholder at least an equivalent opportunity to sell at the price the bidder is offering, which usually carries a premium over the current market price. What is achieved as a result is an equality of opportunity, and more precisely a proportional equality of opportunity. In Australia, in contrast, at present partial bids may only be structured on a proportional basis, that

is the offer itself may not be for a specified number of shares but must be structured as an offer to buy the same fraction of shares held by each shareholder. This requirement assures each shareholder a maximum number of his or her shares that the offeror can be obliged to accept if the shareholder accepts the offer.

In Great Britain, as in Ontario and in the United States, pro-rated treatment of over-subscribed partial bids is required. More importantly, the City Code imposes additional stringent regulations on partial bids. First, the Take-Over Panel itself must consent to a person making a partial bid. In practice, the Panel almost never consents to a bid that would give the prospective offeror control of between 30 and 50 percent of the target's shares, that is, effective control of the target. Second, the City Code requires a shareholder plebescite to approve the offer. The shareholders of the target company vote on whether to approve or disapprove having a partial bid made for their company, and their vote is separate from their individual decisions whether to accept the bid. The offeror must receive the affirmative vote of a majority of a target's shareholders for the partial bid to succeed.

The practical consequence of the more stringent regulation of partial bids in the United Kingdom is, not surprisingly, that very few partial bids are made. One might wonder why the Panel determined to regulate partial bids so as to inhibit their occurrence. One possible explanation is that the legal position of minority or non-controlling shareholders in a British company is not a strong one, in contrast with comparable shareholders in the United States in particular. Relatively few remedies are available to the disgruntled minority shareholder in a British company, which may make the regulatory solution to partial bids that the City Code has reached an attractive one.

Other aspects of bidder tactics are also subject to varying regulatory treatment. For example, often in the United States bidders condition their obligations under the bid, and in particular condition their obligation to buy the shares tendered on their ability to raise necessary financing. In the United States, but not in the other systems under discussion, bidders have always been free to impose conditions on bids, including conditions whose fulfillment must be in the subjective judgment of the bidder itself. In the other systems, in contrast, bidders' conditions are regulated and restricted.

Another difference between the United States and these other systems is the extent to which shareholders, once they have tendered shares to a bidder, have the right to withdraw the shares, possibly to tender them to another bidder. Under the federal regulations in the United States, shareholders have defined withdrawal rights, and these rights in themselves may mitigate the risks that shareholders would otherwise bear as a result of conditions imposed by the bidder on its obligations under the bid. In Ontario, likewise, shareholders have the ability within specified periods

of time to withdraw shares that they have tendered. Shareholders do not have withdrawal rights in Australia.

Another difference among systems is their treatment of the bidder's ability to purchase shares on the stock exchange or through privately-negotiated transactions during the period the bid is outstanding. In the United States, but not in these other systems, once the bid is made, the bidder is restricted to it for its duration for any purchases. In the other systems, subject to restrictions and regulations, bidders are able to purchase shares on the stock exchange even though the bid has been announced. A rationale for prohibiting such purchases in the United States is the possibility that they might be used to manipulate the market price of the shares, and thus affect the success or failure of the bid itself. Likewise, in the United States, bidders are not able to mount bids through stock exchanges, although they are able to do so in the other three countries.

### **Defensive Tactics**

The third central issue is the extent to which the directors and management of the target company should be free to defend against an unwanted bid. A subsidiary question is the criteria against which their defensive actions should be assessed. These concerns are appropriate to takeover regulation because defensive tactics create the risk that shareholders in a prospective target company will be deprived of a valuable opportunity to sell at a premium above the current market price. All of the systems under discussion impose some limitations on the defensive propensities of target managers. Once again, however, the precise nature and extent of these limitations vary.

In Britain, the City Code states the broad principle that once a bid has been announced or once a bid appears to be in the offing, the target's directors should take no steps that could have the effect of defeating or precluding the bid, without receiving the approval of a majority of the target company's shareholders. This prohibition would include such actions as issuing shares to a prospective ally or selling the company's most valuable asset, unless shareholder approval has been obtained. None of the other systems imposes such a broad limit on directors' discretion. Outside Britain, the extent to which the directors of the target are free to defend against a bid is a question addressed almost exclusively through judicial interpretations of the fiduciary duties imposed on directors of companies. In Canada and Australia, the central issue contested in the cases is whether the directors' use of their powers can be tied to some commercial purpose of the company or some interest of the company as a whole. This is an approach that focuses principally on the directors' motivation, on their stated purpose for the transaction, and on the extent to which the transaction can be tied to some plausible commercial plan.

A basic contrast between directors in Australian com-

*Takeover regulation in the United States consequently is atomistic rather than comprehensive, enabling separate transactions that cumulatively may shift control of a corporation.*

panies and their counterparts in the United States (and for the most part in Canadian companies as well) is the broader range of powers granted to directors in United States companies through the provisions of company law itself. For example, corporation statutes in the United States permit companies to repurchase their own shares, and do not restrict the company's ability to lend financial assistance for the purchase of its shares, as does section 129 of the Australian Companies Code. Thus, essential to the defensive posture of directors in U.S. companies is the fuller range of powers they have under company law itself. Nonetheless, directors' use of these powers in the United States is subject to fiduciary restraints. Unless the powers are used pursuant to good faith exercises of the directors' business judgment, the directors will be obliged to justify to the court their use of the power, and the court will assess the adequacy of the justification against the consequences for the company. In the most recent cases applying this test, courts have critically reviewed directors' justifications for drastic defensive maneuvers and in some instances found them wanting. In these cases, courts focus on the objective reasonableness of the decisions taken and their economic effects, in addition to the directors' stated rationale for the transactions.

### **Post-Takeover Transactions**

The fourth central issue raised by the regulation of takeovers is created by the aftermath of a takeover. Can the new controlling shareholder be compelled to buy out the remaining non-controlling shareholders? If such an acquisition occurs, whether compelled or not, at what price may or must it occur?

Once again, the most restrictive response to this question is found in Britain's City Code, which requires any person who acquires control of 30% or more of a company's voting shares to offer to buy out the remaining shareholders, at the highest price paid in the preceding 12 months in assembling the 30% block. That is, the new controlling shareholder must offer to all shareholders the highest price paid in acquiring control. This requirement effectively assures that any premium paid for control is made equally available to all shareholders. It thus achieves an equality of treatment among all shareholders. At the same time, the mandatory buyout has the effect of increasing the cost to a prospective bidder of acquiring control of a company, and, overall, increases the cost of shifting control of companies, because it requires that a pros-

*All of the systems under discussion impose some limitations on the defensive propensities of target managers. Once again, however, the precise nature and extent of these limitations vary.*

pective bidder be willing to commit sufficient funds to buy all the voting shares in a company.

In Ontario, a comparable buy-out requirement is applicable, but only if the control block has been assembled through purchases from fifteen or fewer shareholders. That is, if the control block is acquired through a public bid or through purchases from more than fifteen vendors, the acquiring person is not under an obligation to offer to buy out the remaining shareholders. The limited nature of the buy-out requirement in Ontario appears to be based on the assumption that public shareholders are treated most apparently unfairly when control premiums are paid to a small number of vendors. This may be a particular concern in Canada due to the highly-concentrated nature of the Canadian economy, in which a small number of family-identified groups of companies control a high percentage of the shares in the largest publicly-traded companies.

In contrast, under Australian company law, shareholders can compel the acquisition of their shares, but only if the acquiring person has acquired 90% of the shares. Likewise, a 90% shareholder under Australian company law would be able to compel the remaining minority shareholders to sell their shares.

Takeover regulation in the United States does not impose any comparable buy-out requirement. Under most of the provisions in state corporation statutes that regulate negotiated merger transactions, once a person owns or controls over 50% of a company's shares, those shares constitute a sufficient majority to approve a merger agreement between the company and some other corporate entity. In a merger transaction, and in some states in other fundamental transactions as well, shareholders of the target company would have the right to vote against the merger and then to exercise appraisal rights which are designed to give them the right to have their shares purchased at their value as of the time immediately prior to the approval of the merger agreement.

#### **Administration and Enforcement**

The fifth key issue is the choice of an administrative forum to enforce takeover regulations, which is inevitably tied to determining the content of the regulation in the first place. In Britain, the Take-Over Panel has been able through its takeover code to enact and enforce comprehensive regulation of takeover trans-

actions. Its success appears to turn on factors unique to Great Britain. From the very beginning of the Panel's history, the Bank of England, along with The Stock Exchange, the merchant banks and the stock dealers, has played a significant role in the Panel's operations and staffing. In Britain, the Bank is a significant economic force in itself that is not precisely equivalent to the role of the reserve banks in the other countries. Second, the financial community in Great Britain has long been a socially cohesive and geographically concentrated group, with a long-term collective interest in maintaining a viable system of self-regulation. The new statutory framework that ushered in the "Big Bang" of enhanced competition in Britain's market for financial services effectively preserved the Panel as a self-regulatory organ while lending statutory backing to its investigations and sanctions.

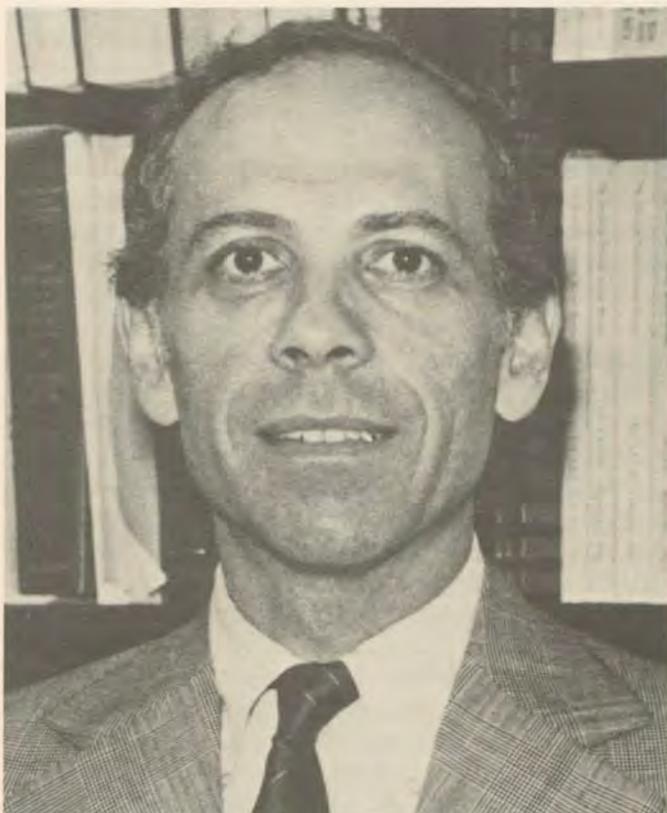
Australia at present has a co-operative federal scheme. One aspect of it is a federal administrative body, the National Companies and Securities Commission, which administers the Acquisition of Shares Code and investigates alleged violations of the Code. The Commission, however, does not have extensive power to enact or prescribe rules. Recently the national government introduced legislation in Parliament to make company law and securities regulatory law direct federal legislation.

Canada has no comprehensive federal legislation or administrative agency dealing with securities regulation, including the regulation of corporate takeovers. Although Canada has a federal corporation statute, the Canada Business Corporation Act, the provincial securities legislation applies to companies with shareholders resident in a province, independent of where or how the company has been incorporated; thus, the takeover provisions of the Ontario Securities Act would apply to a CBCA company if it had sufficient shareholders in Ontario to trigger the jurisdictional provisions of the Ontario statute. Some Canadian observers view the territorial reach of Ontario regulation as an undue affront to inter-provincial comity. This reaction is no doubt aggravated by the fact that the Ontario regulations described in this article are more stringent than those imposed by the other provinces. None for example imposes a buy-out requirement comparable to the Ontario requirement.

In contrast, the United States has had federal securities legislation since the 1930's, and the Securities and Exchange Commission has from its early days had extensive administrative rule making power. The enforcement of takeover regulation in the United States also differs from Australia and Great Britain in the extensive role played by litigation brought by private parties in federal and state courts. In the United States, but not the other two federal systems under discussion, the development of coherent content for takeover regulation has been adversely affected by the federalist division of legislative competence between the national and state governments.

# Is the Presidency Failing?

Donald L. Horowitz\*



Since 1960, no President of the United States has served out his full term in honor. Every one has met with death, disgrace, or grave political disability. In fact, the trend goes further back, to Truman's inability to stand for reelection in 1952 or even to the interwar period, to the rejection of Wilson, the dishonor of Harding, and the helplessness of Hoover. Since World War II, Eisenhower and only Eisenhower has survived unscathed. The 1950's were a decade of such extraordinary political complacency, and Eisenhower was so skillful at deflecting responsibility for unpopular action, that his presidency may fairly be assumed to be the exceptional one. Thereafter, Kennedy was assassinated. Johnson

was undone by a war more unpopular than the war that undid Truman. Nixon was disgraced by scandal. Ford, unelected, left office tainted by the Nixon pardon, an act that produced a deep cleavage in public opinion. Carter was upended by perceived personality flaws as serious in their own way as Johnson's and by policy failings that appeared to flow from them. Now Reagan's presidency threatens to be swamped by a hybrid of scandal and policy debacle. The trend seems clear: the presidency magnifies the flaws leaders possess, and the public, seeing the flaws in bold relief, repudiates the incumbent, paving the way for a period of stalemated or enhanced authority for the other branches.

At one level, no doubt, Nixon's Watergate cover-up, which produced committee-approved articles of impeachment, has nothing in common with Carter's immobilism and the peculiar pacifism of his Secretary of State. Truman and Johnson share willful persistence in divisive regional wars; neither is of a piece with Reagan's failings. If there is a single common theme, that theme is deception, but even deception cannot really be laid at the door of Truman or Ford, despite suspicions of a "secret deal" for the Nixon pardon. The deception theme, I shall suggest later, does have some deep meaning, but for the moment it is the uncommonality of the events producing the common result that I wish to underscore. For if most presidents fail for different and unpredictable reasons, but fail nonetheless, perhaps the sum of their failures is greater than all of them together. Perhaps the presidency is failing.

## Cumulative Failure

The case for system failure is not difficult to make. For one thing, these failures transcend periods of popular activism and quietude. Johnson and Nixon fell during turbulent times, but Truman, Carter, and Reagan fell in more complacent times. Moreover, there is an element of cumulative causality at work. To the extent that Indochina undermined Nixon, it had already decapitated Johnson. What finished Ford was the unfinished matter of Nixon. Carter's weakness was, in part, the result of Johnson's and Nixon's perceived bellicosity. And, above all, Reagan's (not-so-) secret war in Nicaragua, including the transfer of funds from the Iran arms deal, was a response to congressional restrictions, which in turn were a response to

\*Professor of Law, Duke University. An expanded version of this article was originally printed in 88 *The Public Interest*, Summer 1987, and an earlier version of the article was presented at the Harvard University faculty seminar on constitutionalism.

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Johnson's and Nixon's more or less unilateral conduct of hostilities. Similarly, Reagan's trade of arms for hostages may have proceeded from the keen knowledge that unredeemed hostages had previously toppled Carter.

Presidents, in short, are failing as a result of pursuing policies perceived to be necessary or constrained by the failure of their predecessors—and sometimes, as in the case of congressional restrictions on aid to the Contras, policies made illegal as a result of the earlier debacles. With Reagan, the cumulative effect comes from responses to previous perceived failures in all directions—to Carter's weakness on terrorism (hence bargaining for hostages must be secret) and his problems with Iran (hence the hope of secretly turning Iran around), as well as to Johnson's and Nixon's inappropriate use of military force (hence secret aid, forbidden by law). When the various secret schemes are revealed and are shown to be intertwined, there is clear evidence of the cumulative impact of individual presidential failures. The disclosure of secret transactions, contradicting previous public statements, is redolent of the Watergate sequence of denial and revelation. The Reagan scandals are the pinnacle of cumulation.<sup>1</sup>

Far from purging the presidency of problems that became apparent during the Johnson and Nixon Administrations, Watergate did little to change the institution and much to lower the threshold for presidential failure. The Watergate outcome did nothing to hinder the unfettered ability of the president to organize his office as he sees fit; or the character of the White House staff as the nerve center of the executive branch, countering tendencies to autarchy and unresponsiveness in the departments; or the frequent deadlock between the legislative and executive branches. Watergate and Vietnam, taken together, appear to have extended that deadlock from domestic to foreign policy, with an activist president seeking ways around restraints imposed by a gun-shy, cautious Congress. The profound popular recollection that the worst was indeed true in 1974 and therefore could be true again heightens the disposition of those in adversary relationships with the president to seek and ferret out scandal. Scandal in the White House, any White House, is now highly credible.

#### **An Uncertain Office**

If we ask why Americans invest so much faith in the president and then so quickly reject him, the inquiry appropriately turns to the work of the Framers

of the Constitution and produces two important conclusions. First, considerable equivocation attended the creation of the presidential office. Second, almost by accident, the Framers located the presidency in the vortex of the most complex political and personal feelings Americans could have. The expectations of the office—its constitutional status—and the affect directed toward it—its psychological status—are both suffused with ambivalence.

The Framers knew what they wanted the national legislature to do. What they had to work on was mainly how to compose the legislature, so as to secure the assent of the less populous states. The resolution of other issues, including the presidency, was often held hostage to this one. The carefully elaborated thought of Madison, so influential elsewhere in the Constitution, was least developed with respect to the executive. Conceiving of the office of president, empowering it, and agreeing on a suitable mode of electing the president all proved to be elusive tasks. The decisive work on them was done by committees, late in the Convention. Even then, some fundamental issues were left unresolved. Article II of the Constitution, on the executive power, is far more cryptic than Article I, on the legislative power. Several strains of thought regarding executive power had contended during the Convention, and the emergence of the document by no means signified that any one strain had prevailed. And because the Framers were not wholly clear on what they had created, elements of parliamentary supremacy and cabinet government survived the Convention.

The presidency that emerged in the Constitution was primarily the outgrowth of two things the members of the 1787 Convention did not want and two things they did. They wished to avoid creating a monarchy, and many equally distrusted the sovereignty of the legislature. The Framers wanted stability and a check on unwise legislation, governmental features that some of them came to identify with certain of the post-colonial state governorships.

Early in the Convention, Hamilton had suggested a strong central government, with a strong president. His plea, which included a remark that "the British Govt. was the best in the world,"<sup>2</sup> fell on deaf ears, and Hamilton was later accused of favoring monarchy. As colonials who had felt the brunt of the Crown at a time when it was unusually potent, the delegates were ill disposed to consider anything that smacked of elective monarchy. Echoing widespread sentiment at Philadelphia, George Mason opposed a single executive as an imitation monarchy, and Roger Sherman advocated an executive wholly responsible to the legislature. Executive power was, for most delegates, not a positive good.

Under the Articles of Confederation, there had been no confederal executive, except for the committees established by and responsible to the Congress. By 1787, the delegates understood the administrative

shortcomings of that arrangement, visible as they were throughout the War for Independence. The alternatives the delegates were most familiar with, however, were the subdued governors who had succeeded the colonial governors in several states after 1776.

Existing state governments inspired the major proposals on the executive presented at the Convention. Although they differed on other matters, both the Virginia Plan and the New Jersey Plan proposed an executive chosen by and accountable to the legislature. The Virginia Plan did not specify the number of executives, whereas the New Jersey Plan expressly contemplated a plural executive. The latter also made the executive removable by Congress at the request of a majority of state executives. A separate, but weak and dependent, executive was intended.

The first strain manifest in the Convention, then, was anti-monarchical. It led to proposals endorsing legislative supremacy. During the colonial period, state assemblies, recapitulating the British struggles with the Crown a century earlier, had wrested concessions from colonial governors. After the American Revolution, state governors had been subordinated by legislatures and by executive councils appointed by the legislatures to control the governors. Legislative control of the executive was thus a powerful reflex.

What had brought the Framers to Philadelphia, however, was the palpable failure of the Articles of Confederation, whose most conspicuous feature was unbridled legislative domination. Irresponsible state legislatures had failed to respect property and been unable to preserve stability in the mid-1780's. Conservative as they were, many of the Framers feared the popularly elected branch. Their fears were given immediacy by the printing of paper money, the accommodation of debtors, and the disorder prevailing under the Articles, most recently illustrated by Shays' Rebellion of 1786. A revolt of the debtor masses, it had ended in capitulation by the Massachusetts legislature to the rebels' demand for tax relief. This example of the noxious character of popular rule was much on the Framers' minds as they contemplated the need for strong government. The second strain in evidence at the Convention, then, was abhorrence of legislative supremacy. To those who shared that abhorrence,

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*The trend seems clear: the presidency magnifies the flaws leaders possess, and the public, seeing the flaws in bold relief, repudiates the incumbent, paving the way for a period of stalemate or enhanced authority for the other branches.*

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*Presidents, in short, are failing as a result of pursuing policies perceived to be necessary or constrained by the failure of their predecessors . . .*

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neither legislative election of the executive, nor a plural executive, nor a council to control the executive was admissible.

Between these poles of inhospitability to an autonomous executive and fear of popular domination, the Convention drifted. Proposals to choose the president by direct popular vote were more than once beaten back by delegates from smaller states, who, having secured agreement to parity of representation in the Senate, did not wish to be outvoted in the presidential election. The powers of the new office were likewise uncertain, and the idea of a legislatively-appointed council, to control the president, kept resurfacing.

In the end, these matters were resolved by a few delegates whose understanding and experience in the states differed from those of most delegates. Although legislative supremacy had prevailed in most states, executive power had not been subdued everywhere.

In Pennsylvania, unlike every other state with an executive council, the council was elected by direct popular vote, and its powers were provided in explicit terms. Although the Pennsylvania Council protested legislative infringements of its power, it, like other state executives, ended up feeble. Still, there was a principle of separate election there.

Alone among the states, New York had no council whatever. Its executive power was confided to a governor, directly elected for a three-year term and exercising broad powers borrowed from the Pennsylvania Constitution. New York's governor exercised his powers vigorously, frequently vetoing legislation and putting down disorder, including the spillover of Shays' Rebellion across the border. Slowly, the New York example made itself felt in neighboring states that sensed the lack of independent executive authority.

The New York experience established the utility of executive power and exemplified some of its indispensable features: a single executive, elected directly for a fixed term, and possessing broad powers, especially the veto. All these features, save direct election, found their way into the Constitution. A Pennsylvanian, James Wilson, and a New Yorker in the Pennsylvania delegation, Gouverneur Morris, both keenly aware of the New York experience, had argued for a strong, independent, popularly-elected executive. They had made some inroads before the whole body but never carried the point. Only in committee did they finally prevail. Wilson, who drafted the report of the Committee of Detail, insisted on the independence of the president, uncontrolled by any council, and he enhanced the powers accorded the president. Gouver-

*As colonials who had felt the brunt of the Crown at a time when it was unusually potent, the delegates were ill disposed to consider anything that smacked of elective monarchy.*

neur Morris, the leading member of the Committee on Unfinished Business, organized the presidency, laid down its four-year term, and shaped an Electoral College for presidential selection.<sup>3</sup> The Electoral College made the plan more attractive to the small states than legislative election or direct popular vote would have been, and this fact made the final product impervious to opposition.

The work of Wilson's Committee of Detail certainly did not express "the will of the parent body,"<sup>4</sup> and the product of Morris' committee was acceptable only because it was so astute a compromise, breaking the deadlock over who would elect the president. The advocates of what was called "a high mounted government" had prevailed behind the scenes over the more powerful "prejudices [against] the Executive," in Wilson's words, prejudices resulting from "misapplication of the adage that the parliament was the palladium of liberty."<sup>5</sup>

#### **Presidents, Firm and Infirm**

Although an independent presidency emerged in the document that issued from the Convention, the anti-monarchical currents of the Convention survived it. When they examined their work, some of the delegates, fearful of monarchy, "stood aghast." "From an official designed to be, at the outset of the convention, a dependent of the legislature, the executive had developed into an independent figure of importance."<sup>6</sup> On the floor of the Convention, so expansive a view of the office was exceptional, even among those with direct knowledge of the persistent meddling of the Confederation Congress in administrative details. Outside the Convention, among a people steeped in revolutionary conceptions of popular sovereignty and suspicion of concentrated executive power, an office

*When they examined their work, some of the delegates, fearful of monarchy, "stood aghast." "From an official designed to be, at the outset of the convention, a dependent of the legislature, the executive had developed into an independent figure of importance."*

like the presidency was regarded with misgiving. When, in *The Federalist* Nos. 69 and 70, Hamilton likened the office at once to the British monarch and the New York governor and commended the attributes of "energy . . . [d]ecision, activity, secrecy, and despatch" made possible by the provisions of Article II, he was not reflecting the consensus of the Framers. What made such an office palatable at all was the knowledge that George Washington would be its first occupant, perhaps for many terms.

The debates on ratifying the Constitution focused more on the establishment of a strong central government in general than on the presidency in particular. Many of the Anti-Federalists feared a strong Senate more than a strong presidency, but all feared the two in combination. Americans had spent a good deal of energy in defiance of authority. Behind seemingly innocuous, uncalculated executive action, they were recurrently able to find dark and sinister plots to establish tyranny. They nursed an abiding uneasiness with power, an uneasiness conspicuous at the Convention and surviving it. The Convention made available a single office, redolent of the British monarch, as an object for fears of conspiracy to establish tyranny. In a revolutionary polity, the presidency did not begin as a fully legitimated office.

The problematic character of the office was illustrated by elements of cabinet government and parliamentary supremacy that survived its creation. Steeped in state practice, many of the Framers preferred, as we have seen, a council to limit the executive. Despite the dramatic departure of the Convention from such arrangements, the beginnings of cabinet government were discernible in Hamilton's Treasury reports to Congress, as well as in his attempt to become prime minister under Washington, and even more prominently in the inconsistent cabinet practice of the first two presidents. As governors had earlier been outvoted by their councils, both Washington and Adams occasionally yielded to cabinet majorities. But both also took action on their own. On one such occasion, Madison protested that Washington, employing what Hamilton had justified as inherent executive power, was exercising a British royal prerogative that the president did not possess. It was Jefferson who finally subordinated the cabinet, assuming personal responsibility for the whole executive branch, and Jackson who denigrated the cabinet by disregarding it.

Nonetheless, the early impulses to confine the president survived. Legislative supremacy was not easily defeated. Beginning with Jefferson, and for twenty years thereafter, the president was, in practice, elected by the Republican Congress—the very scheme rejected in Philadelphia—and was essentially a creature of his legislative party. For some time, it was unclear whether the president had the power to remove an officer who had been confirmed by the Senate. The matter was narrowly settled in Washington's favor by Vice-President Adams' tie-breaking vote in the Senate. Had it come

out otherwise, congressional control would probably have been unavoidable. As late as 1835, Tocqueville mused that the presidency was inherently a weak office, likely to be strengthened only in foreign affairs, as military power grew, and that in a conflict Congress would surely prevail over the president.

Popular early presidents often suffered eventual public rejection. By the end of his second term, Washington was held in such low esteem that he barely secured ratification of the Jay Treaty, averting war with Britain. Twice the Virginia legislature refused even to pass farewell resolutions commending his "wisdom." Jefferson, too, lost virtually all his support over an unpopular foreign policy, the embargo on trade with France and Britain. Accused of autocracy, he, like later presidents, refused to credit reports of his low standing even in his own party. To lose public regard at the end of one's term is not the same as to lose it in the middle. Still, rejection of presidents, rooted in deep resentment of executive power, has early antecedents.

Hamilton had argued in *The Federalist* that a fixed four-year term would "contribute to the firmness of the Executive," enabling him "to dare to act his own opinion with vigor and decision" against the vagaries of public sentiment. The indirect election of the president by an *ad hoc* Electoral College was also to be a support of executive firmness. Since Jackson's time, however, the Electoral College has been transformed into a body reflecting the will of state electorates. What has evolved is a close approximation of the direct election of the president that was rejected by the Convention because it would put the president at the mercy of the popular will.

More recent institutional changes have also deflected the expectation of the Framers that a directly elected Congress (or House) would be more closely accountable to public opinion than a president chosen by an Electoral College. With the growth of interest groups (to some extent at the expense of parties), the decentralization of congressional business, and the increasing advantages of incumbency, Congress has become, not the successor to the populist state legislatures the Framers feared, but the frequent servant of myriad segmental interests, none of them neces-

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sarily majority interests. Changes in the presidential nomination process, on the other hand, have heightened the direct influence of the electorate in the choice of presidents. The four-year term remains—although the Nixon resignation is a precedent of uncertain future application—but little besides the fixed term induces a president "to dare to act [on] his own opinion with vigor and decision," over any extended period, when the public has other ideas. In significant ways, the expectations of the Framers about the independence of the respective branches have been turned upside down. Presidents carry polls in their pockets.

#### **Beneath Declining Approval**

Attitudes embedded in the national culture do not, by themselves, account for the recurrent pattern of sharply declining approval within each presidency. High approval at the outset of a presidency—almost always higher than the president's share of the popular vote a few months earlier—followed by a more or less swift decline, recapitulates the course of positive childhood attitudes toward the president, which decline steeply with the onset of adolescence. Without much deeper investigation of both phenomena, this point cannot be pushed very far, but the analogy (if that is all it is) has one immediate benefit. It suggests very clearly that the early approval ratings are not wholly directed at any given president: they reflect idealization, akin to the childhood idealization of the office.

Lack of party loyalty helps explain volatile approval ratings. A recent study suggests far more movement of individual respondents over time—especially from approval or disapproval to "undecided" and then back again—than might have been suspected.<sup>7</sup> Respondents with the most changeable attitudes were those least involved in politics, and strong partisans, whether Democratic or Republican, were least likely to change their opinion over time. Over the last 25 years, party identification has been declining, as more voters have become independents, or switched parties, or voted split tickets. Declining party loyalties probably bear much of the responsibility for the especially tenuous approval ratings of recent presidents. Strong party loyalty can cement people's ties to an incumbent they might otherwise come to dislike. The rejection of

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presidents is a common occurrence in American history, but it seems easier to achieve now, and the decline of party loyalty furnishes a solid basis for understanding a good part of the change.

**Congress: Clothed in the Law**

Of the institutions which define the incapacity and the scandals that make for presidential failure, perhaps the foremost is Congress. To be sure, the institutional interest of Congress in presidential failure is tempered by the interest of congressional members of the president's own party in reelection, but between elections Congress can benefit from exposing executive misfeasance. At such times, the branch asserted to be mired in "special interests" is able to support rectitude and clothe itself in the law.

It is not really possible to have a scandal or even a single profound policy failure in Congress. Congress is not a coherent, corporate body; it cannot be accountable as one. The major congressional scandals of the postwar period, most of them involving sexual or payroll peccadillos, did not rub off on the institution. The presidency, by contrast, remains a corporate entity, on which responsibility can ultimately be fixed. In fact, its corporate character is a major reason for the expansion of the White House staff, to accomplish something close to what the president wants to accomplish. The White House is a creature of its leader's style of advice-taking and decision-making, as virtually every study of the presidency attests. The White House is also a creature of its leader's personal failings, whether they be Carter's excessive concern with detail or Reagan's neglect of it, Johnson's humiliation of subordinates or Nixon's encouragement of their fortress mentality. In Congress, the styles and flaws of members are mainly interpreted as idiosyncracies of their office; they rarely extend even to the committees they chair. Misfeasance disgraces only individuals.

The approval ratings of Congress typically rank lower than those of the executive. Congress runs fairly consistently on low to moderate levels of public confidence. The equivalent of high presidential approval does not exist for Congress—another proof of the unique character of the presidency. The approval relationship of the branches, however, is reversed in times of presidential failure. When Johnson's popularity was waning in 1966 and 1967, Congress edged ahead of him. In the pre-Watergate Nixon years, Nixon ran several points ahead of Congress, but the televised Senate Watergate hearings changed this dramatically.

By September 1973, only 19 percent of respondents had "a great deal of confidence" in the president, compared to 30 percent with a great deal of confidence in congressional leaders—this at a time of markedly low confidence in institutions overall. Too much scandal is dangerous, of course, for the lack of confidence may be generalized, but misfeasance involving executive branch violation of law is more often than not in the interest of Congress, and its members have long known this to be true.

In exposing misconduct, Congress works in tandem with the press. In fact, as Stephen Hess has shown in his book, *The Washington Reporters*, the most important news stories about the White House come from congressional sources. Congressional staffs have grown about eight-fold in the postwar period, so there is no shortage of sources. Nor is there any shortage of motivation. Especially since the popularization of the presidential nomination process, through the increased importance of primaries and the less professional composition of party conventions, the president is only nominally the leader of his party. Presidents are often inclined to think that they got to the White House by themselves, that they know the public interest better than Congress does. Such views and the resulting neglect of Congress, which reached its apogee in the Carter years, sometimes create the desire for vengeance.

**The White House: Coherently Irregular**

The vulnerability of the White House is vastly enhanced by the unprofessional character of the White House staff and its loyalty to each serving president. The whole point of the White House staff is that it constitute an assembly of loyalists who can counter the centrifugal tendencies permeating American government and bring a measure of coherence to the president's policy and its implementation. The president is entitled to organize his office as he sees fit, and this means virtually no carryover of personnel from the previous administration. The importance of outsiders in the White House goes back to Andrew Jackson's kitchen cabinet, which displaced the nominal cabinet, and in this century to Woodrow Wilson, who brought, not only Colonel House to the White House, but several of House's relatives as well. The stronger the aspirations of the president, the more

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pervasive the tendency to assemble strong-willed outsiders on the inside. Very often, the main experience those outsiders bring to the White House is service to the president in prior official incarnations (especially governorships) or in a long series of primary campaigns. As the Nixon, Carter, and Reagan Administrations attest, neither is optimal experience for governing at the center.

From time to time, Congress has tried to control aspects of White House organization. The Council of Economic Advisors and the National Security Council were created by Congress as a check on Truman. He responded by declining to call upon their services. The attempt to regularize the presidency is uniformly regarded as an attempt to weaken it. The hallmark of the White House staff is its irregularity. The very purpose of the staff is to accomplish things, in the face of deliberately inertial constitutional arrangements, to accomplish things in spite of Congress, occasionally against Congress, and to do so with Hamiltonian "secrecy and despatch"—in short, to do things that will, on occasion, incur profound disapproval and utilize means that are not bureaucratically regular but idiosyncratic to each president. The enormous growth of the staff in recent decades multiplies the opportunities for irregular action.

Cautioning against a plural executive, Hamilton, in *The Federalist*, warned that a proliferation of personnel would make personal accountability for executive misdeeds difficult to establish. It would deprive the public of "the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office, or to their actual punishment in cases which admit of it." As the protracted crises of the Nixon and Reagan Administrations show, Hamilton was correct. In public psychology and in legal conception, we have the unitary executive of the Framers; in the difficulty of tracing responsibility and in the accompanying immobilism, we have something closer to the plural executive they rejected.

### Reveling in Revelations

In exposing misconduct, the press plays a central role. Volatile presidential approval ratings insure that the president is concerned with his public audience. This dramaturgical imagery is appropriate in the light of recent developments in the mass media. Here I refer not merely to the enormous influence of television—98 percent of all homes have one, and 50 percent have two or more—or to the now well known career rewards of investigative reporting. Rather, I have three specific things in mind. The first is the extent to which presidential failure is good business for the mass media. The second is the selective memory function of the media, which at first exaggerates what a new president can accomplish but later underscores similarities between current crises and earlier ones. The third

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*Presidential failures cast long shadows over later presidents, whose transparent strategy is to find ways to make the analogies look far-fetched.*

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is the effect of differentiation and synergism among the mass media.

Like Congress, the press thrives on the slowly unfolding story behind the scenes. When the executive editor of the *Washington Post* confesses, of the Iran-Contra revelations, that he has not enjoyed himself so much since Watergate, he may be expressing excessive professional exuberance. The shareholders presumably have additional reasons for enjoyment. It is not merely that the *Post* became a truly national newspaper in the course of Watergate but that it and the *New York Times* became major national news services, with greater authority (and earning power) than the established wire services. Similar points could be made with respect to television news programs and coverage of Senate hearings, which in ordinary times produce poor ratings. The point is so obvious it is virtually never made. Audiences are more attentive over longer periods at times of domestic crisis than at virtually any other time. The press may be a public service, but it is assuredly in the private sector.

Quantitative study of the traditional press "honeymoon" with the winner of a presidential election shows a change after Nixon. During their transition periods, both Carter and Reagan received more negative treatment in the national press than Nixon had in 1968-69.<sup>8</sup> Presidential failures cast long shadows over later presidents, whose transparent strategy is to find ways to make the analogies look far-fetched. In Reagan's case, this means to avoid at all costs conducting himself "just like Nixon." Vietnam, Watergate, and the resignation of Nixon stalk presidents decades later, if only because of the need of journalists to supply some context for events. Journalists looked with incredulity on Reagan's "Teflon" presidency, one suspects, because they could no longer imagine a president not under siege as operating in normal conditions. They reflected disbelief at his failure to fail, as other

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presidents had. There is now an expectation of failure, and Reagan is fulfilling it.

Beyond the common definition of news, there is a division of labor between the press and television. Television is a medium that flourishes by focusing on people, not institutions. Although moving and visual, television stands still: it cannot show a process. The machinations of interests in the corridors of the Capitol make good print copy, but they do not fit on the screen. Stories about Congress are more common in newspapers; stories about the White House are more common on television. Television is the president's medium. It will make him look better when he seems to be good, worse when he seems to be bad. It will report his summit meetings with fanfare, his Cuban missile crisis with gravity: it has a tone of voice. It will show his flaws in microscopic detail. It showed Ford stumbling off an airplane and stumbling over Eastern Europe's freedom from Soviet domination. It showed Carter stumbling in a race. It showed Ford and Carter as stumbling presidents. It showed Johnson and Nixon entombed in the White House while democratic protest swirled outside. Ever personalistic, it serves to attribute blame. But it can do none of this without the print media.

Newspapers uncover the stories that television popularizes. Newspapers report details of inside maneuvering, which the nightly news typically portrays as the difference between what was said and what was really done. The two together are perfectly positioned to cater to the public's suspicion of deception. The press finds, confirms, and certifies the facts. Television disseminates those facts and alerts the audience to the next day's press revelations. Television may be the more trusted medium, on which two-thirds of Americans rely for their news, but it enjoys that status because of its synergistic relations with the print media.

### Parliamentary Temptations

There are recurrently those who want to alter the presidency. A century ago, Henry C. Lockwood wrote a book called *The Abolition of the Presidency* (1884), arguing for its replacement with an executive council, on the Swiss model. A year later, Woodrow Wilson published *Congressional Government*, in which he suggested that Congress was so dominant the president could almost be a civil servant. An Anglophile, Wilson admired Gladstone's England. He particularly preferred the coherence of policy emerging from open

debate and a responsible cabinet to the incoherence of congressional committee government and the purely ministerial functions of cabinet secretaries in the United States. Wilson favored a parliamentary system, and his hero in the Philadelphia Convention was neither James Wilson nor Gouverneur Morris but Roger Sherman, the apostle of legislative supremacy.

Wilson was reacting to the weak presidencies after Lincoln. With the presidency of Grover Cleveland, he changed his view. Others, however, have followed in his path, typically when presidents were weak or national problems seemed so urgent as to demand structural change.

The latest entry is the work of James L. Sundquist and the Committee on the Constitutional System.<sup>9</sup> To Sundquist, the major problems of American politics are "failed presidents" and "divided government," in which the White House is held by one party, Congress by the other. The Nixon resignation, far from helping to destabilize later presidents, was a "useful precedent" for those times when a president "has discredited himself beyond recovery." The problem was the inability of Congress to remove Nixon by a vote of no confidence.

Now, too, Sundquist looks to the parliamentary system as "a source of ideas for incremental steps that might bring more unity to the American government," if adaptable to American conditions. He would permit members of Congress to sit in the Cabinet and provide a mechanism for new national elections, at the instance of the president, or the House, or the Senate, so "either branch could challenge the other to a showdown, with the people to decide." As things now stand, the "United States is in bondage to the calendar," so that unfit presidents (he cites Herbert Hoover, among others) cannot be removed and interparty-interbranch deadlocks cannot be resolved. Such a change would be the boldest departure at a single stroke since the Philadelphia Convention.

It is too bold for public opinion. Even at low points in public confidence, survey respondents have overwhelmingly attributed the failings of government to bad leadership, rather than systemic defect, and have shown themselves open only to changes that would recruit different leaders or otherwise make the existing system work better. In 1984, a survey found that 54 percent of Americans explicitly preferred a situation in which no one party controls both the

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presidency and the two houses of Congress; only 39 percent preferred one-party control of both branches. The public is firmly attached to the separation of powers and to interbranch-interparty checks and balances.

That attachment, however, is not the only problem with the current constitutional Anglophilia. The assumption that, in the United States, with its legislative entrepreneurs, the threat of a no-confidence vote would help break interbranch deadlock, rather than exacerbate that problem, is entirely fanciful. The further assumption that termination of a failed presidency would produce a successful successor is based on the belief that the failures are idiosyncratic. But one failed president has been followed by another. A no-confidence mechanism would be likely to quicken the tempo of such replacements, sending the electorate to the polls more often and placing candidates further in debt to the interest groups and campaign financiers that, as Sundquist recognizes, already detract from party cohesion. A no-confidence vote might change a president quickly enough, but it would shorten the investigation of wrongdoing in the executive branch and so undermine the public sense that ultimately the system gets to the bottom of things—an especially important sense to satisfy, given the deep American belief in executive deception.

### **An Emerging Pattern**

Does the evidence we have reviewed merely suggest that the presidency is in the same condition as it has always been? Historical continuities certainly stand out. The suspicion that executive authority will turn to tyranny has never been far below the surface. Public opinion has always been fickle, even rejecting the most popular of presidents. Parliamentary impulses, going right back to 1787, surface at times of presidential difficulty. They will no doubt do so again, with attempts to regularize the White House staff and appointments by making them more acceptable to Congress. Power has always flowed from as well as to the White House.

There are, however, new elements in the situation of the last two decades. The decline in party identification is palpable. A president can no longer depend on a large core of committed supporters who will stay with him through thick and thin. Likewise, with the tenuous bonds of common party across the branches loosened further by changes in the presidential nominating process, there is less restraint in Congress on benefiting from protracted crisis. Bigger congressional and White House staffs allow more opportunity for things to go wrong and more opportunity to discover mischief. Legal restrictions deriving from previous crises often require consultation with Congress before executive action is taken, institutionalizing opportunities for confrontation as much as for consultation. Finally, there is the habituating impact of five consecutive presidential failures.

*Television is the president's medium. It will make him look better when he seems to be good, worse when he seems to be bad.*

Harder to pin down but vitally important, are qualitative changes in the formation and impact of public opinion. Where once the authority of presidents depended on their persuasive power with key elites, to some extent apart from public opinion, now elite and mass opinion feed each other. Governmental and media leaders alert the public to the importance of problems in the executive branch, and those elites then pay serious attention to the public opinion they have helped arouse. In good times, presidents play to favorable public opinion, creating a self-fulfilling prophecy of failure when approval ratings inevitably sink. Elite opinion has been democratized. There is in place a formidable, if inchoate, opposition to presidents, ready to be activated at any sign of trouble, and the trouble reflex is in excellent condition.

It would be ahistorical to assume these new conditions are permanent. Previous periods of presidential weakness have passed. Eventually, this one may, too, but what we are witnessing now is not just more of the same.

Do any consequences attach to increasing presidential failure? Sharply declining popularity is not tantamount to complete ineffectiveness. Studies of the relationship between presidential popularity and legislative success turn up few consistent patterns. The conventional wisdom that a president at the peak of his public approval can get anything he wants, while a discredited president can get nothing, appears to be wrong.

Presidential failure in foreign affairs is an altogether different matter. The Framers expected the president, or the president and an indirectly-elected Senate, to play the leading role in foreign affairs, where decisiveness counted. Jefferson was of the view that diplomacy must be "executive altogether." Congressional involvement for two decades has been heavily biased toward restraint overseas. In part, this is because international politics requires action on the basis of diffuse dangers and abstract balances of power, before threats get close to home. Congress does not conceive of problems in this way; it responds to perceptible pulls and tugs. In part, the propensity to think in terms of analogies is also at work. Vietnam is still a powerful analogy. And in part, too, the travail of the president in foreign policy is a mark of how difficult are the problems, how various the constraints, impinging on the office.

One of those constraints—critical public opinion—has grown at the same time as a key presidential resource—the leeway that derives from party loyalty among the

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public—has declined. Anyone who views with less than equanimity the emerging pattern of presidential failure might well pay close attention to the revitalization of party and party loyalty in American politics. The design of the Framers was such that the functioning of institutions depends on small balances, and the balances underlying the presidency have shifted. The result is that the president has not been able to carry the public very far in foreign policy. Distrust of executive power is part of the culture that prevents tyranny, but it can also inhibit leadership in a world in which other countries have an abundance of executive power. It is remarkable how much the Reagan foreign policy resembles the Carter foreign policy it was supposed to displace. Tempted to show strength in Beirut, Reagan withdrew when the marines were attacked, preferring to fight only where it was safe to do so, on the ground in Grenada and in the air over Libya. For both Carter and Reagan, fighting seemed so implausible an option that enemies were able to pick away at American interests and to take hostages with impunity.

Presidents have always had to trade off their view of what the national interest demanded against what their popularity would allow. With popularity volatile, however, even an ideological president like Reagan has had to scale down his conception of national interest. Add to this the usual American impatience for quick results—Americans declare war on poverty and then promptly surrender—coupled with the unlikelihood of quick results on most difficult problems of international relations, and there is little basis for steady foreign policy in the absence of direct, dire threats to national security. When he traded arms for hostages in Iran, Reagan must have understood very well that his tough, publicly-declared policy lacked credibility in Tehran.

Of the three main contributions the United States Constitution has made to the art of government—a federal republic in a continental country, judicial review, and the presidency—the separately elected executive is in many ways the most remarkable. A century after the British had subjected their monarch to parliament,

the Americans gambled on an executive elected outside the legislature. It was a fortunate stroke—one now increasingly imitated in other democracies—for it created an executive able to speak with one voice for a complex government, its powers separated and layered, a government that could otherwise not speak coherently at all. Relatively little value was placed by the Framers on getting things accomplished, and direct responsiveness to the people was, to them, more a vice than a virtue. The fixed term—being “in bondage to the calendar”—insured that the president would not serve at the pleasure of Congress or of a fickle public opinion. To the extent that this innovation is in danger, the presidency is failing.

1. Although presidential failure may be a cumulative or progressive phenomenon, there is also much continuity in the oscillation of sentiment toward individual presidents since 1945. The Gallup Poll has been asking Americans for decades whether they approve of the way the president is conducting his office, and they have provided abundant evidence of inconstancy. The average difference between high and low approval rates for presidents, including Reagan, is 41 points, as Table 1 shows.

TABLE 1  
PRESIDENTIAL APPROVAL SINCE WORLD WAR II  
(Percent expressing approval)

President	High	Low	Difference
Truman	87	23	64
Eisenhower	79	49	30
Kennedy	83	56	27
Johnson	80	35	45
Nixon	68	24	44
Ford	71	37	34
Carter	75	21	54
Reagan*	68	35	33
Mean	76	35	41

Source: Gallup Poll data

\*Through January 1987

2. M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, 288 (rev. ed. 1937) [hereinafter M. FARRAND].

3. The Electoral College idea had been discussed inconclusively in earlier speeches on the floor, including one by Madison. *Id.*, Vol. 2, at 109-11.

4. C. THACH, JR., THE CREATION OF THE PRESIDENCY, 1775-1789 118 (2d ed. 1969).

5. M. FARRAND, *supra* note 3, at 300.

6. M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 161 (1913).

7. Tedin, *Change and Stability in Presidential Popularity at the Individual Level*, 50 PUB. OP. Q., Winter 1986, at 555-62.

8. Johnson, *The Honeymoon Period: Fact or Fiction* 62 JOURNALISM Q., Winter 1985, at 869-76.

9. J. SUNDQUIST, CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT (1986); A BICENTENNIAL ANALYSIS OF THE AMERICAN POLITICAL STRUCTURE (1986).

# Business Negotiations with Japan: Sometimes a Frustrating and Difficult Endeavor

*Percy R. Luney\**



**T**here is no ideal model for an American versus Japanese negotiation session. The negotiation methodology depends on the subject and individual negotiators' personalities and skills. Each participating negotiator comes to the bargaining table with unique sociocultural background knowledge reflecting his or her life experiences and education. As Americans and Japanese learn more about each other, the dynamics of the negotiation process will inevitably change. Future sessions with other Japanese or American negotiating teams will reflect the experience gained from previous sessions.

Mutual trust, the most critical factor for sustaining a long term and successful working relationship, is very difficult to maintain in U.S.-Japan negotiations.<sup>1</sup> The current U.S.-Japan political climate surrounding trade issues encourages confrontation rather than consultation.<sup>2</sup> Inflammatory and/or inaccurate statements by the press, and business and political leaders often result from ethnocentrism and reflect linguistic failings and cultural misperceptions.<sup>3</sup> There are simply too few Americans who can communicate in Japanese or who understand Japanese culture and history. Likewise, there are too few Japanese who fully comprehend the immense diversity in the American society and political system. Unfortunately, there are very few fully knowledgeable simultaneous translators who also understand the different nonverbal behavior patterns of Japanese and Americans.<sup>4</sup> Consequently, misinformation and ethnocentrism at the bargaining table inhibit cooperation and trust.

### **Differing World Views and Styles**

Confucian philosophy imported from China in the fifth century, has been a primary influence on the Japanese culture and personality. Confucianism sees the world as a single organism governed by certain unchanging laws (*dao*) which mandate cooperation rather than competition among men. This philosophy stresses social compassion (*jen*), harmony and concord (*wa*), and social ties (*en*). Relationships are governed by an intuitive understanding of one's place in a larger scheme. Japanese culture, therefore, emphasizes group

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identity and conformity in a uniform social structure. American culture, on the other hand, relishes diversity and praises rugged individualism and aggressive determination. These cultural differences are, of course, reflected in the respective educational systems.

Throughout the American educational process, students are taught to compete individually in everything from academics to athletics. Americans learn about team competition and cooperation, but the emphasis is placed on individuality, independent thinking, and equality. More often than not, competition in America necessitates the formation of adversarial relationships. These American cultural values and behavior norms strongly influence the American negotiation style.

In contrast, the Japanese educational process reinforces the cultural values and behavior norms which support group loyalty and the consensus decision making process. Individual needs are deemphasized in favor of the group's goals. The group may be family, village, neighborhood, school, company, or club. Cooperation, obedience, loyalty and listening skills are stressed in this educational process and are reflected in the Japanese negotiating style.

The Japanese adhere to rules of bargaining that are quite different from those to which Americans have become accustomed. Americans favor hard, aggressive bargaining, while the Japanese favor a more peaceful, harmonious exchange establishing a long term relationship between the parties as described below.

It should be noted, however, that although Japanese negotiators are extremely polite, this veneer of traditional politeness hides an aggressive business personality. Little has been written concerning the aggressiveness that Japanese business persons have developed after several decades of successful international trade and investment. Mistaking the historical tradition of politeness as symbolizing a lack of aggressiveness or assertiveness in the Japanese character, many Americans misinterpret the Japanese negotiation style and proceed too hastily. The Japanese expect business negotiations to display the polite formalities that they demand in other human relationships in Japanese society. Most Americans are not conditioned to asserting strong business interests during negotiations while maintaining a superficial veneer of extreme politeness. Trying

to negotiate as a Japanese business person would negotiate places most Americans at a disadvantage.

To the Japanese, developing a personal relationship is critical to the formation of mutual trust in the business relationship. Therefore, the personality of the foreign negotiator is very important. If the American negotiator speaks Japanese, has worked in Japan or understands Japanese history and culture, this personal relationship is much more easily developed. The development of this personal relationship between the negotiators is a precondition to the establishment of a more lasting business relationship between the parties. Japanese negotiators begin building this relationship by engaging in a feeling out or socializing period prior to formal negotiations sessions. Personal information is exchanged while the Japanese observe how an opposing negotiator interacts with other team members, describes himself and asks questions.

The Japanese prenegotiation socializing period is called *nemawashi*, preparing the ground or wrapping the roots, and prepares the negotiators for transferring their ideas without conflict. Business cards should be exchanged,<sup>5</sup> gift giving should take place,<sup>6</sup> and social activities which have nothing to do with the negotiation, such as a friendly dinner, should be planned. American negotiators should be fully briefed on Japanese business and social etiquette, including the importance of business cards and gift giving, before meeting the Japanese negotiators. These activities provide the American negotiators with the opportunity to create positive, personal relationships with Japanese negotiation team members. Socializing may also continue after business hours during the negotiation itself.<sup>7</sup> The amount of time consumed varies, but its importance to the overall negotiation process should never be underestimated.

The Japanese want to know the general operational picture of the proposed venture between the two parties. During initial negotiations, the Japanese seek to probe the American negotiator's attitudes and ideas. Although these probes may be unrelated to the underlying business deal,<sup>8</sup> the Japanese negotiators are attempting to learn the attitudes, personalities,

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and thinking patterns of the American negotiators to ensure that a long-term business relationship characterized by friendship and trust is truly desired.<sup>9</sup> The Japanese want to learn how sincerely the American negotiators want to be partners in the venture and whether the American negotiators are qualified to act as negotiators. American negotiators should not resent this process, but should send signals to the Japanese negotiators during the initial stages of the negotiation that future prospects for mutual cooperation are good. American negotiators should try to establish their trustworthiness and display their understanding of the general business climate surrounding the subject of their negotiation.

For the Japanese, the negotiation process itself is "more of a ritual, with actions predetermined and pre-specified by status relations."<sup>10</sup> Status distinction may be determined by age, sex, place of education, firm, one's position in the firm or the firm's industry. "Values that determine the relative weights of role and status, company size and name recognition, and perceptions regarding the true intent of negotiators affect the negotiation process."<sup>11</sup> Bargaining strategies are determined by the vertical hierarchy of interpersonal relationships.<sup>12</sup>

The Japanese principle of *amae* reflects the social hierarchy of dependent relationships influencing Japanese negotiators. *Amae* describes the initial feeling of dependence children originally feel toward their mothers which is reflected later in other childhood and adult interdependent relationships. Employees have an interdependent relationship with employers. Employees presume the benevolence of employers who accept this dependence by taking responsibility for the lives of their employees.<sup>13</sup> The concept of *amae* operates in all vertical relationships in Japanese society.

By gaining an idea of how much the person depends on and is depended on by others (*amae*) on the team, the experienced negotiator can make preliminary judgments on how to proceed with various communicative strategies . . . to begin to establish a sense of harmony. . . . Both sides need to become more aware of the need for trust, phatic communication, and *amae*, dependence.<sup>14</sup>

Japanese society is well-organized according to these status relationships as exemplified by the hierarchical structure of Japanese corporations. Although senior/junior executive relationships are by no means perfect, they are carefully designed and structured with many social restrictions to minimize conflict and to encourage harmony. The strict ranking system and the incentive for being promoted have helped the Japanese maintain rigidity of corporate discipline that in turn helps the Japanese business persons to negotiate with outsiders as a team. And in understanding the character of Japanese negotiators, Americans must always remember that the Japanese negotiators

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are working as a team and that they view the Americans as outsiders. "Not only is theirs a group-oriented way of life, but from early childhood they have little opportunity at home to socialize with foreigners. They are taught at school about foreign countries, their different cultures, and languages—but always as something completely outside of their own system."<sup>15</sup> The Japanese will speak in one voice and explain their ideas in one tune.

Japanese characterizations of American negotiators and American negotiating behavior contrast with this "team mindedness" and provide informative insights.

U.S. negotiators are difficult to understand because they come from a background of different nationalities and experiences. Thus, much of what they do is truly unpredictable and erratic. At the same time, there is reason to suspect that beneath the rather disorderly appearance of U.S. negotiating teams whose members often seem not to be listening to each other and do not even dress in the same style, there is a calculated set of tactics and objectives which guide them.<sup>16</sup>

This comment implies that Japanese negotiators are often confused by the lack of uniformity of American negotiators and their failure to work as a team. American negotiators should be consistent in presenting their position and plan strategy so that each member of the negotiation team is fully versed on the issues to be discussed. Special efforts must be made to ensure that each member of the negotiating team is aware of the organization's position on the issues.<sup>17</sup>

In any negotiation between Americans and Japanese, the number of Japanese participants will normally outnumber the number of American participants. It is not uncommon for the American negotiators never to comprehend fully the purpose for which some of the Japanese participants are attending the negotiation sessions, and Japanese participants never go out of their way to explain their purpose in attending. It is clearly an advantage for the Japanese non-active participants, however, to observe the process of the negotiations and to make specific suggestions and recommendations to their superiors relating to their specific fields of expertise. The number of participants also can be an indication of the seriousness and commitment of the Japanese company to the negotiations.

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The strict ranking system of Japanese business executives is very apparent in the negotiation process. In the early and concluding stages of negotiations, senior officers of equivalent status from both organizations should meet to establish the cooperative relationship necessary for successful negotiations. Details of the agreement can then be negotiated by lower ranking members of the two organizations' hierarchies.

Japanese negotiation strategy for establishing the final agreement incorporates a unique Japanese consensual decision making process within the hierarchical structure. "Known as *ringi seido* (written proposal system), it is a system of middle-up management, of consultation to reach consensus, of subsequent writing of the proposal (*ringisho*), of circulation of the proposal for approval by those whose opinion helped shape it, and finally, of approval or objection by top management."<sup>18</sup> A Japanese negotiator, therefore, rarely gives immediate answers to proposals. The Japanese corporate structure and decision making process enables the Japanese negotiator to shift the burden of an immediate reply to a later time with the excuse that the person with the necessary input for the decision or the person with the authority to make the decision is not present. (Though, in some instances, this might also be interpreted as a polite way of saying "no" to the proposal on the table.) This decision making process involves middle and lower management in the decision making and creates a sense of purpose throughout the organization in the substance of the negotiations. The series of discussions leads up the ladder right to the top where the negotiators are given the final go ahead to conclude the agreement. This is necessarily a slow moving process and American negotiators should prepare to accommodate it.

It should be noted that Americans, on the other hand, negotiate an agreement and then return to their organization with the goal of gearing up to comply with the new agreement's terms. This can take longer than the Japanese decision making process. Americans must sell their agreement to middle and lower management and plan implementation. For the Japanese, this has already been accomplished, and they are normally ready to proceed immediately after the agreement is concluded.

Face saving is very important in Japan and also relates directly to this Japanese decision making process. Japanese are much more sensitive about face saving than Americans. Americans are prone to confrontation by addressing issues directly during negotiations.

On the other hand, the Japanese may be deliberately vague on specific issues to avoid any possible confrontation. "This vagueness may be due to the need to obtain consensus in decision making and the desire to save face, in case a reversal of position needs to be made at a later time."<sup>19</sup> Vagueness may also result from a desire on the part of the Japanese not to include the issue as a subject for negotiation. An outright Japanese rejection of an American proposal results in a loss of face for the Americans and vice versa. Loss of face by one negotiating party can destroy the harmony (*wa*) of the relationship. American negotiators should not back Japanese negotiators into a corner on unresolved issues.<sup>20</sup> Japanese negotiators need room to maneuver and change positions without loss of face during their long decision making process.

### **The Language Barrier**

Language may also pose a significant problem in negotiating with the Japanese. Japanese do not typically speak in very clear cut or precise terms. Hence, negotiations with Americans can be extremely difficult because the natural tendency for Japanese, whether speaking in Japanese or English, is to be vague and indirect. Unless the Japanese make a conscious effort to use direct language, it is very easy for normal, idiomatic Japanese to be misunderstood by Americans who understand some Japanese or rely on literal translations. In some instances, "normal Japanese expression and natural Japanese diction will not be suitable and will probably lead to worse problems than would be brought by the other extreme of no communication at all."<sup>21</sup> The only alternative is for the Japanese to alter their normal diction and expression and use a special kind of "very clear cut" Japanese when talking to Americans directly or through a translator.

A good example of traditional miscommunication in U.S.-Japan discussions and negotiations resulting from ambiguities in the Japanese language occurred in 1973 and was reported in the *Asahi Shinbun* (newspaper). The article (entitled *Vagueness of Japanese*) shows parallel concern for ambiguity among Japanese and ambiguity resulting from literal translation for the sake of foreigners.<sup>22</sup>

Reading the report in Newsweek magazine about the interview with former Prime Minister Eisaku Sato, we felt that the use of words is a very difficult thing. In the interview Mr. Sato touches on the problem of restrictions on textile exports in the meeting with President Nixon. Mr. Sato said, "I did not say that I would do anything specific. Japanese may say, 'I will think about it' and 'I will try to do something about it,' and Americans think we have actually committed ourselves and that some tangible result may come out of it, whereas in Japanese psychology it doesn't mean anything." What happens when an American hears a direct translation of the same words? There were many

experts who said, "They would mean that Mr. Sato promised specific steps."

This does not mean that saying things in a roundabout way or obscuring things is not good in all instances. In a country like Japan, with only one race, one does not have to say things directly to get things across to the other person, and speaking indirectly becomes a wisdom for avoiding friction. . . . In the case of Mr. Sato, however, there was an illusion in the fact that he thought that the evasive words usually used between Japanese would be understood by Americans. In talking to foreigners, Japanese should speak in very clear-cut terms.<sup>23</sup>

Negotiation between Japanese and Americans is usually performed in the English language. This can be a distinct advantage to the Japanese because they can more often resort to the tactic of selective understanding, that is to say, stating "I do not understand" or "That is not what I meant."<sup>24</sup> Many Japanese who understand and speak English fluently, use an interpreter in negotiations to allow them more time to consider their responses and to study the facial expressions and other forms of nonverbal communication expressed by the Americans.<sup>25</sup> Americans generally talk at the interpreter or listen to the interpreter while the Japanese watch and study the Americans.<sup>26</sup>

In a recent survey by Dr. Rosalie Tung at the University of Pennsylvania's Wharton School, most American companies (87%) involved in negotiations with Japanese companies which had a bilingual negotiation team member reported "that the presence of the bilingual member improved the quality of the negotiation and an almost equal number believed that the presence of the bilingual member increased the speed of the negotiations."<sup>27</sup> On the other hand, half the companies using interpreters were dissatisfied because their Japanese interpreters lacked a good command of the English language, and the negotiations suffered from misunderstandings.<sup>28</sup> Japanese negotiators tend to be more at ease if a member of the American negotiating team is bilingual and understands Japanese culture and business customs.

#### **Differing Legal Philosophies**

Of utmost importance to the lawyer who wishes to negotiate with the Japanese is an understanding of

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the difference in laws and legal norms regulating business transactions. In the western world the contract document governs the relationship between the parties. American businessmen rely on enumerated rights and duties in contract clauses to regulate the transaction and relationship between the contracting parties. In Japan, the relationship itself is paramount. The contract is merely a reference tool defining the parameters of a general contractual agreement. Most Japanese contracts are brief and rather vague by American standards. A general standard of "good faith" attaches to all Japanese agreements.<sup>29</sup> A lengthy contract designed to strictly regulate performance and address every contingency is not only unnecessary but insulting because the insistence on one's rights and another's duties implies that the other party cannot recognize his obligations.

"Keeping one's word" and "honoring one's promise" are basic norms of Japanese society which have been reaffirmed continually throughout Japanese history following their formal introduction in the Analects of Confucius, written between 551—479 B.C. Although written contracts are often used in Japan, they are not normally required by law. Oral contracts are legally enforceable and are used between Japanese merchants, businesses and companies. In sales transactions based on oral contracts "the sale shall be effective when one of the parties promises to transfer the right to some property to the other party and the other party promises to pay its price."<sup>30</sup> *Daku-sei-kei-yaku*, which means "contract formed by [oral or written] acceptance [of an oral or written offer]," is the basic rule of contract law in the Japanese Civil Code. Japanese contract law thus follows and reaffirms the moral norms "to keep one's word" and "to honor one's promise."

In Japan, as in the United States, written contracts eliminate the hazards of proving an oral contract in court. The terms and conditions of the contract are clear. However, the task of negotiating all the details of a written contract are time consuming and difficult for the Japanese. The precise wording, which satisfies all parties and clearly expresses their intentions, can be elusive. Without such wording, the trust needed to sustain a successful contractual relationship may not exist. Consequently, it is much easier to negotiate an oral contract of general agreement towards a spe-

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cific goal than a written contract of specific terms and clauses. The time consuming process of contract drafting is eliminated, and there is no necessity for the contracting parties to hire lawyers or to have the technical knowledge required to draft a written contract.

Mutual good faith covers all contingency situations and lays a foundation of trust on which the relationship and the agreement rest. A dispute between contracting parties is a deviation from the proper way that contracting parties should behave toward one another. Dispute resolution requires flexibility to discover a solution which bridges the gap in understanding and restores harmony to the relationship. It is not helpful to declare someone right and someone wrong on the basis of enumerated obligations in the contract document. Japanese often include so-called "round solution clauses" in their contracts. These clauses require a good faith conference and harmonious consultation in the event of a dispute between the contracting parties. Therefore, the contract document becomes a symbol and the contracting parties look to good faith and mutual trust for the success of their working relationship.<sup>31</sup>

With certain exceptions, oral contracts are generally void and unenforceable in the United States.<sup>32</sup> Many Japanese business persons have studied the American legal system and contract law as undergraduate law students at their Japanese universities or as graduate students in American law and business schools. From the Japanese perspective, American business persons have a sense of oral agreement derived from and cultivated under the Statute of Frauds. In other words, American business persons may lack the sincerity necessary to honor their words and promises. American case law provides many examples of business activities and conduct evidencing failure on the part of Americans to honor their words or promises. For this reason, the Japanese are very wary in business transactions and negotiations with Americans, and it becomes more difficult for Americans to establish the strong human networks so necessary for successful business operations in Japan.<sup>33</sup>

While it is common practice in the U.S. for commercial squabbles to be settled in a court of law, Japanese corporations are generally unaccustomed to lawsuits between business partners or coventurers and are embarrassed at the stigma attached to being sued by a party with whom the company has a business relationship. In Japan, a party who brings a legal

action is considered too aggressive and incapable of maintaining social harmony. Many Japanese mistrust lawyers because they believe that lawyers destroy harmony by advocating their clients' interests and ignoring compromises beneficial to society as a whole. Indeed, the prejudice against legal resolution of a dispute is pervasive in Japanese society, and the mere involvement by a Japanese company in litigation harms the company's domestic reputation by generating a public perception that the company has committed a legal breach. Litigation presupposes that there is a right and a wrong and is contrary to the Japanese emphasis on harmony and face saving in which relationships are preserved through mediation and conciliation without an undue loss of face to either party.<sup>34</sup>

Japanese can be intimidated by threats of litigation but such threats constitute a double-edged sword. The Japanese are very unwilling to engage in courtroom squabbles over business matters and prefer to resolve disputes through private negotiations. Once negotiations are started, litigation should be implied but not threatened. Threatening or instituting a legal action normally destroys any possibility for future business relationships between the disputing parties.

Although attorneys may be present in American-Japanese negotiations, their role should be downplayed in comparison to their role in negotiations where both parties are American. As previously stated, many Japanese mistrust lawyers and believe that lawyers' roles as client advocates detract from the cooperative atmosphere of the negotiations. Representatives of Japanese industry, trade associations or government regulatory agencies play a much greater role in actual negotiations than their American counterparts.<sup>35</sup> They may observe the negotiations and even participate substantively in the actual negotiations. Many U.S. business persons believe that these industry and government officials are so involved in the Japanese decision making process that their approval is often necessary before an agreement can be reached.<sup>36</sup>

In conclusion, although differences in culture, negotiating styles and business practices can pose barriers to successful business negotiations between Americans and Japanese, these barriers are not insurmountable. In negotiating with Japanese business persons, Americans must be prepared for potential communication problems, lack of trust, slow negotiation process and slow decision making process on the part of the Japanese. American negotiators should avoid direct confrontation on issues of disagreement,

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permit face saving when necessary, have a bilingual negotiating team member and recognize nonverbal communication from the Japanese team members. Above all, the maintenance of mutual dignity and sincerity of purpose between the contracting parties is of utmost importance in negotiating with the Japanese.

1. D. McCREARY, JAPANESE-U.S. BUSINESS NEGOTIATIONS: A CROSS-CULTURAL STUDY 2 (1986).

2. *Id.*

3. *Id.*

4. *Id.*

5. Business cards (*meishi*) are very important in Japan, not just to introduce the parties, but to introduce the rank of the parties. The emphasis on status places great importance on the ceremony of exchanging business cards. A business card informs the reader of a person's business organization and rank within that organization. Business cards inform the receiver of the status (rank) of the presenter and the degree of formality required in dealing with him. W. RUCH, CORPORATE COMMUNICATIONS: A COMPARISON OF JAPANESE AND AMERICAN 67 (1984).

6. Gift giving is a very important element of Japanese society. Honored guests are given gifts. Gifts are given to those persons with whom you expect to establish lasting relationships.

7. Males dominate the Japanese business community, and wives normally are not included in the after business hours socializing because they impede the social bonding process between businessmen. Consequently, Japanese patriarchal attitudes can pose problems if the U.S. negotiator is female. For the most part, Japanese men are simply unaccustomed to having women as their equals in the professional world. The barriers for women are not insurmountable but they require patience and understanding.

8. Even the name of the American negotiator's college can create a good feeling among Japanese negotiators. For instance, if the American graduated from Duke or another nationally known university familiar to the Japanese, the Japanese may have more trust in this negotiator.

9. E. HAHN, JAPANESE BUSINESS LAW AND THE LEGAL SYSTEM 34 (1985).

10. J. GRAHAM & Y. SANÔ, SMART BARGAINING: DOING BUSINESS WITH THE JAPANESE 9 (1984).

11. D. McCREARY, *supra* note 1, at 3.

12. McCreary defines the Japanese sense of vertical hierarchy as "ranking consciousness" and adopts the following description from Nakane:

A Japanese finds his world clearly divided into three categories, sempai (seniors), Kohai (juniors), and doryoin (colleagues) with the same rank. . . . Even among doryo, differences in age, year of entry (to the company) or of graduation from school or college contribute to a sense of sempai or kohai. . . . In Japan, once rank is established on the basis of seniority, it is applied in all circumstances, and to a great extent controls social life and individual activity.

*Id.* at 18.

"Ranking Consciousness" is reinforced by the Japanese language where a suffix attached to an addressee's name indicates the status of the addressee with respect to the speaker. The lack of suffix use generally indicates an informal conversation between colleagues or friends. Verbs, verb conjugations and personal pronouns indicate the superior-inferior relation between the speaker and the listener. *Id.* at 19. The inferior must address the other using the language of formal respect (*Keigo*), while the superior has the option of using the colloquial language (*Kogo*) to occasionally supplement or even replace the formal language. *Id.*

13. *Id.* at 31.

*As Americans and Japanese learn more about each other, the dynamics of the negotiation process will inevitably change.*

14. *Id.* at 33-34.

15. T. OZAWA, MULTINATIONALISM, JAPANESE STYLE 208 (1979).

16. Moran, *Business Negotiations and the Japanese View of Americans*, 8 EAST ASIAN EXEC. REP. 17 (Mar. 1986).

17. *Id.* at 17.

18. *Id.* at 70.

19. See R. TUNG, BUSINESS NEGOTIATIONS WITH THE JAPANESE 54 (1984).

20. *Id.* at 60.

21. R. MILLER, THE JAPANESE LANGUAGE IN CONTEMPORARY JAPAN 35 (1977).

22. *Id.* at 33.

23. *Id.* at 35 (citing Asahi Evening News, May 7, 1973, translating the column appearing in the previous day's Asahi Shinbun [Asahi newspaper]).

24. J. GRAHAM & Y. SANÔ, *supra* note 1, at 11, 12.

25. *Id.*

26. *Id.*

27. R. TUNG, *supra* note 19, at 70. Bilingual negotiators capable of interpreting Japanese nonverbal communication are preferred. This sort of interpreting is an art and American interpreters with these skills are rare.

28. *Id.*

29. The JAPANESE CIVIL CODE, art. 1, ¶2 states: "The exercise of rights and performance of duties shall be carried out in accordance with [the principle of] faithfulness to the promise and good faith [*shin-jishi-jitsu*]." *Shin-ji* (faithfulness to the promise) means to keep the promise and to perform the duty. *Sei-jitsu* means to be honest and to have sincerity. Sincerity is a fundamental moral norm of Japanese society. When one does anything, it should be done with sincerity.

The principle of *shin-ji-sei-jitsu* is widely applied in many areas of Japanese law and permits the court to maintain harmony between *daku-sei-kei-yaku*, the general rule of contract law, and the moral norm "to keep one's word" and "to honor one's promise." The legal principle is firmly grounded in Japanese culture and morality and is much broader in scope than the English translation implies. The Japanese approach to the law of contracts tries to maintain a harmony between moral norms and legal principles.

30. JAPANESE CIVIL CODE, §555. Sales transactions can include real and personal property.

31. R.E. Watts describes the Japanese contract as a vague reference tool defining the outer boundaries of agreement; the contract is based on "a pre-existing relationship." Watts, *Briefing the American Negotiation in Japan*, 16 INT'L LAW. 597 (1982).

32. UNIFORM COMMERCIAL CODE art. 2, §201 is a restatement of the old Statute of Frauds written contract requirement for sales of goods valued at more than \$500.

33. Discussion with Professor Shinichiro Michida, Faculty of Law, The University of Kyoto. The moral aspect of the legal rule is important in the Japanese business and legal community. Law is a part of culture in Japan, and the Japanese culture is defined by its moral norms. The legal rule of contract and the moral rule of contract share a common ground in Japanese society and culture.

34. R. TUNG, *supra* note 19, at 46.

35. *Id.* at 70-72.

36. *Id.*

## A Conference Report

# Vice: Legal, Social and Policy Considerations

**L**aw and Contemporary Problems and Duke Law School presented a conference on the subject, "Vice: Legal, Social and Policy Considerations" on June 5-6, 1987. Conference participants included professionals in the fields of Criminology, Economics, Government, Jurisprudence, Sociology, Public Health, Political Science, and Law. The Conference purported to survey the politics, history and culture of vice, discussing jurisprudential and policy issues and the philosophical underpinnings of vice regulation. Papers presented at the conference will be published as volume 51, number one of *Law and Contemporary Problems* under the special editorship of Philip J. Cook, Chairman of the Department of Public Policy Studies at Duke University.

Jerome H. Skolnick, Professor of Law at the University of California at Berkeley, began the conference by exploring the link between political attitudes and enforcement practices. The stated goal of his presentation, "Moral Ambivalence: The Social Transformation of Vice," was to explain the process by which certain forms of vice become more or less socially acceptable, based on studies of changing public attitudes towards drug use and gambling in the San Francisco Bay area. He contended that three factors are largely responsible for the transformation of either deviant conduct into what is considered to be generally acceptable behavior or of merely disreputable conduct into conduct defined as serious crime. First, Mr. Skolnick contended that increasing personal familiarity with an activity tends to normalize it in the public's perception, thereby producing an ideology of legitimization. On the other hand, the more an activity is socially isolated, the more likely it is that the activity will be increasingly perceived as illegitimate. Skolnick further stated that the lower the perceived social status of those people engaging in an activity, the less likely it is that the activity will be perceived as legitimate. An activity which spans the social spectrum will tend not to be perceived as morally blameworthy. Finally, Skolnick explained that the more a particular vice involves young people, the more likely it is that it will be defined as morally blameworthy. Such shifting views mean that the concept of vice poses fundamental and perplexing challenges for jurisprudence.

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*... increasing personal familiarity with an activity tends to normalize it in the public's perception, thereby producing an ideology of legitimization.*

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The criminalization of vice was explored by examining both its underlying philosophy and special problems encountered in the process. Gordon Tullock, an economist at George Mason University, presented a discussion entitled "Vicious Externalities," in which he addressed the degree to which various laws against vice can legitimately be regarded as controlling externalities such as: increased crime; decreased combat effectiveness; the impoverishment of gamblers, drinkers, and drug users; and automobile accidents. Mr. Tullock concluded that the externalities argument for outlawing vice is weak and that such laws cannot be economically justified. Further, Mr. Tullock pointed out that present efforts to ban vice, like the 1920's prohibition of alcohol, have led to the establishment of a thriving and violent black market.

Professor David A.J. Richards of the School of Law at New York University presented "Liberalism and Theories of Virtue and Vice." Professor Richards contrasted constitutional liberalism with the classical republican tradition espoused by Aristotle. The author stated that classical republicanism emphasizes the role of the law in enforcing popular concepts of virtues and vices. Constitutional liberalism is based upon tolerance as a core political virtue and views intolerance and associated prejudices as vices. The founding fathers rejected classical republicanism. First, a representative form of government was adopted instead of mass democratic government. Also, the rights to vote and to participate in government were not believed to be exhaustive of all values—but were seen as important instruments to defend and vindicate independent values, including defense of one's basic rights of the person.

The founders argued that the lesson derived from political history, including that of classical republican-

ism, was to break the link between sectarian moral and political judgment and political power. The most substantive and direct constitutional attempt to break this linkage is the theory and practice of the first amendment.

Trevor Bennett of the University of Cambridge Institute of Criminology discussed "The British Experience with Heroin Regulation." According to Mr. Bennett, the British system, under which heroin addicts are treated not as criminals but as people who are sick and in need of medical care, was once widely viewed as the most effective and humane method of dealing with heroin addiction. During the last ten years, however, the number of British heroin users experienced a four-fold increase. Mr. Bennett suggested, therefore, that a comprehensive reappraisal of the British system was warranted.

Mr. Bennett began his reappraisal by explaining that the British system treats heroin use as both a criminal problem and a medical problem by prohibiting imports and non-authorized distribution of heroin while simultaneously offering free, licit supplies to those who have broken the law so frequently that they have become physically addicted. Nevertheless, Mr. Bennett stressed that a policy of controlled availability is preferable to a policy of legalization and free availability, which appears to be the current policy direction of the British government. Under the past policy, methadone was usually prescribed to addicts rather than heroin and prescription was for rapidly reduced dosages rather than maintenance levels. With the arrival of AIDS, the British government has moved toward a policy of making free supplies of methadone or heroin indefinitely available to addicts. According to Mr. Bennett, before the British government commits itself to this or any other policy direction, a complete reappraisal of the existing and future policy options is necessary.

Conference participants explored the tension existing between the desire to define and control vice and the American concern with protecting the privacy of individuals. Carl E. Schneider of the University of Michigan Law School, discussed "State-Interest Analysis in Fourteenth Amendment Privacy Cases." Mr. Schneider's presentation focused on what family law illustrates about interpreting vice issues in terms of the constitutional right to privacy. The right of privacy, Mr. Schneider explained, extends to activities relating to marriage, procreation, contraception, family, relationships, and child rearing. Statutes which infringe the right to privacy bear a heavy burden of justification: the statutes are not deemed valid unless they are "necessary" to serve a "compelling state interest." Statutes which do not affect the privacy right, on the other hand, are presumed to be constitutionally valid as long as they are "rationally related" to a "permissible state purpose."

Mr. Schneider criticized the Supreme Court's failure to adequately define or consistently apply the terms

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*The more an activity is socially isolated, the more likely it is that the activity will be increasingly perceived as illegitimate.*

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"necessary" and "compelling state interest." Moreover, Mr. Schneider denounced the Court's frequent suggestion that a statute is not "necessary" whenever some less offensive alternative would serve the state's purpose. According to Mr. Schneider, the problem with the Court's approach is that in family law, law enforcement problems are pervasive and alternative statutory schemes, such as those suggested by the Court in the seminal case of *Zablocki v. Redhail*, have proven ineffective. The statute struck down in the *Zablocki* case limited the ability of people delinquent in their child support payments to remarry. Mr. Schneider pointed out that statutes, such as the one at issue in *Zablocki* seek to influence behavior indirectly, by reinforcing public attitudes that encourage restraint in family and sexual settings. The challenged statute, together with other alternatives, should therefore be viewed as a "necessary," if incremental step. Mr. Schneider concluded that the socializing strategy behind such statutes ought to be regarded as a legitimate state interest in cases concerning the right to privacy.

John McConahay of the Department of Public Policy Studies of Duke University discussed pornography. He believes that pornography is largely a symbolic issue. The author rejected legalization of all pornography (except for child pornography and age limitations upon who can buy, rent or view pornography) as politically unfeasible although he personally favored this policy. Given the intensity of the public debate, the current contemporary community standards test is the best policy. The author observed that, despite the appointment of the Meese Commission, the Reagan administration realizes that pornography is a symbolic issue. He observed that the Department of Justice "has not made any serious efforts to change the [pornography] laws or mount a major effort to enforce existing laws." The author conceded that the local community standards approach will never prove satisfactory to the moralists because the entertainment market is an increasingly national one.

Dr. D.J. West, Professor Emeritus of Clinical Criminology at the Institute of Criminology at Cambridge University, presented "The Control of Youthful Homo-

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*An activity which spans the social spectrum will tend not to be perceived as morally blameworthy.*

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*Random urine testing would establish a dangerous precedent because it casually sweeps up the innocent with the guilty and willingly sacrifices each individual's fourth amendment right in the name of some larger public interest.*

sexuality.' The author asserted that "[in]tolerance of homosexuality is so deeply entrenched in Anglo-Saxon culture to be likely to disappear in the foreseeable future, and young people who have any choice in the matter are unwise to opt for homosexuality." Dr. West agreed with Dr. Cook's observation that medical experts have not established that few, or even any, youthful homosexuals have any choice over their preference. Moreover, the author contended that "the criminal law is at best a crude, costly and inefficient instrument for regulating the consensual sexual behavior of the young. . . ." Based on the British experience, the declaratory function of the law, setting out what legislators consider wrong, does, however, influence public opinion. The author advocated a policy of tolerance and non-discrimination.

Christopher Petrini '87 and James Felman '87, recent graduates of the Duke Law School, presented a paper entitled, "Urine Testing Public Employees: Factual and Legal Issues." The authors cautioned against adopting a massive program of employee testing, without regard to probable cause or reasonable suspicion because there are serious public policy, constitutional, and statutory objections to this approach.

Such a program is contrary to sound public policy because results would yield a substantial false positive rate if few employees actually use drugs. Based on experience with the military testing program—if the entire federal workforce of 2.8 million workers were tested, estimates are that about 140,000 workers would be accused and disciplined unjustly. Furthermore, these tests do not demonstrate intoxication or actual job impairment. Also, random urine testing would establish a dangerous precedent because it casually sweeps up the innocent with the guilty and willingly sacrifices each individual's fourth amendment right in the name of some larger public interest.

Finally, policy makers need to ask whether this program is worth the estimated one-hundred million dollars that testing the federal workforce alone would cost. Legislators need to ask whether such a large sum of money is better spent directly combatting the problems that urinalysis addresses only indirectly.

The authors also expressed concern about the court's use of a unitary standard in reviewing random testing plans. They explained that "the reasonable suspicion standard achieves the goal of stopping the

mass testing programs while politically saving face." The authors advocated adjusting the constitutional standards in each case to reflect the state's interest in a particular case.

One session of the conference analyzed the impact of the AIDS epidemic on public health policy. Mark A.R. Kleiman of the John F. Kennedy School of Government at Harvard University read a paper on "AIDS, Vice, and Public Policy." Dr. Dan E. Beauchamp, a professor of public health and medicine at the University of North Carolina at Chapel Hill, presented his paper, "AIDS, Public Health, and the Tangle of Moralism." Neither author believed that the moralists' or the civil libertarians' philosophical arguments should control public policy. Both authors emphasized the need for conducting scientific studies of the AIDS epidemic and developing pragmatic programs to control the disease. Also, both authors agreed that any testing program entails a significant potential for discrimination against those who test positive.

Professor Beauchamp proposed mandatory testing of all males from 15 to 50 years old. He believes that mass screening is necessary because of "the clear possibility that a second pool of infected individuals composed of females and bisexuals, could be forming outside the primary pool [composed of homosexuals], threatening to spread the epidemic to the larger population." The strongest objection to such a screening program is the well-founded fear of gays and drug addicts that they would be singled-out for discrimination because a disproportionate number of the members of these groups have contracted the virus. But, there are steps that the federal government can take to develop the trust of members of these high risk groups and to make a disease prevention program more effective. Because mass screening does not single out high risk groups, such a program signifies that AIDS is a problem of the entire society. Moreover, given the long history of the criminalization of the high-risk behavior, Beauchamp asserted that the federal government should take other steps to erase the fear of moralism. Currently, about one-half the states have antisodomy statutes. The federal government could require that these states repeal their antisodomy statutes and include a requirement in a major federal program, such as Medicaid, that each state enact anti-discrimination legislation to protect gays in housing, employment, contracts, and so forth. Moreover, strict laws assuring the confidentiality of test results could be established. Finally, the federal government could assure that all AIDS patients receive humane and affordable medical care. Such policies are complementary to a program of educating the general population about how to prevent contracting the virus.

Mr. Kleiman observed that three factors complicate an AIDS testing program. First, the AIDS test yields both false positive and false negative results. A false positive is a test result which indicates that a person has AIDS when he does not have the disease. A false

negative is a test result which indicates that an infected person does not have the virus. Because the percentage of members of high risk groups who carry the AIDS virus is much greater than that of the general population, these testing deficiencies have important public policy implications. For groups with a low incidence of disease, the current tests would yield a large proportion of false positives. Some experts believe that as many as thirty to forty percent of all positive test results of members of low risk groups would be false positives. False negative results could have disastrous consequences for the affected individual. For example, an individual who limits his or her sexual partners to persons who already have also tested seropositive is at a great risk of actually contracting the virus. For members of high risk groups, there is a significant risk of false negative test results. This reduces the assurance provided by any negative test result and could lead to increased HIV transmission by infected individuals who tested negative. Also, imposed risk-reduction measures, such as mandatory screening, lead to compensating behavior, such as a higher number of sexual partners. This risk compensation causes a smaller reduction in the spread of AIDS than one would expect otherwise.

For the heterosexual population, the most effective prevention program would educate the public about safe sex practices. Screening the general population is impractical because of the high incidence of false positives and the potential for discrimination against these individuals.

Mr. Kleiman also proposed policies directed at reducing the spread of AIDS from high risk groups to the general population. Heterosexual prostitution and illicit drug use are two activities which should be addressed by special strategies. The riskiness of contacts with prostitutes would be greatly reduced if the state

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*Because mass screening does not single out high risk groups, such a program signifies that AIDS is a problem of the entire society.*

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*The riskiness of contacts with prostitutes would be greatly reduced if the state licensed prostitutes and tested them for the AIDS virus.*

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licensed prostitutes and tested them for the AIDS virus. A prostitute's license should be rejected only if she tested positive for the HIV virus. Thus, failure to display a license would warn a concerned customer of the prostitute's HIV status.

Vice presents significant enforcement problems, which are explored in the final session of the conference. Economist, Peter Reuter, of the Rand Corporation discussed "Federal Drug Enforcement: The Interdiction Program." According to Mr. Reuter, the federal government's interdiction program is directed almost exclusively at two drugs: cocaine and marijuana. To explain the ineffectiveness of the interdiction program, Mr. Reuter presented two economic models of the market for drug smuggling. The first model, which takes into account adaptation by smugglers to changes in risks faced on smuggling routes, demonstrated that very large increases in the interdiction risk faced on most routes are required before there can be a significant impact on the costs of smuggling drugs into the United States. The second model, which assumes that smugglers learn risk reducing methods, presented an even more pessimistic assessment for the effectiveness of increased interdiction. Mr. Reuter concluded by arguing that local enforcement is more effective than federal drug interdiction and suggesting therefore that more responsibility and resources be returned to state and local governments.

The prudence of Mr. Reuter's recommendation was challenged by John Dombrink, Professor of Social Ecology at the University of California, Irvine, during his presentation "As Little as Possible: Vice and Police Corruption in the 1980's." Mr. Dombrink responded to Mr. Reuter's assertion that concerns about local corruption that led to federal intrusion in the vice area have recently diminished, by detailing the widespread police corruption recently exposed in Philadelphia, New York, Miami, Boston, and San Francisco.

# ABOUT THE SCHOOL

# Moot Court Board

The Duke University School of Law Moot Court Board was officially organized in the spring of 1964. Its founding is attributable to the excitement, dedication and farsightedness with which Dean Elvin R. Latty worked to enhance the national reputation of Duke Law School. Twenty-three years later, Dean Latty's vision has become an integral part of Duke's federal practice curriculum, and the Moot Court Board continues to enhance the national reputation of Duke Law School through its sponsorship of regional and national moot court teams.

The Board began in the spring of 1964 as a small organization of five to seven members. Despite its small size, the Board made large contributions to the Law School. In those early years, the Board was responsible for helping to develop problems for the first year moot court practice class which was a required portion of the first year legal writing and research program. The Board members also helped in the administration of the class and acted as judges for the arguments. Shortly after its formation, the Board developed a more formal extracurricular competition for first year students.

In the fall of 1962, the law school had been shocked and saddened by the death of A. Lee Hardt, a student who had just completed his first year. Students in the class of '64 chose to honor this memory by dedicating a cup in his name to be given to the winner of the first year moot court competition. To this day, both the cup and the competition bear his name. The large trophy which marked the origin of the formalized first year competition today contains the names of all those students who have achieved the ultimate recognition in this challenging and fast-paced competition.



*Barbara Van Ess '89 makes her argument while opponents confer.*

In addition to its work with the moot Court practice course and its running of the Hardt Cup Competition, the first Moot Court Board also administered the Dean's Cup, a spring competition for second year students. The Dean's Cup and Hardt Cup Competitions provided the Board with outstanding advocates from which to select a national team.

In the fall of 1964, charter Board members Charles L. Bateman, William H. Lear and James B. Maxwell argued their way into the finals of the National Moot Court Competition. The following fall, Duke was again in the National finals, this time with a team composed of Maxwell, Eric C. Michaux and Dale A. Whitman. Throughout the competition, the Law School supported the National Team members with enthusiasm by posting a large score board in the lobby of the school which, through daily phone calls, traced the team's ascent to the finals.

Today, the Moot Court Board remains true to its original goal of allowing students to test and refine

their oral advocacy skills in intramural and interscholastic competitions. However, the scale of the enterprise has grown dramatically. The Board now consists of thirty-three second and third year members who represent Duke in interscholastic competitions, administer Duke's two intramural competitions, and provide support for a class in federal appellate advocacy.

Last year, there were nearly 60 second and third year participants in the Dean's Cup. Divided into teams of two, the students wrote briefs on a "live" issue (a case upon which the Supreme Court had granted certiorari, but had not, as yet, delivered an opinion). They argued both on and off brief against other students in the competition.

Most of the participants in the last few years have chosen to enroll in federal appellate advocacy, allowing them to receive academic credit for all their hard work. The course, which includes study of appellate practice and procedure in the federal courts and instruction in oral advocacy, culminates with an oral



*Joel Cohen '88, Moot Court Board Chairman, makes an important point during an oral argument.*

argument to an experienced federal circuit judge. For 1987-88, Judge J. Dickson Phillips of the Fourth Circuit and Judge Daniel M. Friedman of the Federal Circuit will be participating. Each year, however, some students not taking the class write briefs and enter the competition on their own.

The Dean's Cup Competition culminates in "Law Day." On this day, distinguished Supreme Court, circuit court and district court judges hear arguments from the Competition's two finalists. The final round draws a large crowd of students and faculty who not only watch the arguments but also hear the judges' critiques. At the end of the morning the panel of distinguished jurists awards the round and the competition to one of the finalists and the Board gives awards to the runner-up, semi-finalists and authors of the best brief. Shortly after the completion of the competition, the Board extends invitations to become members of the Board to some of the participants in the Dean's Cup. Selection is based on performance in the competition.

Last year's Hardt Cup Competition offered 105 first year students a similar opportunity to try their oral advocacy skills. Hardt Cup is considerably less involved than Dean's Cup. Hardt Cup problems do not entail brief writing; the prob-

lems are distributed 24 hours before the scheduled rounds, and research is limited to a few pre-selected cases. By limiting the scope of the Hardt Cup, the Board strives to give first year students a taste of oral advocacy without interfering unduly with their heavy workload. Based on their performance in the Hardt Cup competition, a few first year students are invited to become members of the Board.

While Board members judge nearly all rounds of these two intramural competitions, the most exciting aspect of their membership on the Board is their participation in interscholastic competitions. The Interscholastic Competition Committee headed by third year student Martha Hall has pushed to increase the number of interscholastic competitions for Board members. Last year, a Duke team won the prestigious Craven Cup Competition held at the University of North Carolina. Craven Cup team members Jim Felman, Brian Rubin and Brian Sher won over thirty-two teams representing schools from all over the Southeast. The Board also fielded two teams for the National Moot Court Competition.

This year, members are scheduled to participate in four competitions. In addition to defending the Craven Cup, teams will be sent to the National Moot Court competi-

tion, the Entertainment and Communications competition at Cardozo Law School in New York, and the Polsky Competition on Criminal Law and Criminal Procedure at Temple University in Philadelphia.

The Moot Court Board constantly strives to improve the quality of the competitions it runs and strives to allow current Board members to continue to test their advocacy skills. To this end, a few notable changes in Board structure have been made. First, committees have been established to suggest and implement structural changes in the running of the intramural competitions. As a result, Dean's Cup and Hardt Cup procedures have undergone significant reconstruction.

Past criticisms of the intramural competitions focused on a perceived arbitrariness surrounding participants' advancement to the later rounds. The committee suggested a more uniform system of scoring. The Dean's Cup then instituted its current double-blind grading policy for the requisite brief and oral arguments. The system ensures objectivity in determining which participants advance to later rounds. The results have pleased both participants and Board members. The Board also implemented a different grading system for the Hardt Cup; a point system now assists judges in determining who advances to further rounds. This procedure allows for a more accurate assessment of abilities than a strict won-loss record. Additionally, the sectioning of participants was restructured to avoid having participants argue repeatedly against the same person. Finally, a judging committee was established. This committee helped develop uniform standards for judging. The result was a marked improvement in the judging system which, in turn, has enhanced the reputation of the Board among intramural participants.

Faculty support of the Board's attempts to improve the level of moot court activity has been greatly appreciated. The Moot Court program will continue to need such support in the future if it is to remain competitive with such programs at

similarly ranked law schools. Despite the fact that space is at a premium at the Law School, the Board has managed to secure an office in the basement of the Law School so that it will no longer be forced to run its extensive programs from obliging professors' offices or in the hallway. The Moot Court trophy case will soon be moved to a more prominent place in the Law School and the plaques and trophies will be updated to accurately reflect the achievements of Board members past and present.

In the future, the Board will sponsor speakers on topics in oral advocacy and related subjects of

interest to Board members. The Board is also discussing setting up informal debates among the membership on selected legal issues, a program which would help to keep Board members current in both their oratorical skills and their knowledge of issues before the courts.

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*There is one final aspect in which the Board has become particularly interested over the last few months: its own history. In writing this article we have discovered that very few records were kept of the Moot Court Board's structure, activities or participation in intramural tour-*

*naments; little or no information exists as to what oral advocacy at Duke was like prior to the official establishment of the Board in 1964. Therefore, we extend a plea to alumni from all classes who participated in moot court activities to write to the Board and tell us about your experiences. Did you successfully compete in National competition? Who appointed the Board? How were the competitions run? Was the experience valuable? Do you still use the skills you learned while a participant in the Moot Court programs? Contact the Moot Court Board, Duke Law School, Durham, N.C. 27706.*



*Moot Court Board, 1987-88.*

# Duke Law Journal

It is very difficult to describe an institution whose managing staff completely changes every year. In the years of its existence, the *Duke Law Journal* has tried almost every conceivable method of producing a scholarly publication. Through those years, the only constant has been that a group of students does put out a scholarly publication.

The first volume of the *Journal* came out in 1951, under the name of the *Duke Bar Journal*. The first article to appear in the *Journal* concerned the relatively new medium of television.<sup>1</sup> The second article, however, would probably raise more eyebrows today: the article surveyed anti-miscegenation laws prohibiting inter-racial marriage in 29 states, and concluded that "anti-miscegenation laws will probably remain on the statute books."<sup>2</sup>

At the time the first volume of the *Journal* was produced, Yale had already been publishing a law review for 60 years. The 1951 volume of the *Yale Law Journal* filled 1,452 pages. In contrast, the 1951 volume of the *Duke Bar Journal* was 259 pages in length. There were 32 people on the staff of Yale's 1959 *Journal*; Duke produced its first volume with a staff of eight.

All of the pieces in the first seven volumes of the *Journal* were written by students. Professor Robinson Everett, faculty advisor to the early *Journal*, wrote in the foreword to the first volume that the *Journal* was created at the urging of the students, to provide "a medium of student self expression."<sup>3</sup> It was also hoped that "the experience of the students in editing one another's papers would contribute to the process of intellectual maturing which results from give-and-take legal discussions."<sup>4</sup>

A survey of the articles in these first volumes is fascinating: both in

that it provides a window for the interests of law students at that time, and because it reflects the predominant social issues of the 1950s. Of the 111 pieces published between 1951 and 1958, twenty-three dealt with constitutional issues, twenty-three dealt with criminal issues, twenty-two dealt with corporate or commercial issues, and twenty-one dealt with marriage and divorce.<sup>5</sup> Tax, military law, and evidence were also popular subjects. Some of the titles of these pieces are uncomfortably pertinent in the late 1980s:

"Constitutional Limitations on the Forcible Extraction of Body Fluids by Law Enforcement Officers,"<sup>6</sup> "The Public Schools and the Bible,"<sup>7</sup> "The 'Right' to Practice Law,"<sup>8</sup> "Obscenity and the First Amendment: The Search for an Adequate Test."<sup>9</sup> Other titles reflect the troubles and the hopes in the 1950s: "The Scierenter Requirement and Retrospective Clauses in Loyalty Oaths,"<sup>10</sup> "The Wire-Tapping Controversy: A Symptom of the Times,"<sup>11</sup> "The Demise of Race Distinctions in Graduate Education."<sup>12</sup>

A pivotal year for the *Journal* was 1959. The most apparent change was in name: from the *Duke Bar Journal* to the *Duke Law Journal*. The most confusing change was in volume designation. Since 1959, volumes have been designated by year rather than by volume number.

The most important change, however, was between the covers. The number of pages more than tripled, and the number of issues per volume doubled. There were 44 pieces in the 1959 volume—compared to 111 in the previous seven volumes.

1959 was also the first year that the *Journal* published articles by non-students. This single change transformed the *Journal* from a student showcase into a potential-

ly national forum for academic discourse. The 1955 volume contained pieces by many whose names stand out in the development of Duke Law School: John S. Bradway, Brainerd Currie, Robinson O. Everett, Gerald R. Gibbons, Robert Cramer, Charles Lowndes, and Francis J. Paschal.

Nevertheless, student pieces remained an important part of the *Journal*. Well over half of the pages of the 1959 volume were dedicated to students' work. The pieces covered a variety of topics, from insanity<sup>13</sup> to military law.<sup>14</sup>

The work of students and members of the faculty remains a very important part of the *Journal*. The law school has gathered an illustrious faculty; articles by these scholars have helped the *Journal* become a credible and respected publication.

The *Journal* also actively pursues important pieces by outside scholars. One of the criticisms often leveled at student-run journals is that they stifle academic debate (by publishing only tome-like pieces).<sup>15</sup> Rather than stifling debate, the *Journal* actively solicits responses to articles it has published—or to significant legal issues in general. Recent examples of such debate can be seen in the exchanges between Professors Christie and Blasi<sup>16</sup> and between Professors Wiley and Hovenkamp.<sup>17</sup> Furthermore, although the *Duke Law Journal* is not intended to focus on single issues, it does produce an administrative law issue each year, as well as an occasional symposium such as the recent issue on legal education.<sup>18</sup>

In his foreword to the first volume of the *Journal*, Professor Everett wrote of "the process of editing—with all its blood, sweat, tears and late hours for editors and editees alike."<sup>19</sup> It is quite easy for many—including people who are and are not on a publication staff—to ignore

Professor Everett's description and look upon law school publications as honor societies, rewards for a first year well done.<sup>20</sup> This misperception loses force when considering the very small difference between those "at the top" of a class and those "at the bottom." This misperception also detracts from the credibility of the *Journal* as an academic publication.<sup>21</sup>

Along with programs designed to foster debate and attract pieces from top legal scholars, the *Journal* has some unusual programs intended to integrate second year staff members into the editing process. The first year on any publication is tedious and possibly mind-numbing since it involves mainly cite checking and proof reading assignments. Such work is important, however, and must be carefully completed. Unlike most schools, Duke does not keep files on errors made by new members. Furthermore, at some point in the first year of membership, each new member is assigned a piece to help edit and shepherd through the publication process.

Editing for a publication is a very rewarding activity. Aside from the technical skills acquired, editing requires close reading and study of whatever legal topic a particular article discusses.<sup>22</sup> Furthermore, because working on *Journal* requires so much time, a deep sense of camaraderie and friendship can develop among the editors. The importance of such a "safe haven" cannot be overemphasized in the law school milieu.<sup>23</sup>

The number of editors has increased since 1951. There are now eight article and note editors—equal to the entire staff of the first volume. The entire second and third year membership of the *Journal* numbers around fifty. The work-product has also increased: the *Journal* now publishes around 1,200 pages in six issues per year.<sup>24</sup>

The best way to conclude an article about the *Journal* is to repeat the beginning: *Journal* consists of a group of people working very hard to publish six issues a year. The work can be incredibly frustrating—equipment is antiquated and there are only twenty-four hours in a day<sup>25</sup>—and at the same time quite rewarding. Professor Everett wrote in 1951 that "somehow or other we have managed to produce this first issue of the Duke Bar Journal."<sup>26</sup> Thirty-six years later, there are no better words.

1. *Television Programming—Its Legal Limitations*, 1 DUKE B.J. 1 (1951).

2. *Anti-Miscegenation Laws in the United States*, 1 DUKE B.J. 26, 40-41 (1951).

3. Everett, *Foreword*, 1 DUKE B.J. (1951).

4. *Id.*

5. These categories are fairly rough. The author does not pretend to know with certainty how to categorize every article.

6. 7 DUKE B.J. 25 (1954).

7. 4 DUKE B.J. 127 (1954).

8. 1 DUKE B.J. 249 (1951).

9. 7 DUKE B.J. 116 (1958).

10. 3 DUKE B.J. 94 (1952).

11. 4 DUKE B.J. 116 (1954).

12. 1 DUKE B.J. 135 (1951).

13. Note, *American Law Institute's Insanity Test*, 1959 DUKE L.J. 317.

14. Note, *Military Justice: A New Attempt to Advance Individual Rights*, 1959 DUKE L.J. 470.

15. See Cramton, *Faculty-Edited Law Reviews: Yes*, Syllabus, September 1985, at 1.

16. Christie, *Why the First Amendment Should Not Be Interpreted from the Pathological Perspective: A Response to Professor Blasi*, 1986 DUKE L.J. 683; Blasi, *The Role of Strategic Reasoning in Constitutional Interpretation: In Defense of the Pathological Perspective*, 1986 DUKE L.J. 696.

17. Wiley, "After Chicago": *An Exaggerated Demise*, 1986 DUKE L.J. 1003; Hovenkamp, *Chicago and Its Alternatives*, 1986 DUKE L.J. 1014. Professors Wiley and Hovenkamp, joined by Professor Liebler, will continue their debate in the November, 1987 issue of the *Journal*.

18. The April, 1986 issue was a symposium entitled *Legal Education in an Era of Changes*.

19. Everett, *supra* note 3.

20. More than one person has inquired why *Journal* membership is based largely on grades. Any historical explanation is vitiated by the almost universally accepted fact that grades are at best poor indicators of ability and at worst arbitrary. Feinman & Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875, 881, 918-24 (1985). The basic reason is that it places the least strain on an already overworked staff.

21. See Carrington, *Why Deans Quit*, 1986 DUKE L.J. 342, 352 ("Organizations responsible for a publication can pose serious problems; more than a few function far below the par of quality that the students are capable of achieving.").

22. An often overlooked benefit of a non-symposium publication is the variety of legal topics the editors get to study in the course of a year.

23. See Halpern, *On the Politics and Pathology of Legal Education*, 33 J. LEGAL EDUC. 383, 389 (1982) ("The student is stripped naked, so to speak, so that he may be remade a lawyer. The underlying dynamic . . . parallels a highly structured, controlling, emotionally initiating rite used by the church or the military in the indoctrination of their neophyte."); Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. LAW & SOC. ACTION 71, 75 (1970) ("First year students when acting as a group in class are as cruel if not more cruel than teachers. They howl with glee when one of their number is dismembered.").

24. Still, unfortunately dwarfed by Yale's 2,000 pages per year.

25. Some schools combat this problem by reducing or eliminating class requirement for upper echelon editors.

26. Everett, *supra* note 3.

# Law and Contemporary Problems

Established in 1933, *Law and Contemporary Problems (L&CP)* is Duke Law School's oldest scholarly publication. It was originally designed by its founder, Professor David F. Cavers, as a faculty edited publication though it now has a student editorial staff. From the beginning, the journal has been organized in a symposium format in that each of its quarterly volumes is devoted to an in-depth examination of one particular topic. Within each issue, authors from a number of disciplines write about and debate different aspects of the given topic, often reacting and responding to each other within their articles. It was the hope of Professor Cavers that this format would allow scholars from other disciplines more opportunity to influence law and legal analysis. *L&CP* has remained faithful to this symposium format throughout its almost fifty-five year history.

For many years, the Faculty Editorial Board (Board) was responsible for the general supervision of the journal while the editor, a member of the Duke Law School faculty, was responsible for immediate supervision and editorial duties. Then, as now, this faculty board provided a continuous institutional base for year-to-year policy making. The Board made decisions regarding topics for future issues and, whenever possible, helped to recruit authors. Most of the actual solicitation of articles in addition to the editing of manuscripts and the administrative aspects of producing the quarterly journal were the responsibility of the faculty editor, who was also engaged in teaching and scholarly pursuits of his own.

Throughout the 1970's, faculty editors, therefore, relied increasingly on student editorial assistants to help produce each issue. Finally, in 1981, the decision was made to trans-

form *Law and Contemporary Problems* into a largely student-edited publication. Several changes in structure were instituted at that time: (1) the designation of a Special Editor for each issue; (2) the initiation of conferences sponsored by *L&CP* on the symposia topics; and (3) the appointment of a General Editor as liaison between the Faculty Editorial Board and the student staff.

Professor Cavers, himself, had suggested the use of a "special editor." He envisioned this person as someone "with special training in the field . . . chosen from the ranks of the faculty as the one best equipped to conduct a study in the selected field." He considered the special editor an advisor to the permanent editorial staff. Such a special editor is now designated for every issue of the journal. Any member of the Law School faculty as well as faculty in related fields or practitioners may propose topics for *L&CP* symposia. Often these topics are interdisciplinary.

Once the topic is approved by the Faculty Editorial Board, the faculty member is designated a special editor and is recognized as such in the published issue. The special editor is thus responsible for the generation of the topic and for intellectual leadership of the symposium and the conference that now precedes publication. He assists by soliciting articles from professionals and scholars in the field, developing suitable subjects for student notes in the legal area, and serving as consultant during the editing process. Most special editors also write for their issues. Some direct one or two semester research tutorials on their topics; enrollment in these courses is generally limited to eight students and may or may not include student members of the *L&CP* staff. Some members of the Duke faculty who

have served as *L&CP* Special Editors most recently include: Richard Babcock (Exactions), Melvin Shimm (Bankruptcy Revisited), Pamela Gann (Extraterritorial Economic Legislation), and Jerome Culp (Economists on the Bench). Special editors for the immediate future include Phillip Cook (Vice), Jonathan Ocko (Emerging Framework of Chinese Civil Law), and Paul D. Carrington (Empiricism in Civil Procedure).

Conferences are now a unique feature of the traditional symposium format of the journal. Though individual conferences vary, usually a maximum of twenty authors and commentators come together to hear and discuss formal presentations concerning the symposium subject over a one or two day period. Following the conference, the authors have an opportunity to revise and polish their work before submitting it for publication. The most recent *L&CP* sponsored conferences were on Vice (June, 1987) and the Emerging Framework of Chinese Civil Law (October, 1987). In the spring of 1988 *L&CP* will host two conferences, one on Empiricism in Civil Procedure, and one on the Economics of Contract Law.

Planning for the conferences may begin as long as two years in advance of publication. The conferences are coordinated by Law School staff. In the fall of 1986, the fiftieth reunion classes of 1936-37 established an endowment fund to help defray costs occasioned by the editorial conferences and by technological developments. The generosity of these alumni and friends has thus helped to ensure the survival and continued excellence of this interdisciplinary journal whose scholarly reputation has brought honor to Duke Law School for so long.

The Faculty Editorial Board maintains an active role in supervising the journal. Ordinarily convening semi-annually, the Board approves topics to be treated in upcoming issues and conferences, may help to recruit authors for those issues, appoints the special editors, assists in the selection of the new staff members each year, comments on the published issues, considers various managerial and editorial policies and generally tracks the progress of the journal. The Board is comprised of six faculty members, each of whom serves from two to four years. Board members include faculty members not only from the Law School, but also from such University departments as History and Economics. The current Board members include: Herbert Bernstein, Paul Carrington, Peter Fish, William Reppy, William Van Alstyne, and Clark Havighurst, the current Chairman.

The General Editor, a member of the extended faculty, reports to the Faculty Editorial Board on the progress of individual issues, the quality of solicited submissions and student work, and student workloads (for purposes of continuing evaluation of the size of the staff). The General Editor also maintains liaison with the special editors, particularly during the topic planning and conference implementation stages. She also makes recommendations to the Chairman concerning staff selection and elevation. The current General Editor is Joyce Rutledge, who actually began her career with *L&CP* in 1980 as a student editorial assistant.

Originally numbering fewer than twelve, the student editorial board is currently comprised of twenty-six students. Generally, ten to twelve second year and three third year students are selected each fall to join the third year students currently on the staff. These student editors are selected on the basis of grades

(ranking academically within the top twenty percent of the class), faculty recommendations from first year research and writing professors, and demonstrated writing skill. By selecting additional third year students each fall, *L&CP* affords students who have done well academically in their second year of law school the chance to "grade" onto a journal. It also guarantees students who have transferred to Duke in their second year the opportunity to participate in a Duke publication.

In their first year on the journal, students carry the title of "staff editor." The title is not merely honorific, as *L&CP* staffers actually edit from their first day on the job. One student or a student team will edit an entire manuscript rather than portions of an article. This procedure is designed to provide greater integrity, uniformity and consistency in the editing process. New and continuing staff members are generally paired for such assignments. During the year, each student's editing assignments will involve all issues in progress insofar as possible.

All students serving a second year on the journal take senior editorial responsibility. Five senior members fill the executive editorial positions, which include Executive, Administrative, Note and Planning, Style, and Technical Editors. Other senior staff members serve as issue Project Editors. In addition to reading and editing all articles and notes at the final pre-publication stages, the Executive Editor maintains communication with the publisher, monitors the flow of articles, and assumes primary responsibility for day-to-day office matters. The Administrative Editor allocates work assignments to the staff, oversees the preparation of student notes, and orients the new staff members to office and scheduling procedures.

The Note and Planning editor helps to develop topics for future

symposia, solicits note topics from Special Editors, and edits student notes. All student members write notes, and most are published as the topics are chosen by the special editors to complete coverage of the symposium topic. The Articles Editors give instruction in editing and offer substantive review of the quality of editing performed by the student editors. The Articles Editors also mediate any manuscript problems with the authors, if necessary.

The Style Editor establishes style conventions for specific issues, reviews all manuscripts for stylistic consistency and quality of substantive editing and helps train the new staff members in editing and cite-checking skills. The Technical Editor works closely with the Style Editor to make final decisions as to journal policy concerning citation form and checks every manuscript for strict adherence to citation rules.

Project Editors are in effect the assistants to the Special Editors whose issues are in preparation. Each issue of the journal has a Project Editor, who works with the Special Editor to organize the conference and screen all incoming manuscripts. The Project Editor then attends the conference sessions and oversees the progress of an issue up to the time of publication.

The present organization of *L&CP* was designed with several goals in mind: to ignite the enthusiasm of both faculty and students for scholarly discipline; to heighten faculty involvement in the discussion of interdisciplinary issues; to increase student exposure to broad law-related research; and to provide a practicable oral and written forum for scholars from Duke and elsewhere. Faculty-student interaction is a cornerstone in the journal's reorganization—injecting new life into Duke Law School's oldest scholarly publication.

# The *Alaska Law Review* at Duke?



*Alaska Law Review student editors enjoy the opportunity to visit Alaska.*

Established at the Duke University School of Law in 1984 as one of the law school's three academic journals, the *Alaska Law Review* is a unique publication. The *Review* is concerned with the examination and analysis of legal issues within or affecting the State of Alaska. In this regard, the *Review* not only provides academic criticism of legal opinions and trends, but also helps to keep the Alaska practitioner up to date with developments in the legal field. This academic/practical orientation assures wide interest in the *Review*, which has a circulation of approximately 3000 copies per issue, one of the highest of the nation's law reviews.

How did Duke come to publish a law review for a state nearly 4000 miles away? Alaska does not have a law school of its own to provide a forum for scholarly analysis of the unique legal issues in Alaska. In light of this need, Duke was chosen following a competitive bidding process in which several law schools par-

ticipated. In 1983, the Duke law faculty were considering the establishment of a third legal publication. At the same time, the Alaska Bar Association was searching for a distinguished law school to continue publication of the *Alaska Law Review*, after expiration of its contract with the UCLA School of Law. Professor Walter E. Dellinger and Dean Paul D. Carrington drafted a proposal to bring the *Review* to Duke. Dean Carrington then flew to Anchorage to present Duke's proposal to the Alaska Bar Association. The Dean proposed the establishment of a faculty editorial board to oversee a staff of second- and third-year law students. These students would be chosen on the basis of academic achievement. To overcome the problem of distance, Dean Carrington suggested ways to facilitate communication between members of the *Review* and the Alaska bench and bar. One of these suggestions included an annual trip to Alaska by the second-year editors.

Selection to the *Alaska Law Review* is based primarily upon academic performance in the first year of law school. Other factors are also afforded considerable weight by the *Alaska Law Review* faculty editorial board. Faculty recommendations and writing ability, as demonstrated by performance in the legal writing and advocacy course, are examined by the board in making their decisions. Each year, twelve new members are selected as editors. The designation editor reflects the amount of work and responsibility that is expected from each member. In addition to major editorial responsibilities, each editor must write a note of publishable quality on a legal topic of current interest in Alaska.

The second-year editors supplement the third-year staff of senior editors and the executive board. The executive board comprises the Editor-in-Chief, the Executive Editor, the Articles Editor, the Notes Editor, and the Managing Editor. The Editor-in-Chief is an elected position, and he or she chooses the people to fill remaining positions. Although they work closely with the Editorial Board, and particularly with Joyce Rutledge, the General Editor, the Executive Board is ultimately responsible for publication and management of the *Review*.

Presidents of the faculty Editorial Board have included Walter E. Dellinger, III, Katharine T. Bartlett and Pamela B. Gann. Positions on the student executive board have been filled by: Bea L. Witzleben, Marcia Swihart Orgill, David Edward Mills and William A. Schwennesen in 1984-85; John F. Grossbauer, Elizabeth A. Johnson, Michael C. Castellon, Mark D. Gustafson and Richard A. Frank in 1985-86; Amy L. Majew-

ski, Gregory W. Whiteaker, Frank W. Cureton, John F. Guyot, Robert E. Harrington and John R. Read in 1986-87; and Paul M. Aguggia, Sandra J. Hardgrove, Don J. Frost, Jr., Suzan E. DeBusk and Erik O. Autor in 1987-88.

The editorial responsibilities are particularly heavy on the *Alaska Law Review* due to the nature of the contract between the Duke University School of Law and the Alaska Bar Association. The contract requires bi-annual publication to be issued by June and December of each year. This provision was agreed upon to ensure timely publication of topics of current interest in Alaska.

This arrangement has worked extremely well during the time Duke has published the *Review*. Members of the *Review* have received numerous letters and telephone calls from practitioners in Alaska expressing their satisfaction with a particular article or note that has aided their practice in some way. In addition, students are excited by the prospect of writing a note that could provide useful guidance for members of the Alaska legal community.

Although the responsibilities of publication are great, membership is not without its rewards. Editors who write notes of publishable quality are virtually assured publication in the *Review*. Also, employers view the experience gained on the *Review* as a valuable credential. Finally, all second-year editors get a free trip to Alaska during the law school spring break. This trip is certainly a highlight of the experience on the *Review*, as it is not only fun, but is an opportunity to meet and interact socially and professionally

with a large portion of the readership. The second-years meet with federal and state judges, attorneys in both the public and private sectors and politicians. These meetings strengthen ties to the Alaska legal community. Because the editors stay with various members of the legal community during the trip, opportunities arise to develop close personal ties as well. In fact, one court of appeals judge invited several members of the *Review* to go skiing at Alyeska ski resort with him. Also, one attorney took Terri Stein and Sandy Hardgrove, two current members of the *Review*, flying in his plane. The highlight of that adventure was their landing on a frozen lake.

In addition to the usual law review topics on tort, criminal, corporate, labor, constitutional and property law, the *Alaska Law Review* has published a variety of articles and notes on topics ranging from oil and gas leases on the continental

shelf to issues of tribal sovereignty. These articles have traditionally been written by practitioners in Alaska, but recently contributors have also included academics and practitioners throughout the country.

The increasing interest in the *Alaska Law Review* has created new opportunities both for members of the *Review* and its contributors. Several articles and notes have been cited in other scholarly works and reportorial services such as Westlaw. The members of the *Review* carefully monitor and plan to capitalize on this interest. Current plans for the *Review* include efforts to increase circulation, especially in the law libraries of the country, and to widen solicitation of articles, with a special focus on attracting judges and academics to contribute articles to the *Review*. The stated goal of the members of the *Alaska Law Review* is to make this publication the finest state law review in the country.



# THE DOCKET

# Lawyers for Duke

As the pages of this issue attest, Duke law alumni are truly dispersed across the country and around the world. A number, however, are pursuing careers right here at Duke University. What is it like to be a lawyer for Duke? Ask Kate Sigman '83, who recently joined the University Counsel's Office, and you are rewarded with a big grin and a quick "I really love it"—a sentiment echoed by others working here.

David Adcock '76, finds his job in the Counsel's office complex, challenging and satisfying. A labor lawyer, who left a partnership in an Atlanta law firm in 1982 to come to Duke, Adcock points out that Duke provides a rare opportunity for someone in his field. He likens the University to a small city with a budget of three quarters of a billion dollars and over sixteen thousand employees. "About the only thing we don't have is our own fire department. There is an unparalleled diversity of employment here. Do you realize, for example, that the University still owns its own stone quarry? We employ everything from a ship's captain to a surgeon, from a law professor to a lumberjack. We represent those engaged in ancient crafts such as glaziers and those working at the forefront of the new technology." As a labor lawyer, Adcock does everything from union negotiations to employee benefit and ERISA work.

Under the leadership of Eugene McDonald, University Counsel, the University Counsel's Office has established a staff of six experienced attorneys (three of whom are law alumni) working in specialty areas from tax to labor and from estate planning to technology transfer, though all do some general work. "Gene has done a great job of attracting and organizing a legal staff and establishing a comfortable working atmosphere for them," says Adcock.

Now that McDonald has taken on additional administrative duties and is serving as Executive Vice-President of the University, the day-to-day supervision of the Counsel's office has devolved to Adcock who serves as Associate Vice-President and Associate University Counsel.

As was the case with Adcock, attorneys recently hired in the Counsel's Office have come from an established practice as the Office is not large enough to perform a training function for incoming attorneys. Staff size and the number of projects being handled at any given time also affect the decision to send certain matters to outside counsel. Adcock explains that outside counsel will be retained in two instances, generally—protracted litigation and opinions in highly specialized areas. "We have a significant motion practice, but for the more time consuming aspects of litigation, such as taking depositions and handling a lengthy trial, we would use outside counsel in the thirty-five to fifty litigation matters we may have pending at any given time." They might also decide to send out for an opinion requiring in-depth research on a highly specialized legal point. All cases handled by outside counsel are managed and closely supervised by the lawyers in the Counsel's Office. Adcock figures he spends a couple of hours a day reviewing pending cases. This allows the Duke in-house attorneys to spend more of their time practicing "preventive law."

In addition to finding a rare opportunity to practice in his chosen field (without the extensive traveling he had been accustomed to), Adcock cites the pleasure of working for Duke University—and right on the quad! Though he admits that it sometimes takes longer than with private clients to get a clear

idea of the goal being pursued in an endeavor because a number of constituencies may be involved, "ultimately, through the President and the Board of Trustees you get a clear statement of the goal, and essentially it always involves the advancement of education."



Ralph McCaughan '66

Ralph McCaughan '66 agrees that this different bottom line for his client is a compelling part of his job satisfaction. "With a business client, the bottom line is *always* a matter of economics. While that is a factor here, the real goal is education, and it is nice to be a part of that." McCaughan joined the University Counsel's Office in 1981, coming from an estate planning practice in Ft. Lauderdale, Florida. Feeling that he needed a change after fifteen years in private practice, he made a conscious decision to return to Duke and North Carolina. Another difference from practicing with a private firm which McCaughan cites is the absence of the time com-

mitment to law firm administration. "As a member of the management committee at my firm, I was spending up to thirty percent of my time on administration. Now, I have the luxury of concentrating on practicing law in the field I most enjoy."

As Associate University Counsel for Development, McCaughan works with the University Development Office to help structure gifts to the University—in the areas of estates, trusts and charitable trusts, though he has also headed the University Patent Office. He also teaches a clinical course in estate planning at the Law School, where he serves as a Senior Lecturer in Law. His students examine the problems and techniques of estate planning and administration including the taxation of trusts and estates, by preparing recommendations and drafting documents for hypothetical clients.

The opportunity to teach at Duke Law School was also a bonus to the job in the University's Counsel's Office for Donald Etheridge '77 who just left a three year stint in the Counsel's Office for a position with Smith Helms Mullis & Moore in Raleigh. A Lecturer in Law at the Law School, he continues to teach the course, Financial Information, Accounting and the Law, at Duke and a similar course at UNC Law School. The course introduces basic accounting principles and practices and examines their relationship to the law as many attorneys are required to evaluate financial data, notably financial statements from corporations, on a regular basis. The course also studies a number of contemporary accounting problems relating to financial disclosure and the accountant's professional responsibility. Etheridge's expertise in tax law makes him well suited to this task. He worked for the Internal Revenue Service in Washington, D.C. for two years following his graduation from Law School during which time he also completed an LL.M. in tax. Though he really enjoyed working in the Counsel's Office, he is now looking forward to specializing in tax matters at a time when recent changes in the tax laws make

it particularly exciting. While in the University Counsel's Office, Etheridge did most of the tax related work though he also did work in other areas, including doing some gift and estate planning projects along with Ralph McCaughan.



*Roland Wilkins '55*

McCaughan also has been closely associated with the Estate Planning Council which presents the Estate Planning Conference each year. This annual conference was started nine years ago under the leadership of Andrew Parker and Roland Wilkins '55, who was at that time an assistant dean at the Law School. The program is still sponsored, in part by the Law School. The two day event attracts attorneys, accountants and trust officers who work in the area of estate planning. According to Wilkins, though most participants come from the Southeast—mainly from Virginia, North and South Carolina—the Conference is now nationally known, particularly for its overview of recent developments of interest to the practitioner. The Conference offers continuing legal education credit to both lawyers and accountants. Wilkins attributes the program's success to the fact that it gives practical, "hands on" advice and instruction to the prac-

itioner through written materials and the excellent faculties they have been able to recruit, including many Duke alumni.



*Kate Sigman '83*

Kate Sigman '83 joined the University Counsel's office in 1987, coming from Fulbright & Jaworski in Washington, D.C. She explains that, although she liked the firm and the people with whom she was working, she "missed North Carolina and wanted to get back. I enjoyed living in Washington, but I find Durham to be an easier place to live. I personally would rather spend ten minutes driving over to watch the Durham Bulls play ball than spend an hour getting out to watch the Orioles." Sigman came to know the work of the University Counsel's Office while working at her firm, which had been retained as outside counsel for litigation in an employment discrimination matter. Since outside counsel work very closely with University attorneys, she came to know David Adcock and the work the Counsel's Office was doing quite well—and vice versa. When an opportunity arose, she jumped at the chance to return to Duke and North Carolina. Sigman does not specialize, but handles a tremendous variety of legal prob-

lems. About fifty percent of her work relates to medical/legal issues, working with and handling spillover from the Medical Counsel's office which is itself located in the hospital and is handled by Patricia Meador. The other fifty percent of her work is a "little bit of everything."

Sigman finds that she spends far more time in meetings and on the phone than she did as an associate. "I spend a lot of time answering specific questions and advising people. You know, any time a novel or interesting question arises, the lay person assumes that there must be a 'legal' answer." Some questions she can answer by calling upon her common sense; others she can answer quickly and easily from past experience and research. Of course, still others require research which she may handle herself or for which she may seek help from the law clerk employed by the Counsel's Office. David Adcock explains that it is traditional to employ a Duke law student as a clerk.

Debra Pistorino '89 worked in the Counsel's Office for the summer after her first year and is working there part time during the school year. "It's been great," she says. "I work with quality lawyers who are getting to do what they love and working for an institution they believe in—sort of like doing legal work for your family." Debra found that working after her first year and during her second year has added perspective to the classroom study of law. "It adds a touch of reality to what I am studying." She has been able to work in a variety of legal areas. "The amount of legal work generated and the range of subject areas in which they work is truly amazing. I have worked on matters from education law to bonds, from trustee liability to health care." One major project which Pistorino handled during the summer was the drafting of releases for the various University sports clubs. She found that she had to become something of an expert in the various sports—if only from her armchair—in order to draft releases which would cover the various contin-

gencies. "I learned a lot about Tae Kwon-do, for example." As an undergraduate Duke alumna as well as a current Duke law student, Pistorino enjoyed gaining special insight into "how the University operates and is governed and firsthand information about what is happening at the University."

Carol Hardman '89 worked in the Office of the University Counsel at the Medical Center for the summer after her first year and is working there part time during the school year. Though she found that the work was somewhat more limited by the fact that it was all health care law related, she also had the opportunity to work in a variety of legal areas. She had projects relating to tax, corporate law and antitrust in addition to such areas as medical malpractice. For one particularly interesting project, she researched the issue of informed consent in the use of human research subjects. In conjunction with the project, she attended a meeting of the Hospital Review Board during which its members were advised as to the legal implications of the use of human research subjects.



*Jeff Potter '79*

Jeff Potter '79, who also clerked for the Counsel's Office while in law school, joined Duke's legal staff upon graduation. For his first year, he concentrated on helping to solve problems which arose during construction of the hospital addition and was actually officed at the hospital. Since he had been involved in some of these matters while clerking in the Counsel's Office, he seemed to be the ideal person to tackle them on a larger scale. Following that year, he handled a variety of legal matters for the Counsel's Office, from workers' compensation to student problems. Because of his legal work in the real estate area, he seemed a natural to move into a recently created position, Director of Real Estate Administration. Given the increase in real estate holdings and transactions at the University, it was decided that one office should coordinate all such matters. Potter's office now handles the administrative aspects of the University's real estate holdings from attempting to sell gifts of real estate in other parts of the country to negotiating the lease for the Pickett Road annex, which now houses three of the Law School's administrative offices and the Private Adjudication Center. Though it is still early for him to know exactly how the new job will suit him, he is enjoying it. "I find that I am more of an implementer in this job. I am more often helping people to get things done rather than telling them that they can't do something." He often calls upon the Counsel's Office now to do legal work for his office, though the fact that he is an attorney means that he can handle many of the legal matters involved in administering the property himself. "We're still just getting moved into our new offices and new positions and surveying the University's real estate holdings, but I think I am going to like it. I am looking forward to a new challenge."

Challenging, exciting and enjoyable—all words used to describe the work of those Duke Law alumni who are lawyers for Duke.

# Making the Japanese Connection

Over the last five years the international program at Duke Law School has expanded tremendously. A significant part of that expansion has been of the Law School's connections with Japanese students and academicians. An opportunity now exists for Duke's American students and faculty to learn about the Japanese legal system and to enhance the international flavor of the Law School. In Japan, a growing network of recent Duke law school graduates has formed the Japanese Duke Law Alumni Club which disseminates information about the Law School's international program to interested Japanese students. Recently, members of the law school faculty and student body have studied and worked in Japan, and many law alumni have become involved in transactional work with the Japanese. In the coming years, these and other bonds between the Law School and Japan will be strengthened and will provide exciting opportunities.

## Our Japanese Students

Four Japanese students are currently pursuing degrees at the Law School providing American students opportunities to learn about Japan's culture firsthand. Akira Taguchi, a third year J.D. candidate, works for the legal department of the Chiyoda Chemical Engineering and Construction Co. Taguchi lives here with his wife and says that both he and his wife are comfortable with and enjoy being in the Durham area. He also notes that he was quite relieved to find out that the environment at the Law School was "not like the severe conditions in 'The Paper Chase.'" He was originally sent to Duke by his company to obtain an M.L.S. (Master of Legal Science) degree but switched to the J.D. program after the first year. Taguchi graduated from the University of

Tokyo in 1980 with a liberal arts degree. While at the Law School, Taguchi has concentrated in courses related to the corporate area and was a participant in the Duke in Denmark Program in the summer of 1986. He plans to take the New York Bar after graduation in May and will return to Japan in August of 1988.

Katsuyuki Murai came to Duke in 1986 to obtain an LL.M. He is a Legal Officer of the Industrial Bank of Japan, Ltd. He graduated from the Faculty of Law at the University of Tokyo in 1984. While at the Law School he has studied in the area of corporation and securities law. He will probably work in the Industrial Bank's new Corporate Finance Department, which is orchestrating the move into investment banking, when he returns to Japan later this year. Murai was attracted to Duke because of its reputation, size and location and was urged to come here by Japanese alumnus, Hidefumi Kobayashi.

On May 28, 1987, Murai was married to Chizuko Kimura in a ceremony conducted at the Duke

Chapel. Koboyashi had shown some photographs of the Chapel to Murai before he left Japan. Both sets of parents, colleagues from the Industrial Bank in the U.S., and Japanese students at Duke attended the wedding. The couple drove around the United States for five weeks on their honeymoon, visiting a number of national parks, including Yosemite and the Grand Canyon.

Kichimoto Asaka, an LL.M. candidate, is a postgraduate teaching assistant in the Faculty of Law at the University of Tokyo. He graduated from that university in 1983 and obtained an LL.M. in American Civil Procedure there in 1985. At the University of Tokyo Asaka teaches an Anglo-American Law course and intends to pursue a career as a professor of law. While at Duke, he has concentrated in the area of civil procedure. During the summer of 1987 he had a very special opportunity to work in that field. He worked with Dean Paul Carrington who is presently serving as the Reporter for the Advisory Committee on Civil Rules. This Committee is one of five created by the Rules Enabling



*Katsuyuki Murai and his bride, Chizuko Kimura, were married in the Duke Chapel in May.*

Act to suggest revisions in the federal rules to the Standing Committee on Federal Rules and eventually to the Supreme Court. Mr. Asaka did some research and memoranda on Rule 4 for Dean Carrington who found it "a pleasure to work with him. Mr. Asaka had compiled an extraordinary record at the University of Tokyo, and he did some interesting and perceptive work on this project."

Kimiko Takeda, a second year J.D. candidate, went to Wellesley College in Massachusetts as an undergraduate. Her parents have lived in the United States for the last thirteen years and before that were in Singapore. Takeda wants to work in the United States for at least five years after graduation. She chose Duke because of the national scope of the curriculum and because of the good reputation the school enjoys with the Japanese.

### Alumni Network in Japan

When these students graduate they will be asked to join the Duke Law School Alumni Club in Japan. Recent Law School graduates from Japan have maintained a close relationship and meet often informally in Tokyo. The Club is not yet formally organized but it does maintain ties to the Law School through Judy Horowitz, the Assistant Dean for International Studies. Hideyuki Sakai, an attorney in private practice in Tokyo is the contact person until the Club is formally established. He has made information about the Law School's degree programs for foreign students available at various educational centers in Japan. In addition, a university-wide alumni club is being contemplated and an inaugural meeting is set for January in order to set up an organizational committee.

Sakai received an LL.M. at Duke in 1982 and just recently opened his own law office in Tokyo after working at the law offices of Logan, Okamoto & Takashima for several years. He has acted as a liaison to Duke alumni, faculty and students visiting Japan, organizing dinners and assisting in research projects

and summer job searches. He is excited about the increasing number of Japanese alumni and is looking forward to more interaction and communication between the alumni of the two countries.

Alumnus Toshio Nakao was the first Japanese to graduate with a J.D. degree at Duke. After he left Duke in 1983, he spent one year with Dow, Lohnes & Albertson in Washington, D.C. before returning to the Legal Department of Kobe Steel, Ltd., in Tokyo. In 1986, he was able to provide summer employment for the author, a Duke law student, in the company's legal department.

Other alumni include: Junko Yasuda (formerly Nishibatake), LL.M. 1986, currently an attorney with Braun, Moriya, Hoashi & Kubota in Tokyo; Shuji Taura, LL.M. 1984, a law officer with the Kansai Electric Power Company, Inc. in Osaka; Hirofumi Goto, M.C.L. (Masters of Comparative Law) 1984, at Sumitomo Metal Mining Co., Ltd. in Tokyo; Hidefumi Kobayashi, M.C.L. and LL.M. 1985, an Officer-International Business at the Industrial Bank of Japan in Tokyo; Nobuo Shimakawa, LL.M. 1987, in the Legal Department of Nippon Steel, Ltd. in Tokyo; and Junya Sato, LL.M. 1987, currently at Hughes, Hubbard & Reed in New York City.

### Students Study Japanese Law

In recent years, a growing number of Duke students have taken advantage of the Law School's expansion of its international program by enrolling in the joint degree program (J.D.-LL.M., Foreign and International Law) and concentrating in Japanese studies. A few have even gone to Japan to research and/or work in order to supplement the study of that legal system.

Townsend Hyatt, a third year joint degree candidate, is spending a year in Kyoto at Doshisha University as a graduate research student (*kenkyusei*). He intends to continue an intensive study of the Japanese language and work closely with Taisuke Kamada, a Constitutional Law Professor at the university, researching negotiation tactics in U.S.-

Japan business transactions. He hopes to work for a Japanese law firm in Tokyo next summer and eventually to pursue a career in the field of international business transactions.

The author, also a third year joint degree student, spent the summer of 1986 in Japan working in the legal department at Kobe Steel, Ltd. for alumnus Toshio Nakao, researching the U.S. and European antidumping and countervailing duty procedures and comparing the effectiveness of those methods with current Japanese procedures. It was a tremendous opportunity to gain first hand experience in a Japanese legal department, to study Japanese law and use Japanese research materials, and to improve Japanese language skills. There was plenty of time for all of that. Accepting hospitality in Ashikaga, a two and one-half hour train commute from the job in Tokyo, allowed for an enforced "study hall"—Japanese law on the ride in and Japanese language on the way home. A career in international business transactions awaits.

Ken Yun, a third year joint degree student from Korea, spent the summer of 1986 in Japan studying Japanese law in the Santa Clara program. Ralph Jones, a second year joint degree candidate, taught English at Gateway Gakuin in Kobe, Japan from 1984 to 1986. Julie Bulkley, a second year joint degree candidate, majored in Asian Studies and was President of the Japan Club as an undergraduate at North Carolina State University. All of these students are seeking careers in international business transactions following graduation.

### Alumni Work with Japanese

A number of American Duke law alumni are involved with the Japanese. For example, Hubert K. Arnold '39, submitted a Master's thesis on Japanese Governmental and Civilian Procedures in Caring for the Aged Citizenry in the spring of 1987. John W. Maxwell '54, is currently the Director of Marketing for ITT World Directories, Inc. in Tokyo.



Thomas E. McLain '74

Thomas E. McLain '74, was recently named senior vice president of Balcor International Realty Investment Corporation, an American Express subsidiary. McLain, who helped Mitsui Real Estate Company obtain the rights to build the Tokyo Disneyland, will be working closely with Japanese companies for which he is well qualified, having had extensive contact with Japan. He first went to Japan as an Army liaison officer for three years before finishing law school. After graduating from the Law School, he returned to Japan as a Japan Foundation fellow. He attended the Nihon Kenkyu center in Tokyo, a graduate level inter-university center for Japan studies. He was the first non-academic allowed to enroll though now as many as a third of the Center's students are lawyers and business people attempting to improve their language skills and increase their understanding of Japanese culture. In addition to his formal studies, McLain took a night job as a bartender, practicing his Japanese during lengthy conversations with the bar's patrons.

Subsequently, McLain worked as a trainee at Nagashima & Ohno, a Tokyo law firm, for one year. There, he restructured translations of Japanese documents into formal English legal language—"translating from Japanese English into English English," as he puts it. When he

returned to the United States, he worked for Paul, Hastings & Janofsky and then for Manatt, Phelps, Rothenberg & Phillips in Los Angeles, where he remains of counsel. He concentrated in building an international practice focused in Japan.

McLain has written a number of books and articles on international business affairs, and was co-author and co-editor of *U.S.-Japan Trade Law*, published by the Federal Bar Association. In the mid-seventies he founded The Century of the Pacific Conference, an annual event which promotes better social and business relations between U.S. and Pacific Basin young business leaders. James Hodgson, United States Ambassador to Japan at the time, cites McLain's great empathy for Japanese values and "extraordinary intelligence" in considering him "a man to be reckoned with."

#### Japanese Faculty at Duke

During each of the last three years, a visiting professor from Japan has taught a course covering some aspect of Japanese law at the Law School. Last fall, Yasuhei Taniguchi

from the University of Kyoto taught Japanese Dispute Resolution. In 1985, Koichiro Fujikura of the University of Tokyo, taught Japanese Constitutional Law. In 1986, Shinichiro Michida of the University of Kyoto taught a course on International Transactions with Japanese Firms. Much of the credit for bringing these Japanese professors to Duke and assisting them while here belongs to Percy R. Luney, Jr., Visiting Professor of Law. Professor Luney returned to Japan as a Fulbright Research Scholar at the University of Tokyo in the summer and fall of 1986 to continue research in the area of administrative guidance (*gyosei shido*). Professor Luney has assisted each of the professors with teaching responsibilities. "All the visiting Japanese professors thoroughly enjoyed their stay at Duke and their interactions, both inside and outside the class room, with Duke students and faculty. Professor Usaki even mentioned in the text of his two most recent articles that they were written during his stay at Duke." According to Professor Luney, the courses have been very well received and enroll-



Duke law alumni in Japan enjoyed getting together during the summer of 1986 when Percy Luney was visiting the University of Tokyo as a Fulbright Scholar.

ment has increased from eight students in the first course, to twenty students in the second course, and to forty students in the third course. "Our students recognize the growing Japanese presence in the American business and financial communities and the increasing demand for American lawyers knowledgeable about Japan."

Professor Taniguchi, a native of Kyoto, has been a professor of law at the University of Kyoto since 1971 and specializes in civil procedure. He also has had extensive experience as a professor and researcher in Europe and North America. He has studied law at Michigan, California and Cornell. He has conducted research at Harvard, Florence, Cologne and Aix-Marseille and has taught at California and Michigan.



*Koichiro Fujikura*

Koichiro Fujikura, a professor of law at the University of Tokyo, has studied and taught at a number of American universities. He received a B.A. from Amherst College in 1961, an LL.M. at Northwestern University in 1962, and an LL.M. at Harvard in 1963. He joined the faculty at Doshisha in Kyoto where he subsequently served as dean of the law faculty. He will return to Duke in the fall of 1988 to teach Comparative Law: The Legal System in Japan.

Shinichiro Michida of the University of Kyoto has served as the dean of the faculty of law. He has also taught at Harvard, Michigan and other American law schools. He is President of the Japan Society of Comparative Law and is a member of the International Council for Commercial Arbitration.

The Law School has also drawn a number of scholars in residence to the school in the last few years. Kazuyuki Takahashi of the University of Tokyo was at the Law School in the fall of 1987. Masahiro Usaki of Tsuru University researched freedom of expression and information under the American Constitution in 1985 and 1986. Masashiro Ushimaru of the University of Osaka School of Economics is studying U.S. corporate and securities law during the 1987-88 academic year. And Hiromi Nishimura of the University of Osaka conducted a comparative study of constitutional laws here in 1983-84.

In addition to assisting visiting faculty members from Japan, Professor Luney teaches International Negotiations with Japanese Corporations and a research tutorial on Japanese Administrative Law. Last spring, the negotiation course involved Duke Law Students in an actual negotiation exercise with students from the faculty of law at the University of Tokyo. The Duke students represented an American company seeking a license to use technology owned by a Japanese company. Antitrust issues complicated the negotiation process. University of Tokyo professor Robert McElroy and Masuto Dogauchi supervised the Japanese students in this exercise. Professor Luney reports, "The negotiated agreement was fair to both sides and the student enthusiasm for the exercise was outstanding on both sides of the Pacific."

Dean Horowitz has enjoyed watching the expansion of Law School ties with Japan. "We now have a significant Japanese presence at the Law School and I feel sure that it will continue. The number of applications to the LL.M. program is way up, thanks to our growing reputation and our Japanese alumni." She believes that as the alumni base in Japan expands the Japanese presence will be even stronger in the LL.M. program. Many American law firms are eager to recruit Japanese students. She notes that "the first international student to receive a job offer last year was from Tokyo. Evidence of interest from J.D. stu-

dents lies in the very large enrollments in the Japanese law courses." As the interest of American students in the Japanese legal system increases, she hopes that more courses can be added to the curriculum and that more structure and funds can eventually be added to accomplish this. "We have decided to offer a course in trade with Japan in the 1988 Duke in Denmark Summer Program, for example." There is even some interest in starting a Duke in Japan program patterned on the Duke in Denmark program.

The Law School's interest in and connections with Japan are providing a vehicle to keep Duke among the nation's top law schools involved in this rapidly expanding and important economic and strategic international relationship. This varied and expanding network, established over the last few years, will continue to provide an excellent opportunity for concentrated study of the United States-Japan relationship.



*The author, Taylor D. Ward is a joint degree student (J.D. and LL.M.-Foreign and International Law) from Winter Park, Florida. He lived in Japan with his parents for a year and a half and hopes to work there in the future. Upon graduation he will work at Webster & Sheffield in New York City.*

*Alumnus Profile***Chairman of the Board:***Robert K. Montgomery '64*

For many people working as a senior partner with Gibson, Dunn & Crutcher in Los Angeles might be challenge enough, but for Bob Montgomery it has always been just part of the story. Continuing his tradition of devoting time and energy to those projects and institutions in which he believes, Montgomery takes on Chairmanship of the Duke Law School Board of Visitors in January 1988.

The Law School Board of Visitors, created by action of the University Board of Trustees in January 1963, serves as a reporting and recommending body to the Law School administration, the University administration and the University Board of Trustees. The Board meets once a year to review matters of administration, curriculum, and faculty and student progress and submits formal reports to the Board of Trustees regularly. Though invested with no official administrative responsibility or authority, the Board's recommendations carry significant weight, and its members perform a valuable service to the Law School.

Members of the Board are appointed by the President of the University to six-year terms and represent a broad spectrum of interests, including law alumni in private practice, law alumni in other legal careers, and other distinguished individuals with an interest in legal education and Duke Law School. They also reflect the diversity of age and geographic diversity of our alumni body.

One of the Board's main goals has been to promote better communication between the Law School and the University, the Trustees and the general public. In recent years the Board has also actively sought to increase alumni involvement with the Law School.



Serving as Chairman of the Law School's Board of visitors at this time should be less hectic than some of Montgomery's other "extracurricular" projects, such as serving as Senior Vice President of the Los Angeles Olympic Organizing Committee (LAOOC) or providing "legal aid" for the Live Aid Concert. In accepting the position in early 1983 as number three man on the LAOOC, Montgomery joined a staff of managers (many of whom were lawyers) which tackled problems associated with this massive undertaking, including negotiating arrangements

with the International and U.S. Olympic Committees, twenty-nine cities, eight counties, more than one hundred government agencies, myriad cultural and entertainment institutions, sponsors, suppliers, and a host of insurance companies. Many tasks were complicated by the fact that the 1984 Olympic games were the first to be run by a private non-profit corporation instead of a public body. Because prior Olympic Games had suffered large financial deficits, California state, county and local government refused to accept any financial or management responsi-

bility for the Games. Though they may have had some doubts during the long days of planning, the LAOOC pulled it off despite the pessimism of some like former International Olympic Committee Chairman Lord Michael Killanin who feels that next to drugs, the Olympic Movement's biggest problem is lawyers.

Mr. Montgomery, who personally took charge of ticketing, architecture, venue development, finance and administration for the LAOOC, did not give up working at the law firm. He admits, however, that he had to revise his schedule somewhat—cutting back to five or six hours of sleep a night and sometimes arriving at the firm between 3:30 and 5:30 in the morning—and take a six figure pay cut for the “privilege” of working a second job. He now acknowledges that taking on such a hectic schedule “really makes me sound insane,” but he considered it “a rare opportunity to do something exciting. We were really sailing an uncharted sea.” In the final analysis, the success of the Games was a very gratifying experience. I cannot imagine being associated with a more dedicated group of people willing to work long hours for low pay, despite the looming prospect of guaranteed termination when the Games were over.”

In the summer of 1985, Mr. Montgomery took responsibility for helping to stage another extravaganza, the Live Aid Concert. When approached by concert organizers

regarding his firm's willingness to handle legal arrangements for the Concert, Mr. Montgomery agreed to do so at the firm's reduced public service rate. “We didn't know exactly what was involved, but it seemed like a good, solid thing for us to do.” Montgomery and his associates (three working full-time by the time the concert began) soon found that what was involved was “virtually everything from soup to nuts,” including incorporating the Live Aid Foundation and negotiating leases for Wembley and JFK stadiums, sponsorship contracts, performer and television agreements, and seemingly countless other contracts. Montgomery even found himself positioned on the massive stage for the entire fourteen hours of the concert—collecting performers' signatures on contracts and working to defuse two last minute lawsuits. “It was hard to believe we'd pull it off,” he recalls, “At least with the Olympics, we had years to prepare.”

In the summer of 1979, Montgomery first embarked upon dual employment when he agreed to serve as Chairman of the Board and Chief Executive Officer of Elixir Industries, then a New York Stock Exchange-listed company with twenty-six plants across the country. When Elixir returned to profitability in the summer of 1981 and went “private,” he returned, for a while, to the full time practice of law.

In addition to these once-in-a-lifetime projects, Montgomery regularly devotes his time and energy

to educating young lawyers. A business and corporate finance partner with Gibson, Dunn & Crutcher, he regularly takes responsibility for the orientation of the incoming associates in the corporate department. Initial orientation takes place during an annual retreat which gives attorneys entering the firm an opportunity to get acquainted as well as learn about the firm and its expectations for its corporate attorneys. “Having watched Gibson, Dunn & Crutcher grow from the seventy lawyer Los Angeles firm I joined upon graduation from Duke Law School to a worldwide 600 lawyer firm with seventeen offices, I am particularly sensitive to the need for education and training programs to ensure quality control.”

Mr. Montgomery's commitment to legal education also extends to his Law School and its students. He was one of the first of the School's alumni to volunteer to participate in the first annual Conference on Career Choices. Last spring, he flew in from Los Angeles to discuss the practice of corporate law as a member of the panel on law firm specialty areas.

What will be the next project tackled by this energetic “Renaissance lawyer?” Well, he enjoys collecting wines and admits to a future interest in producing wines at his farm in the Napa Valley, so we may soon find him running a California winery—in his spare time.

## Student Profile

# Legal Laughter

Kevin Mulcahy '88



Every law student seems to find some kind of emotional outlet, but not too many are able to share theirs with thousands of readers every week. Kevin Mulcahy '88 has managed to do just that by writing and drawing his own comic strip while in law school.

The strip, featuring "Norman," a first year law student, appeared regularly in Monday editions of "The Chronicle," Duke's campus newspaper. After a year of publication at Duke, nine of the strips were pur-

chased by the A.B.A.'s *Student Lawyer* magazine which carried one strip in each issue for a year, thus increasing the audience of Duke Law's "Norman" to 40,000 law students nationwide.

Originally, Kevin developed the strip in his undergraduate days at Boston College. Back then the strip featured the same main character, "Norman," but, as one might expect, it focused on the fun, foibles, and ironies of undergraduate life. At the end of his senior year at B.C., after having produced one strip every week for four years, Kevin published a book of strips which sold over 1000 copies in just two days at the Boston College Bookstore and Harvard Coop.

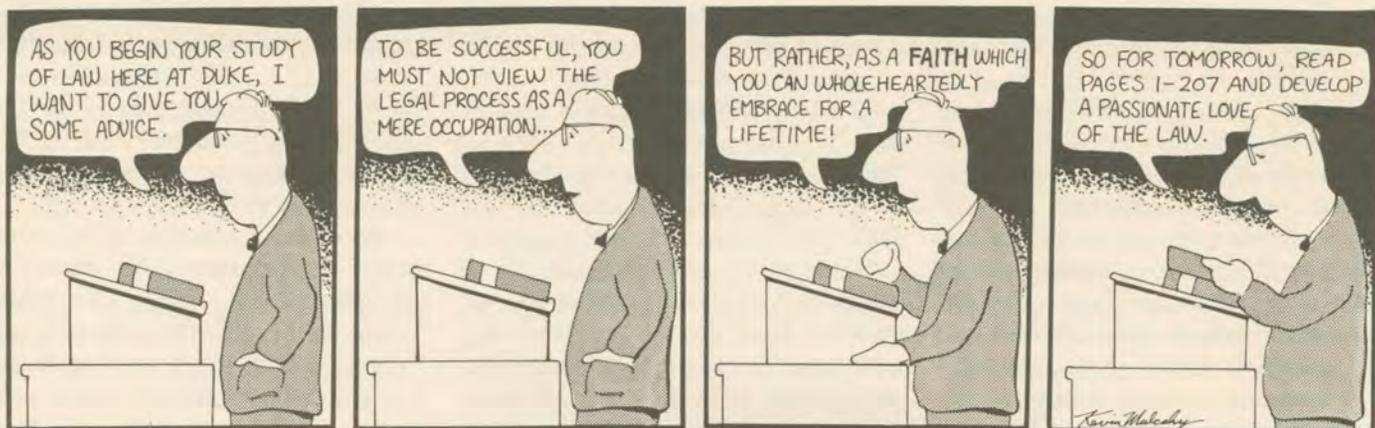
Once at law school, Kevin started doing the strip as a way to keep his creative skills from languishing. "But after a few weeks," says Kevin, "my central motivation was the fact that the strip was a good soap box from which to voice concerns about law and legal education. Also," he adds, "it's a lot of fun."

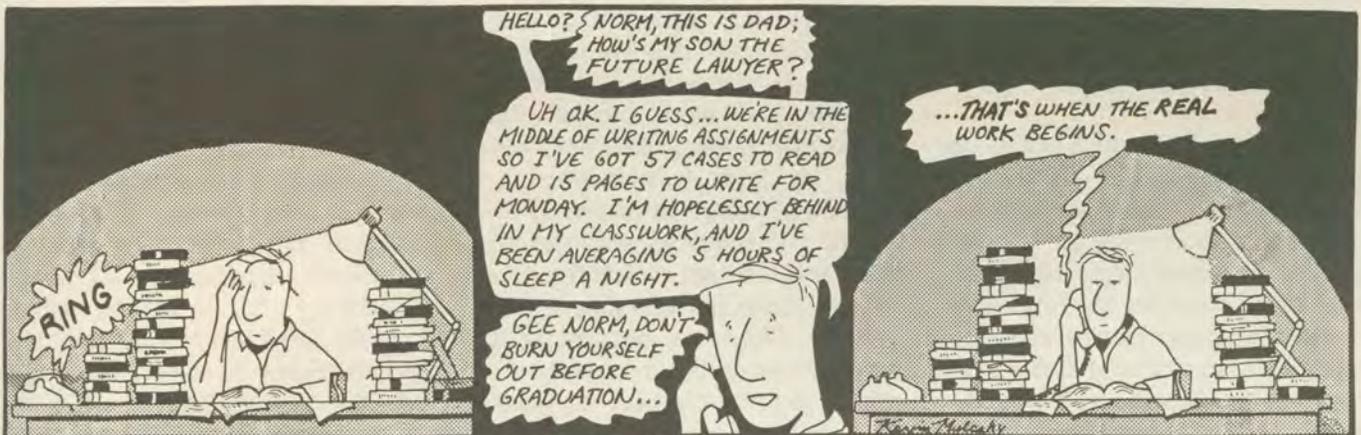
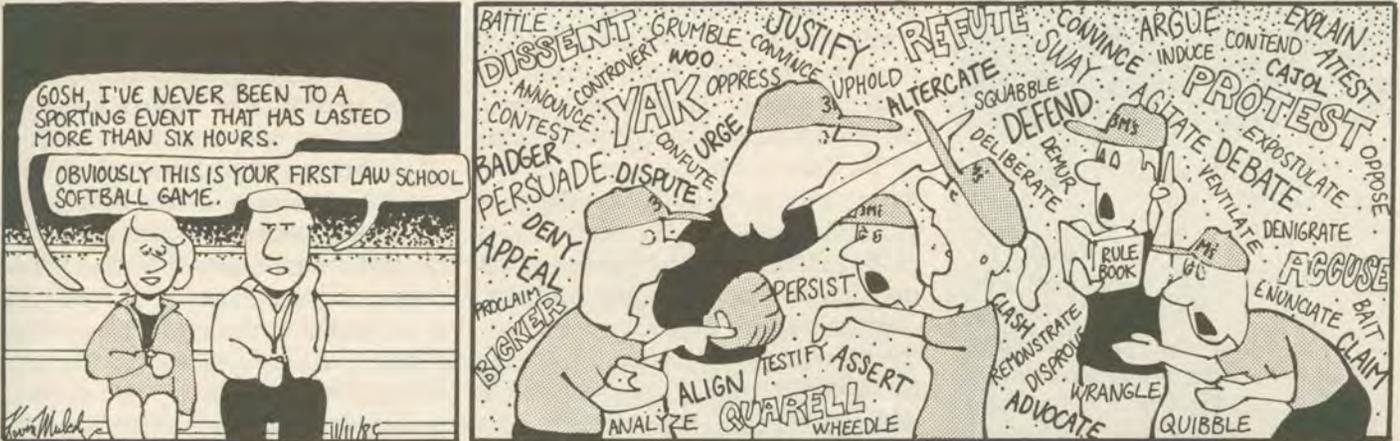
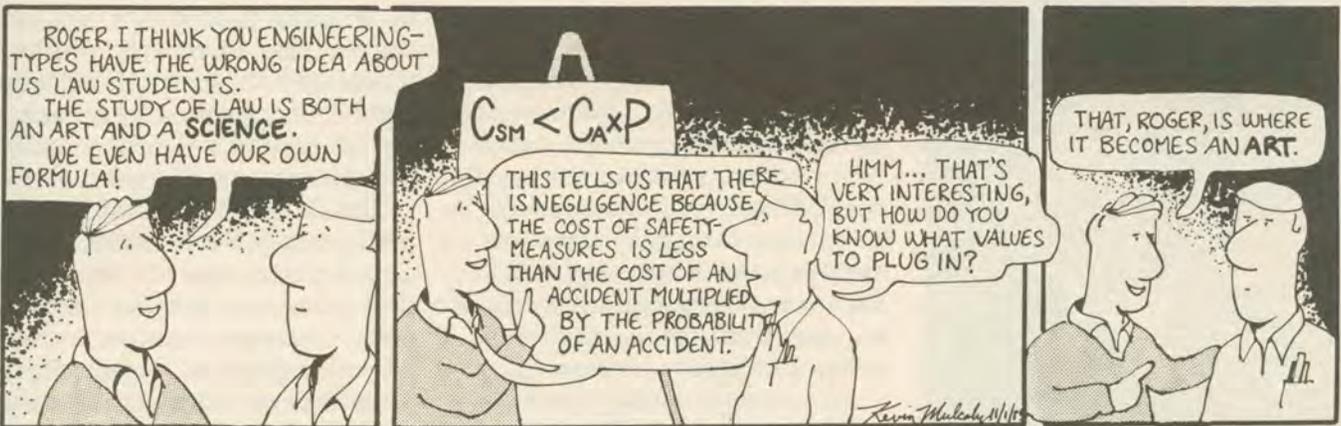
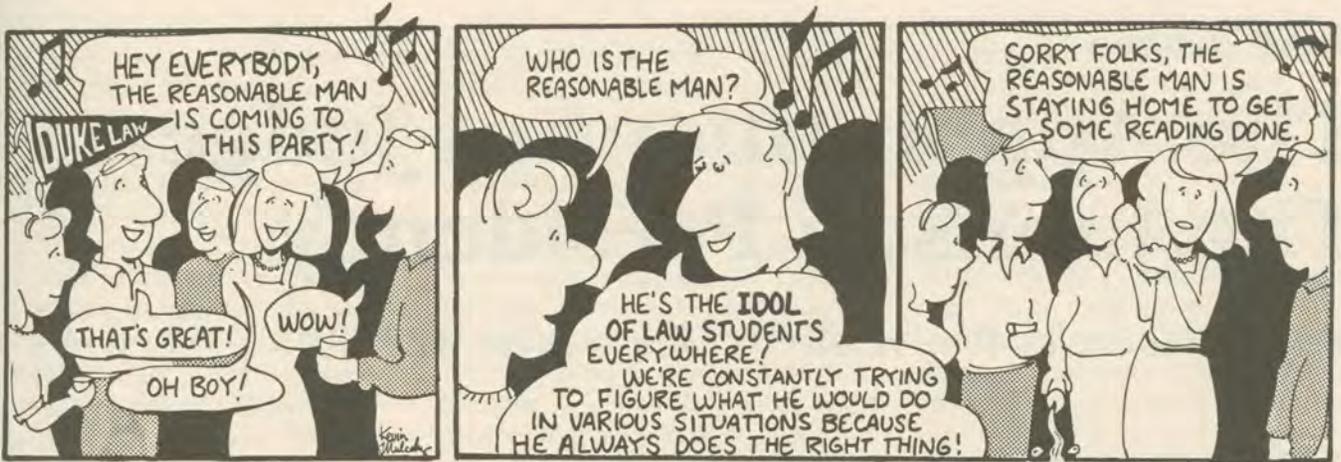
"The object of many of my strips," according to Kevin, "is to ventilate some kind of frustration for the reader. When readers come across such strips," he says, "it's

therapeutic because they realize how universal these frustrations are. And when a strip makes a reader feel better," he adds, "that's very therapeutic for me."

Kevin has found that writing a comic strip not only provides him with a good outlet for creativity but also teaches him to write succinctly because "each strip must have a beginning, middle, and end—in fifty words or fewer." In addition, Kevin notes that writing a comic strip is a lot better than writing articles "because editors don't touch your work and readers don't skim it."

Now, as a third-year law student, Kevin has temporarily retired his cartoonist's pen in order to devote more time to his other interests. Foremost among these pursuits are his research and independent study projects in intellectual property, entertainment, and sports law. Kevin has completed two such projects under the direction of Professors David Lange and John Weistart. Kevin hopes to combine his understanding of the creative process with his legal skills to specialize in intellectual property, entertainment, and sports law issues. After graduation, Kevin will join Donovan Leisure Newton & Irvine in New York.

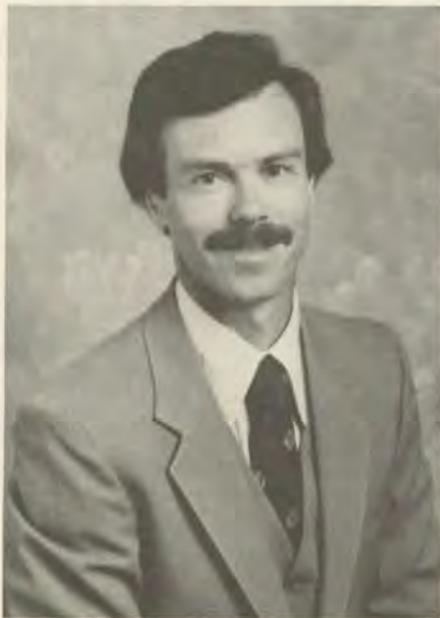




## Book Review

# The Appointment of Judges: The Johnson Presidency

Neil D. McFeeley (University of Texas Press \$22.50)



Neil returned to Law School after receiving a Ph.D. in Government at the University of Texas in 1975 and serving as an Associate Professor at the University of Idaho, 1976-82. While at Duke Law School, McFeeley served as Editor-in-Chief of the Duke Law Journal. After graduation, he served as judicial clerk to Judge Robert Boochever of the U.S. Court of Appeals, Ninth Circuit in Juneau, Alaska for 1985-86. He is presently practicing with Eberle, Berlin, Kading, Turnbow & Gillespie in Boise, Idaho.

Neil McFeeley's latest book, *The Appointment of Judges: The Johnson Presidency*, is a timely addition to scholarship concerning the selection process of federal judgeships. One need look no further than the recent controversy concerning the Bork nomination to realize that the exact nature of the process as it was, is, and should be, is a matter for debate. With the growth of the cor-

pus of federal law has come the growth of the importance of federal judges. In the last few decades, American presidents have increasingly come to realize that a sympathetic judiciary is vital if a President's programs are to be carried out. Yet there were no rules to guide them through the appointment process; rather, they had to rely on two provisions of the Constitution, tradition and whatever political skills they possessed.

At the center of the debate is Art II, sec. 2 of the Constitution, which states: "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Based on the extensive holdings of the LBJ Library at the University of Texas, Austin, McFeeley has reconstructed the various phases of the judicial selection process during the Johnson presidency. The book "explores the management process by which information was filtered and transmitted to the president and through which the president's criteria for selection would prevail." The book also discusses the various actors who played a role in judicial selection, especially those with a continuing responsibility in this area.

The first two chapters of the book give a general overview of the process and place it in its historical context. Each president has had his own method of carrying out his duty to nominate judges for appointment. McFeeley notes that in the last few decades there has been a general trend toward greater participation by the president in the process which previously was largely handled by what McFeeley calls the "subpresidency." As the federal courts grew in power, federal judges took a greater part in the shaping of U.S. law. President Johnson realized that his appointments would help carry out his vision of the Great Society long after he left office.

McFeeley then deals with Johnson's formulation of the nomination process as well as the problems of his sudden ascendance to the presidency. He also examines the process as it existed in the early days of the administration. It is not surprising that LBJ's extraordinary rise to the presidency gave the appointment process an unusual beginning. Johnson was not afforded the normal transition period to develop his own administrative apparatus. He faced several unique problems. The decision of whether or not to support the Kennedy nominees, who were as of yet unconfirmed, was a delicate one. To reject all the fallen president's nominees could mean political suicide, but was LBJ required to fulfill all of JFK's political obligations? Some of these carried considerable political baggage. For example, one of the candidates, David Rabinovitz, a former legal counselor

for the United Auto Workers, was rated "unqualified" by the Wisconsin State Bar Association and the American Bar Association. To further complicate the situation, one of the main participants in the process was JFK's brother, Attorney General Robert Kennedy. Johnson's tight-rope walk in this matter provides a fascinating insight into the workings of his fledgling administration.

Chapter four, "The Developed Johnson Process of Judicial Selection," and Chapter five, "The Criteria of Choice," form the core of McFeeley's work. It was not until Johnson's overwhelming victory at the polls in 1964 that he felt confident enough to develop his own method of selection. He continued to rely heavily on his attorneys general (Nicholas Katzenbach and Ramsey Clark) and the Department of Justice for the suggestion of candidates and preliminary screening. Johnson added a new wrinkle—"the Macy Operation" to the process; it consisted of White House staff members, under John Macy, whose responsibility it was to keep records of the appointment process, conduct oversight operations, and make the President aware of any policy considerations Macy thought necessary.

Various other factors influenced the selection of candidates for judicial vacancies. Recommendations of senators from the state having the vacancy would always be sought early in the process for several reasons: it was a way to pay back political debts; the appointment could be used by the Senators to their political advantage; and, they were sure to make their feelings known to the administration whether or not the administration wanted to hear them. Should a senator's nominee prove unacceptable, an opportunity to suggest other names was always given.

The qualification rating of the American Bar Association's Committee on the Judiciary was always given serious consideration. It was most often used, however, as an imprimatur to justify unpopular nominations. To a lesser extent, U.S. Representatives and sitting federal judges also played a role. But the final decision always rested with Johnson. As McFeeley notes, "there was no single standard or even set of standards against which prospective nominees were judged, although certain criteria did guide the process." It was guided by an "interplay of [Johnson's] intuition and criteria, especially loyalty, experience, merit, [and], policy stands."

McFeeley then presents three case studies which illustrate the Johnson selection process. They are the nominations and appointments of Ray McNichols to the Idaho District Court and John Butzner to the Fourth Circuit Court of Appeals, and the nomination and failed appointment of Justice Fortas to the office of Chief Justice. Not surprisingly, the process varied depending upon the level of the court, with Johnson's participation increasing at each higher level. LBJ's role was greater than previous presidents because he fully understood the importance the appointments would have on the development of federal law long after his tenure was over. The ability to create a lasting legacy is a powerful and appealing one for all modern presidents and Johnson, in particular, wanted to make the most of it.

McFeeley concludes with a chapter on the last year of Johnson's presidency and his difficulties in securing judicial appointments after announcing his decision not to seek his party's nomination for the 1968 presidential election. This was most clearly illustrated by his failed at-

tempt to have Abe Fortas confirmed as Chief Justice. McFeeley clearly shows that Fortas' and Homer Thornberry's confirmation problems were largely political ones. Republicans and southern Democrats opposed the nominations based on ideology, not qualifications. They simply sought to delay the process until Nixon took office.

*The Appointment of Judges: The Johnson Presidency* offers a scholarly, yet entertaining, look into the mechanics of a political process—one of great interest not only to practicing lawyers, legal historians and political scientists, but also to anyone who is interested in the American political process. While works such as McFeeley's may not settle the debate as to the role of the President and Congress in judicial appointment, they do help put those discussions in a meaningful historical context.



*Michael Chiorazzi*  
Reference Librarian and  
Senior Instructor  
in Legal Research  
Duke University  
School of Law.

# SPECIALLY NOTED

## Pye Named SMU President



A. Kenneth Pye, Samuel F. Mordecai Professor of Law and former Duke Chancellor and Law School Dean, was named President of Southern Methodist University in late May and assumed his new duties in August. He thus began to tackle the problems of a university that has suffered through two years of athletic recruiting scandals and has been slapped with the most severe penalty ever administered by the NCAA to a football program: Citing \$61,000 in illegal payments to thirteen SMU players even after the school had been placed on probation, the NCAA suspended SMU football for 1987, and the school decided not to play football in 1988.

Pye says that the athletic problems at SMU have no effect on the quality of academics at the university, and he has already launched steps to reform what he sees as the school's problems of long-term origins. "The University as a whole at Duke is regarded as what people at SMU would like to have in their university—in athletics and academics and the combination of the two," Pye said in a recent interview.

Despite the incredibly high expectations for Pye in Dallas, he has denied that he is a "miracle man" and that the school needs such a man. "My only problem is that they will expect more from me than I can deliver. But they are making it as easy as possible for me," Pye said. Instead of promising miracles, Pye has maintained that SMU is a good university that just needs to be pulled together and redirected. Pye is initiating an evaluation of the different schools within the university to assess budgeting problems much as he did at Duke as Chancellor in 1979. Indeed, his willingness to make difficult and sometimes unpopular decisions as Duke's Chancellor during a period of retrenchment and redirection worked in his favor when SMU's Board of Trustees was looking for strong leadership from a pool of more than 225 applicants. To increase the purse of SMU, Pye is considering pushing for increased tuition. He is also looking into options for increasing the quantity and quality of applicants.

In the field of athletics, Pye is faced with the immediate decision of filling the position of athletic director, which was left vacant last December when Bob Hitch resigned in the midst of scandal. Pye will await the recommendation of a search committee before he makes the final decision.

Pye is also in the process of strengthening the power of the athletic council at SMU in an effort to avoid problems such as the recent scandals. "The problem was that they had no power," Pye said. He hopes to make the council similar to Duke's council—a committee of faculty, students, alumni, trustees and administrators that monitors

the university's sports program—which he served as chair. He hopes to give the Council the right to review the budget and to make recommendations to the president on coaches' performance. Pye also plans to increase the number of students on the council.

In addition to his high-profile presidential duties, Pye will begin teaching at the SMU Law School, in the spring. This decision is in keeping with his practice as chancellor and law school dean at Duke when he continued to teach in an effort to keep in touch with the students.

If Pye's programs are successful, his status in the Dallas area may go from celebrity to superstar. "I have not yet been into a restaurant, barbershop or grocery store where I have not been called by name," Pye said. "My dog gets more press in Dallas than most people," he said referring to a recent Dallas newspaper article that featured a picture of his dog.

Despite many years at top positions at Duke, the extensive press coverage is new to Pye. He attributes it to the difference in the relationship of Dallas to SMU as compared to Durham's relationship to Duke, citing that 40 percent of the SMU alumni live in the Dallas-Fort Worth area. "The relationship between SMU and the city is much closer," Pye said. "I've had more press coverage in three months than in twenty years at Duke."

Dean Paul Carrington spoke for the entire Law School community in bidding Ken Pye a fond farewell. "We shall all miss Ken, but I know we all wish him well in his new job and congratulate SMU on its choice of such an able educator and administrator."

## An Era Ends: Jack Latty Takes His Final Leave

Elvin R. "Jack" Latty, who served Duke Law School for more than thirty-five years, died in Durham on July 4, 1987 after a lengthy illness. Jack Latty came to Duke Law School as a professor in 1937 and retired in 1972 at the age of 70, having served as Dean of the Law School from 1958-66 and as William R. Perkins Professor of Law from 1966-72. Jack Latty is best remembered for the years he spent as Dean of Duke Law School. During that period, a new law school building was constructed—known for many years as "the house that Jack built"—the student body was enlarged; the faculty welcomed several noted teachers and scholars; and the school's library was upgraded as were its placement program and its publications. Veteran observers of the law school world point to that period as the time when Duke Law School truly reached national prominence. Latty himself recalled, "There was a special exhilaration to being dean at a time when so many things were happening at Duke."

Dean Latty also established the World Rule of Law Center at Duke University and brought Arthur Larson, special assistant to President Eisenhower and former director of the U.S. Information Agency, to Duke as its Director. The broad objective of the Center was to stimulate and encourage acceptance of the rule of law internationally—that is, that agreed-upon legal processes instead of force would be used to settle disputes affecting world peace. The Center thus fit well with Latty's stated concept of what a law school should be: "Its prime purpose, of course, is to turn out good lawyers. That is an objective we must never lose sight of. We also want to graduate men and women who are not only skilled legal technicians but who have a feeling for law and humanity under the law."

Before beginning his legal career, Dean Latty taught French and Spanish at the University of Vermont, having graduated from Bowdoin College with a degree in Romance languages. While at the University of Vermont, he also coached the University track team which won the Vermont State Championship several times under his direction and caused him to be remembered as "the scholar coach with a lasting influence."

After completing his J.D. degree at the University of Michigan, Dean Latty worked with Sullivan and Cromwell from 1930-33, including one year spent in their Buenos Aires office, before earning a S.J.D. degree from Columbia and beginning his teaching career.

While at Duke, Dean Latty made lasting contributions in his primary field of interest, corporation law. In addition to writing two books, *Introduction to Business Associations* and *Affiliated Corporations*, and numerous articles in the field, Dean Latty served as chairman of the Council on Business Organizations of the Association of American Law Schools. He was also a principal draftsman of the North Carolina Business Corporation Act, which went into effect in 1957.

Dean Latty brought more than scholarship and administrative ability to Duke Law School. The dedication remarks in *Duke Law Journal* honoring his retirement put it succinctly: "During his thirty-five year association with the Duke Law School, Dean Latty has distinguished himself as a teacher, legal scholar, legislative draftsman and administrator, and it is perhaps in these capacities that he will most likely be remembered in American legal circles. But it is his remarkable enthusiasm and energy in the classroom, his deep concern for the Law School, and his unparalleled rapport with stu-



dents that will be missed most. . . ."

Lee Henchel, Jr. '52, cited these latter attributes as an important legacy while speaking at a 1972 retirement ceremony for Dean Latty, remarking, "All of us, of course, have always respected Dean Latty's intellect and knowledge, but perhaps his most important personality trait that made him one of the great influences in our lives was his enthusiasm. He always attacked any project with vigor, and I feel that the successes realized by some of his students no doubt can be attributed in part to the application of similar enthusiasm to the practice of law."

The rapport he felt with his students endures. Evelyn Pursley, Assistant Dean with responsibility for alumni relations notes, "I sometimes forget that I never had the opportunity to know Dean Latty personally because I feel that I have come to know him well through the reminiscences and wonderful stories I have heard from alumni. It seems that no matter where I go in the country someone says 'Jack Latty is the reason I was in Law School; the reason I was at Duke; the reason

I am where I am today.' He must have been a remarkable man to inspire such emotion across the years."

Given such tributes, Jack Latty probably would have been most happy with the statement made by Roger Howell, Jr., president of Bowdoin College when conferring an honorary Doctor of Laws degree upon him in 1975, "His students stand as a monument to his work."

*Because graduates of the Latty years enjoy a special bond to the Law School quickened by their memories of Dean Latty, a \$1,000,000 Professorship Fund is being established. Pledges of \$25,000 or more, payable over a five-year period are being sought. Inquiries regarding the Latty Professorship Fund should be addressed to Lucille Hillman, Assistant Dean for Major Projects, at the Law School.*

## Leon Rice is Recipient of Charles A. Dukes Award

Leon L. Rice, Jr. '36 was named a recipient of the Charles A. Dukes Award by the Awards and Recognition Committee of the Board of Directors of the General Alumni Association of Duke University. The award, named for Charles A. Dukes, the former Director of Alumni Affairs for Duke University, was established in 1983 to recognize those alumni volunteers whose service to Duke far exceeded the requirements of the position they held.

Mr. Rice was nominated for the award by the Law School for his stellar performance as the reunion coordinator for the joint fiftieth reunion of the classes of 1936 and 1937 held in the fall of 1986. Evelyn Pursley, Assistant Dean at the Law School, recalls, "As I believe he was known to do in all of his endeavors, Mr. Rice went above and beyond the call of duty in coordinating a very special fiftieth reunion celebration." On his own initiative, he

started to generate interest and enthusiasm a year in advance of the event, then went far beyond the norm in sending out letters and making personal phone calls to recruit attendees. His creative ideas, such as retrieving (from the University Archives) the class members' original law school applications with pictures and "why I want to be a lawyer" essays, added special meaning to the event.

Mr. Rice also coordinated a special reunion gift drive to establish an endowment fund for the journal, *Law and Contemporary Problems*. This interdisciplinary journal was established at the Law School in 1933, and many members of these classes had written for the journal. Mr. Rice made the reunion and the establishment of the endowment even more meaningful by bringing David Cavers, founder of *Law and Contemporary Problems* and a professor at the Law School in 1936 and 1937 to Durham for the event.

After the reunion, Mr. Rice contacted those who had been unable to attend the reunion to report on the festivities. Everyone in the fiftieth reunion classes agreed it was the best reunion ever.

Mr. Rice passed away in the spring. The award was presented to Mrs. Leon (Fordie) Rice during the annual Law Alumni Association meeting held in conjunction with Law Alumni Weekend in September.



L. to R.: Calder W. Womble '47; Mrs. Leon L. (Fordie) Rice, Linwood L. Davis '67; Charles W. Petty, Jr. '63.

## Private Adjudication Center to Study Medical Malpractice Procedures

The Private Adjudication Center, a non-profit affiliate of the Law School, has received \$284,000 from the Robert Wood Johnson Foundation to study litigation procedures in medical malpractice cases. Information gained from the research conducted by the Medical Malpractice Project ("Project") will be used to design and test alternative dispute resolution ("ADR") techniques that can be used for malpractice cases.

The three-year project is divided into two phases. Phase One, scheduled to be completed in mid-1988, consists of an in-depth examination of the present litigation system as applied to malpractice cases. Project personnel, including approximately ten students involved in a research tutorial, will review court records and other files in all malpractice cases litigated in North Carolina over the past three years. From this review—estimated to involve over 750 cases—the Project's researchers will be in a position to document specific problem areas as well as identify procedural opportunities that might improve the litigation process.

"From every quarter there have been strongly expressed opinions—mostly negative—about how malpractice cases are litigated," noted Professor Thomas Metzloff, Director of the Project. "Yet, at the same time, there has been almost no research concerning which of the per-

ceived problems are real or the procedural character of these problems. We want to help focus the debate by providing an in-depth, detailed description of the process."

In addition to reviewing records in all litigated cases, the researchers will select approximately 50 cases in which to do an in-depth review consisting of detailed interviews with the relevant parties—plaintiffs, defendants, their attorneys, insurance claims managers, judges, witnesses, and even jurors. "One of the most significant questions we are now facing is how to concentrate our energies in these follow-up cases," noted Professor Neil Vidmar, the Project's Research Director. "While the comprehensive data collection is needed, you must supplement that information with the richness and understanding that can be derived only from a detailed inquiry into all aspects of a number of representative cases."

After the first year, the Project will enter Phase Two, scheduled to last for two years. During this phase, the Private Adjudication Center will first design ADR mechanisms for handling malpractice cases. This system of procedures will then be publicized in hopes of obtaining referrals of malpractice cases to the Center. These cases will be carefully analyzed in order to test the utility and fairness of the new ADR procedures used. David Warren '64

of the Duke Department of Health Administration, who is serving as Administrative Coordinator for the Project, hopes to develop a panel of neutral medical experts to provide input to the parties relating to the medical issues presented.

While the Medical Malpractice Research Project is initially focusing on North Carolina malpractice cases, it is hoped that the finding will have a national impact. "Many states and private entities are actively exploring alternatives to the present litigation system," noted Professor Clark Havighurst, Chairman of the Project's Advisory Board. "We expect that this Project will provide needed insights in the litigation process that will be useful to policymakers throughout the United States."

The Private Adjudication Center is now in its fourth year of operation. In addition to the Medical Malpractice Project, the Center is involved in a number of other significant studies. The Center continues to administer the court-annexed arbitration program in the Middle District of North Carolina, which includes a major research effort. Plans are on the drawing board for a number of new initiatives including a jury trial research program, a securities arbitration program, a study of offer of judgment rules, and an attorney-client fee dispute resolution center.

## Law Alumni Association Presidency Passes

Charles W. Petty, Jr. '63, passed the presidency of the Duke Law Alumni Association to John Q. Beard '60, during the fall meeting of the Law Alumni Association during Law Alumni Weekend. Beard presented Petty with a plaque commemorating his presidency as a token of appre-

ciation for the energy, vision and enthusiasm which Petty brought to this role. Under Petty's leadership, the Law Alumni Association and its governing body, the Law Alumni Council, were rejuvenated and instituted several new programs. The Council commissioned a new alumni

directory, and President-Elect Beard undertook the revision of the Association by-laws—for the first time since 1962—to reflect changes in structure and procedure. The Law Alumni Association co-sponsored the first annual Conference on Career Choices at the Law School which



*Charles W. Petty, Jr. '63 and John Q. Beard '60.*

brought current law students and alumni together to discuss career options. The Law Alumni Council invited representatives of the local law alumni associations to attend its fall meeting in an effort to strengthen both the local association program and alumni ties with the school. Over half of the thirty associations were able to send representatives to the meeting where they received information on current Law School programs, and many attending expressed their appreciation and enthusiasm for the opportunity to become better educated about current activities at the Law School.

Mr. Petty, who will remain on the Council for 1987-88 as Immediate Past President, expressed both his satisfaction with the work of the Association over the last couple of years and his optimism for its continued vitality under the leadership of its new President, John Beard and President-Elect, Anton H. (Nick) Gaede, Jr. '64.

## Charles S. Murphy Award Presented to Gerald Tjoflat

In September, the Duke Law School Alumni Association presented the third annual Charles S. Murphy award to Gerald Bard Tjoflat, '57. The Charles S. Murphy Award is presented annually to an alumnus or an alumna of the Law School 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. Devoting himself to public service, Mr. Murphy held 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.



*Charles W. Petty, Jr. '63 congratulates Judge Tjoflat.*

Judge Tjoflat has served as a judge in the United States Court of Appeals since 1975 (1975-81, Fifth Circuit; 1981-present, Eleventh Circuit). From 1970 to 1975, he was a judge in the United States District Court for the Middle District of Florida, and from 1968 to 1970, he was a judge in the Fourth Judicial Circuit Court for the State of Florida.

In addition to his judicial activities, Judge Tjoflat has devoted himself to the improvement of the legal system through his service in professional organizations. Since 1975, he has been vice-chairman of two committees of the American Bar Association: the Committee on Implementation of Standards of Criminal Justice and the Committee on Discovery, Section of Criminal Justice. He has also served on the Advisory Corrections Council of the United States since 1976 and on the Task Force of the National Center

for Innovations in Corrections, and was a U.S. Delegate to the Sixth and Seventh United Nations Congresses for Prevention of Crime and Treatment of Offenders. Judge Tjoflat has been a member of the American Judicature Society since 1968 and of the American Law Institute since 1972. He has served on the Judicial Conference Committee on Administration of the Probation System since 1973 and as its Chairman since 1978.

The judge is also active in the pursuit of civic improvement. He is a member of the Advisory Board of the National Alliance for Safe Schools and the Board of Trustees of the Jacksonville Marine Institute and is President of the North Florida Council of the Boy Scouts of America. He also serves the Law School as an honorary life member of the Board of Visitors.

The award, an original water-

color of a North Carolina scene, was presented during the annual Law Alumni Association meeting held in conjunction with Law Alumni Weekend. Judge Tjoflat was attending the thirtieth reunion celebration of the Class of 1957, for which he served as coordinator.

Upon accepting the award, Judge Tjoflat expressed his appreciation for the fine legal education he had received at Duke Law School, particularly noting the excellent faculty and the collegial atmosphere. He noted that both his relationships with his judicial clerks who have graduated from the Law School and his association with the Board of Visitors keep him well aware that the tradition of excellence continues at the Law School. The judge encouraged those present, as he encourages his clerks, to devote their energy and skills to civic and public improvement.

# Alumni Activities

## CLASS OF 1932

*Joseph T. Carruthers* is currently "of counsel" with Carruthers & Roth, P.A. in Greensboro, North Carolina.

## CLASS OF 1933

*Bob Adams* is coordinator of Anzusa Society International, an organization dedicated to promoting goodwill and fellowship among Australians, New Zealanders and Americans.

## CLASS OF 1935

*Roy M. Booth* is senior partner in the law firm of Booth, Herrington, Johns and Campbell in Greensboro, North Carolina.

## CLASS OF 1936

*Edward Rubin*, attorney in the law firm of Mitchell, Silberberg & Knupp in Los Angeles, has received a "Distinguished Service Award," one of three such awards presented annually by the Beverly Hills Bar Association Foundation.

## CLASS OF 1939

*Hubert Kennard Arnold* has retired from the active practice of law and received the Master of Arts Degree in Anthropology from Wichita State University in May 1987.

## CLASS OF 1940

*Margaret Harris* was elected a Trustee Emeritus at Duke University after having served twelve years as a trustee.

## CLASS OF 1942

*George B. Pollack* has entered "semi-retirement" by closing his law offices of 42 years and becoming "of counsel" to the law firm of Corodemos & Corodemos, a firm of young lawyers in New Jersey.

## CLASS OF 1947

*Matthew S. Rae* is serving during 1987 as chairman of the Resolutions Committee of the Conference of Delegates of the state bar of California and has been nominated to serve on the Executive Committee of the Conference commencing September 1987.

## CLASS OF 1948

*T. Emmet Walsh* became the President of the South Carolina Bar Association in July 1987.

## CLASS OF 1949

*William Bader* was elected President of Mid Florida Lakes Village Association, a community of 2500 residents, and Commander and Veterans Service Officer of Chapter 87, Disabled American Veterans, of Leesburg, Florida. Bader was also appointed by the Lake County commissioners to serve on a committee to draft a sand mining ordinance.

*Charles F. Blanchard* was elected to a three-year term on the Board of Governors of the International Society of Barristers in July 1987—an organization limited to 600 plaintiff and defense attorneys in the U.S., Canada, England and the European continent.

*William J. Lowry* retired to North Carolina in March 1985 after 35 years of law practice in Ohio. Although admitted to practice in North Carolina, Lowry does not plan to return to full-time "lawyering."

*David K. Taylor, Jr.* retired in late 1986 after 32 years in international negotiations and general management with Mobil Oil Corporation. Taylor is spending the 1987-88 academic year as Senior Fellow in International Business Diplomacy at the School of Foreign Service at Georgetown University.

## CLASS OF 1950

*Ralph Clayton Clontz, Jr.*, senior partner in the law firm of Clontz and Clontz of Charlotte, North Carolina, is author of the "Truth-in-Lending Manual," "Equal Credit Opportunity Manual," and "Fair Credit Reporting Manual," published by Warren, Gorham and Lamont.

*Walter H. Mason, Jr.* who retired in 1984 as H.O. Surrogation Supervisor of the Great American Insurance Company, is now a consultant for the North Carolina Insurance Guaranty Association and a member of the Executive Committee and Board of Directors of the Eastern Carolina Multiple Sclerosis Society.

## CLASS OF 1952

*Lee H. Henkel, Jr.* received the Sigma Chi International Fraternity's highest honor for outstanding achievements in his professional field. Henkel was recognized for his appointment as assistant general counsel of the U.S. Treasury Department and chief counsel for the Internal Revenue Service in 1971; his appointment by President Reagan to the Federal Home Loan Bank Board; and his current position as president of Henkel Properties, Inc.

## CLASS OF 1954

*John W. Maxwell* is currently Director of Marketing for ITT World Directories in Japan and Senior Marketing Manager for the Nippon Directories Development Company.

## CLASS OF 1955

*David C. Goodwin* joined the firm of Morgan, Lewis & Bockius as a partner in the litigation section of the Miami office.

**CLASS OF 1957**

*Gerald Bard Tjoflat* was presented with the Charles S. Murphy Award on September 12, 1987 during Law Alumni Weekend. This award is presented annually to honor a distinguished alumnus or alumna dedicated to public service.

**CLASS OF 1958**

*William D. Caffrey* retired as Chairman of the Board of Trustees of Greensboro College in October 1987, after serving seven years during which the most successful fund raising effort in the College's history was completed.

*William H. Grigg*, executive vice president and chief financial officer for Duke Power Company, was named one of the nation's top 10 chief financial officers.

*Eugene G. Partain* is a partner with the Atlanta law firm of Powell, Goldstein, Frazer & Murphy.

**CLASS OF 1960**

*Thomas H. Lee* is Senior Resident Superior Court Judge of the 14th Judicial District in Durham County, North Carolina.

**CLASS OF 1961**

*Carl Stewart* has been elected to serve on the 36-member board of directors of the Committee on Constitutional Integrity. This committee was established in 1982 for the purpose of recommending changes in policies, procedures and legislation to strengthen the separation of powers doctrine in the North Carolina Constitution.

**CLASS OF 1962**

*James W. McElhaney*, the Joseph C. Hostetler Professor of Trial Practice and Advocacy at Case Western Reserve University School of Law in Cleveland, has been elected to the Council of the American Bar Association's Section of Litigation. As a council member, McElhaney will participate in the national leadership of the section, working to develop association positions on issues affecting the litigation process

and to direct implementation of section policies and goals.

*John Norton Moore*, Walter L. Brown Professor of Law at the University of Virginia, is Chairman of the brand new federal agency, the United States Institute of Peace.

**CLASS OF 1963**

*Lucius H. Harvin III*, chairman of Rose's Stores in Henderson, North Carolina, has been named to the board of directors of Wachovia Bank and Trust in Winston-Salem.

*J. Thomas Menaker* has just completed a two-year term as Chairman of the Pennsylvania Bar Association House of Delegates. Menaker is now serving as Chairman of the Pennsylvania Bench-Bar Conference; and is a member of the National Board of Family Service America.

*Robert H. Metz* was elected President of the Montgomery County Bar Association in Maryland for the 1988-89 year.

**CLASS OF 1964**

*Harry Haynsworth* represented Duke in April at the inauguration of the president of Benedict College in Columbia, South Carolina.

*David G. Warren* is now Medical-Legal Director of the Medical Malpractice Research Project in Duke's Private Adjudication Center. The project is funded by a three-year grant from the Robert Wood Johnson Foundation. (See article at page 57.)

**CLASS OF 1965**

*Patrick C. Coughlan* is a partner in Coughlan Associates, a consulting firm which specializes in arbitration and mediation, in Portland, Maine.

*William H. Lear* is in his 17th year as Vice-President/General Counsel and Secretary of Fleetwood Enterprises, Inc. The company has grown tenfold in revenue during that period and has been in the Fortune 500 most of that time.

*C. Nicholas Revelos* is author of 1987 Pocket Parts for Revelos, Michigan Practice Series, *Corporations*, published by West Publishing Company.

**CLASS OF 1966**

*W. Reece Bader* was "elevated" from the Advisory Committee on Civil Rules of the U.S. Judicial Conference to the Committee on Rules of Practice and Procedure in May 1987. The latter oversees the work of all of the Rules Committees.

*Alexander B. Denson*, U.S. Magistrate of the U.S. Courts in Raleigh, has become President of the newly formed (May 1987) Wake County Duke Bar Association, the local alumni association of Duke law alumni residing in the area of Raleigh, North Carolina.

*Henry H. Fox* has become a director of Greenberg, Traurig, Askew, Hoffman, Lipoff, Rosen & Quentel, P.A. in their Fort Lauderdale office. Fox will continue to concentrate his practice in representing financial institutions and parties involved in lending and financing transactions.

*Jonathon T. Howe*, senior partner and president of the Chicago firm of Howe & Hutton, Ltd., has become President of the National School Boards Association. He represented Duke Law School on September 10 at the 100th anniversary of the founding of the IIT-Chicago Kent College of Law. In addition, Howe is author of the "Operating Considerations" chapter for the 1987 edition of *Not-For-Profit Corporations* published by the Illinois Institute for Continuing Legal Education. For over 25 years IICLE has been the primary continuing legal educator in Illinois, offering a wide range of books and courses for practitioners to use throughout their careers.

*James B. Maxwell*, an attorney in Durham, North Carolina, is President of the North Carolina Academy of Trial Lawyers, the third largest state trial lawyer organization in the nation. He was elected a Fellow of the American College of Trial Lawyers in August 1987.

**CLASS OF 1968**

*Carl F. Bianchi*, the administrative director of Idaho's courts, was awarded the 1987 Warren E. Burger Award from the Institute for Court Management of the National Center

# Law Firm News

*S. Ward Greene '73* announces that Greene & Markley in Portland, Oregon has opened a Seattle office to enable it to offer a full range of commercial, corporate and bankruptcy representation in both Oregon and Washington.

The two firms of Stoel, Rives, Boley, Fraser & Wyse of Portland and Jones, Grey & Bayley, P.S. of Seattle have merged to practice as Stoel Rives Boley Jones & Grey. The new firm has nearly 180 lawyers. Established in 1907, the Stoel Rives firm grew to become the largest law firm in Oregon. The Jones Grey firm, tracing its origin to before the turn of the century, became one of the outstanding general practice firms in the state of Washington.

Two attorneys of Stoel Rives are Duke Law School graduates: *Aaron Besen, '85* and *Thomas Stoel, '37*. One of the attorneys of Jones Grey is a Duke Law School graduate: *Donald Myers, '69*.

for State Courts. This award is presented annually to honor individuals who have outstanding records of accomplishment in the field of court management.

*Charles B. Burton* has been elected a Fellow of the Arizona Bar Foundation and continues to practice in Phoenix, Arizona.

*Robert Frey* is now Vice President and General Counsel for the Whirlpool Corporation in Benton Harbor, Michigan.

*W.G. Hancock* has been elected to serve on the 36-member board of directors of the Committee on Constitutional Integrity. This committee was established in 1982 for the purpose of recommending changes in policies, procedures and legislation to strengthen the separation of powers doctrine in the North Carolina Constitution.

The firms of Moore & Van Allen in North Carolina and Nexsen Pruet Jacobs & Pollard in Columbia, South Carolina announce the merger of their practices under the name of Moore & Van Allen Nexsen Pruet in South Carolina and Moore & Van Allen in North Carolina.

The following attorneys at Moore & Van Allen are Duke Law School graduates: in Charlotte, C. Wells Hall III '73; Margaret Ann Behringer '85; Kenneth S. Coe '76; James P. McLoughlin, Jr. '82; David J. Quattlebaum '86; in Durham, N.A. Ciompi '74; Charles R. Holton '73; and Nancy Russell Shaw '73; in Raleigh, Jean Gordon Carter '83; Richard W. Evans '82; and Donald S. Ingraham '82; in the Research Triangle Park, Ann M. Happel '78 and Laura J.G. Long '72; Richard E. Thigpen '22 is "of counsel" in Charlotte. Harry J. Haynsworth IV '64, professor of law at the University of South Carolina, is also "of counsel" at Moore & Van Allen Nexsen Pruet in Columbia.

*Robert C. Fox* is now a full professor, teaching at Metropolitan State University, an upper division, non-traditional liberal arts college for adults, in St. Paul, Minnesota. Fox is a charter faculty member of the university.

*William P. Pinna*, an attorney with the law firm of Pinna, Johnston, Rhudy, O'Donoghue & Carey in Raleigh, was appointed to the North Carolina Property Tax Commission by Governor James Martin and will serve until June 20, 1991. The five-member commission rules on appeals concerning the appraisal of property belonging to public services companies and also acts as the State's board of equalization and review for the taxation of public service property.

*Brice T. Voran* is now a resident partner in Shearman & Sterling's Los Angeles office.

## CLASS OF 1969

*William J. Bates* was selected President of the Charleston, South Carolina Speech and Hearing Center board of directors, a volunteer board that supervises activities of the Center, which is celebrating its 40th anniversary this year.

*David Klaber*, a partner in the law firm of Kirkpatrick & Lockhart, has become the first President of the newly formed (May 1987) Pittsburgh Duke Bar Association, the local association of Duke law alumni residing in that area.

*Robert B. Posey* has joined the World Economic Forum as Director of Development for the new World Link project which is based in Geneva, Switzerland.

## CLASS OF 1970

*James K. Hasson, Jr.*, practicing attorney in the Atlanta law firm of Sutherland, Asbill & Brennan and Adjunct Professor of Law at Emory University, has been appointed to the IRS Commissioner's Exempt Organizations Advisory Group.

## CLASS OF 1971

*Randolph J. May* is now partner in the law firm of Bishop, Cook, Purcell & Reynolds in Washington, D.C., specializing in communications law.

*Gail L. Richmond* is President of the Greater Fort Lauderdale Tax Council for 1987-88. The third edition of her text, *Federal Tax Research* has been published by Foundation Press.

*Michael L. Richmond* served as a judge for the Scribes law review writing competition this year.

## CLASS OF 1972

*Robert B. Breisblatt* has joined the Chicago law firm of Welsh & Katz, Ltd., which specializes in intellectual property law.

*Joseph E. Claxton* became General Assistant to the President of Mercer University on September 1, 1986, having previously served as Associate Dean of the Mercer University School of Law in Macon, Georgia.

*Amos T. Mills III* served as chairman of the Liaison with Law Enforcement Agencies Committee and the Administration of Justice Section of the Federal Bar Association for 1986-87.

*Richard O. Pullen* left the FCC in 1981 to join Contemporary Communications Corporation as a founding officer and vice-president of its Washington office. At the FCC Pullen did the original research on Point-to-Multipoint radio services, the regulatory basis of terrestrial and satellite television/data distribution.

*June Scarborough*, Vice-President of Manufacturers Hanover Bank in Wilmington, Delaware, has become the first President of the Delaware Valley Duke Bar Association, the local association for Duke law alumni in Philadelphia; Wilmington, Delaware; and southern New Jersey.

#### CLASS OF 1973

*C. Wells Hall III* has been named to a second term as chairman of the Tax Section of the North Carolina Bar Association. Hall is a partner in the firm of Moore & Van Allen in Charlotte, North Carolina.

*Donald O'Brien Mayer* is presently teaching business law at Western Carolina University School of Business in Cullowhee, North Carolina.

*Carolyn S. Parlato* is Assistant General Counsel for Trans World Services, Inc. in New York City.

*David F. Peterson* was appointed substitute judge for the 15th Judicial Circuit of Virginia in December 1986.

*Michael J. Stewart* was appointed Assistant Judicial Officer by the U.S. Secretary of Agriculture in 1986—a statutory position rendering final opinions for USDA in all regulatory programs' cases on appeal from decision by an administrative law judge. This year Stewart was awarded the USDA's "Certificate of Merit for Sustained Superior Performance."

#### CLASS OF 1974

*Edna Ball Axelrod*, formerly an Assistant U.S. Attorney for the District of New Jersey, is the newly-appointed Chief of the Appellate

Division of the District of New Jersey, supervising all criminal appellate work as of September 1, 1987.

*Stephen Neal Dennis* is now Executive Director for the National Center for Preservation Law in Washington, D.C.

*L. Lynn Hogue* has returned to the faculty full-time at Georgia State University College of Law after having served as Associate Dean for Academic Affairs.

*Eric Alan Houghton* has been practicing "laid back law" since 1985 from his home office in the areas of estates and trusts and real estate. He comments that "the flexibility and free time are marvelous."

*Ronald R. Janke* has become chairman of the Environmental Law Section of Jones, Day, Reavis & Pogue in Cleveland, Ohio.

*Jerry W. Jernigan* joined the law firm of Wray, Layton, Cannon, Parker & Jernigan, P.A. in Charlotte, North Carolina on May 1, 1987.

*Ronald M. Marquette* retired from the Air Force this past summer and joined Poyner & Spruill in Rocky Mount, North Carolina.

*Thomas E. McLain*, Senior Vice President of Balcor International Realty Investment Corporation responsible for Asian operations, has been appointed a director of The American Investment Management Company. (See article at page 44.)

*Philip H. Moise* is the managing principal of the Technology Park office of Trotter, Smith & Jacobs in Norcross, Georgia, providing corporate and securities law representation to high technology companies.

*Larry Joseph Skoglund* was elected a shareholder in the Minneapolis law firm of Chadwick, Johnson & Condon in 1986.

*Patricia H. Wagner*, a member of the Seattle law firm of Wickwire, Goldmark & Schorr, was appointed chairperson of the Equal Opportunity in the Law Committee of the American Bar Association's Section of Litigation in August 1987.

*Clair F. White* has joined the Shreveport, Louisiana law firm of Hargrove, Guyton, Ramey and Barlow as a partner.

#### CLASS OF 1975

*K. Rodney May* is a partner in the law firm of Foley & Lardner in Orlando, Florida, where he specializes in corporate finance, bankruptcy reorganization and health law.

*William P. Simmons* is in private practice as a pediatrician in Tulsa, Oklahoma.

#### CLASS OF 1976

*John F. Callender* was certified by the Florida Bar as a Board Certified Civil Trial Lawyer.

*John Richard Flavin* has joined the Barlow Corporation of Chevy Chase, Maryland as President and Chief Operating Officer—primarily in real estate development.

*G. Richard Gesch* has established a new office for civil practice on the island of Maui, Hawaii.

#### CLASS OF 1977

*D. Ward Kallstrom, Jr.* has been selected as Co-Chair (Management) of the Employee Benefits Committee of the ABA Labor and Employment Law Section and member of the editorial board for the ERISA treatise to be published by the Committee under contract with BNA.

*Gary Meringer* has joined the New Orleans firm of McGlinchey, Stafford, Mintz, Cellini & Lang, which is the securities counsel for a number of public and private companies in both finance and industry.

*David Pishko*, a partner in the Winston-Salem law firm of Pfefferkorn, Pishko & Elliot, P.A., has become the first President of the Winston-Salem Duke Bar Association, that area's Duke law alumni association.

*Michael S. Siegel* is now an attorney-adviser with the Board of Veterans Appeals in Washington, D.C. The Board decides all appeals under laws administered by the Veterans Administration in order to grant all benefits to which veterans and their dependents are entitled.

#### CLASS OF 1978

*James J. Capra, Jr.* has become a partner in the law firm of Donovan Leisure Newton & Irvine in New



*Christopher G. Sawyer '78*

York City. Capra specializes in anti-trust and securities matters.

*Marilyn Hoey Howard* is Division Counsel for Harris Semiconductor Products Division in Melbourne, Florida.

*Lawrence G. McMichael* is a partner in the Philadelphia law firm of Dilworth, Paxson, Kalish & Kaufmann.

*William A. Price* was appointed to the Guardian Advisory Council of the National Federation of Independent Business/Illinois, the nation's largest small-business organization which deals with key issues affecting small-business owners.

*Christopher Glenn Sawyer* has been elected secretary-treasurer of the 5,000-member Atlanta Bar Association for the 1987-88 year. From 1983 to the present he served on the board of directors of the association as chairman of its continuing legal education committee and as its secretary-treasurer.

*Karen L. Whittington* has been in private practice in Richmond, Virginia since 1978.

#### CLASS OF 1979

*Valerie T. Broadie* has been named director of corporate and foundation relations at Drexel University in Philadelphia.

*Phyllis Glass* was named Assistant General Counsel of Columbia Pictures Industries, Inc. in January 1987.

*L.T. Portwood* became Associate Director of Foundation and Corporate Relations at Stanford University in April 1987.

*Jeffrey B. Ritter*, a partner in the Columbus law firm of Schwartz, Kelm, Warren & Rubenstein, is President of the newly formed (October 1987) Central Ohio Duke Bar Association, the local association of Duke law alumni in the Columbus area.

*Neil Philip Robertson* became a named partner in the law firm of Peters, Pickle, Flynn & Niemoeller in Miami, Florida on March 1, 1987.

*Carl J. Schuman*, as an Assistant State Attorney for the State of Connecticut, argued a case—*Kelly v. Robinson*, 107 S.Ct. 353 (1987)—in the Supreme Court of the United States.

*Captain Evan Zucker* is nearing the end of six years of active duty with the U.S. Air Force. He is currently flying F-4G Phantom Wild Weasel fighters at Spangdahlem Air Base, Germany and plans to return to the civilian world in 1988.

#### CLASS OF 1980

*Tamah S. Al Shamari* has presented two of his books as gifts to Duke Law Library: *The Board of Directors of Corporation: a Comparative Legal Study between Kuwait Law and U.S. Law*; and *The Commercial Companies Law of Kuwait*.

*John H. Hickey* is chairman of a grievance committee of the Florida Bar and of a professional arbitration subcommittee of the Dade County Bar Association.

*Jane Pickleman Long* became a partner in the law firm of Taylor & Zunka, Ltd. in Charlottesville, Virginia on September 1, 1987.

*Andromeda Monroe* recently joined the corporate legal department of American Bankers Insurance Group in Miami, Florida as associate corporate counsel, specializing in governmental relations and insurance/banking issues.

*Lisa Margaret Smith* is now Assistant U.S. Attorney for the Southern District of New York, in the office of Rudolph Giuliani.

#### CLASS OF 1981

*David S. Addington* was appointed by President Reagan as Special Assistant to the President for Legislative Affairs in July 1987.

*Karen Estelle Carey* has joined the law firm of Womble Carlyle Sandridge & Rice in their Winston-Salem, North Carolina office.

*Robert E. Casselman* is currently managing general partner of Weksler-Casselmann Investments, a diversified investment partnership, and "of counsel" to McDaniel & Jaburg, P.C. in Phoenix, Arizona.

*Patrick Brock Fazzone* is now with the law firm of Collier, Shannon, Rill & Scott in Washington, D.C., practicing in the area of international trade and business.

*Stephen Robert Klein* became a partner in the law firm of Cole Schote Bernstein Messel & Forman, P.A. in Hackensack, New Jersey on January 1, 1987.

#### CLASS OF 1982

*Ruth Dukelow*, Library Establishment Specialist at the Library of Michigan in Lansing, received the 1987 Loleta D. Fyan Award. This award is given annually to a librarian who has achieved distinction in the profession.

*Peter W. Goodwin* has joined the law firm of Hutcheson & Grundy in Houston, Texas to continue practicing oil and gas law.

*Susan K. McKenna* is a partner in the law firm of Garwood & McKenna, P.A. in Orlando, Florida, practicing primarily in the area of labor and employment law.

*Juan Manuel Ruigomez* is a trial lawyer, working for the government of Spain, and is also a private practitioner.

*Michael J. Schwartz*, President and Chief Executive Officer of Alexian Brothers Hospital in Elizabeth, New Jersey, became a Fellow in the American College of Healthcare Executives, an international professional society representing more than 21,000 healthcare executives. Fellowship is the highest level of professional achievement in the College.

*A. Bradley Shingleton* returned in June 1987 from nine months in West Germany as a Robert Bosch Foundation Fellow. He is now associated with the firm of Walter, Conston, Alexander & Green in New York City.

*Scott Sokol* is the Director of Public Relations and Political Education for a professional association and labor union in Orlando, Florida.

### CLASS OF 1983

*Alan B. Berman* is now Western Regional Vice President of Legal Affairs for Richmond American Development Company, a Division of MDC Holdings, Inc., one of the largest real estate development firms in the country.

*William A. Blancato* has joined the law firm of Hendrick, Zotian, Cocklereece & Robinson in Winston-Salem, North Carolina.

*Seth Forman* was unanimously appointed Legislative Counsel by the Congress of the Federated States of Micronesia in May 1987.

*Nora Margaret Jordan* and her husband, *W. Allen Reiser*, both class of 1983, are associates in the New York law firm of Davis Polk & Wardwell.

*Mark Langer* was promoted to the position of Chief Staff Counsel of the United States Court of Appeals for the District of Columbia Circuit.

*Betty Tenn Lawrence* is in the process of setting up solo practice in Asheville, North Carolina after spending 3 years at Davis Polk & Wardwell in New York City.

*Michael T. Petrik* is currently a tax associate with Alston & Bird in Atlanta, Georgia.

*Omer G. Poirier* is now an associate at Peterson, Ross, Schloerb & Seidel in Chicago, Illinois.

*Andrea K. Sigman* left private practice in Washington, D.C. in March 1987 to take the position as Assistant University Counsel at Duke University. (See article at page 41.)

*Tom Simser, Jr.* became a shareholder in the law firm of Winderweedle, Haines, Ward & Woodman, P.A. in July 1987, resident in the Orlando, Florida office.

*David Alan Zalph* recently joined the law firm of Rhoads & Sinon in Boca Raton, Florida. Zalph has also received CPA certification from the Florida Board of Accountancy.

*Valerie Zimkus* is now in-house trial counsel for U.S. Fidelity & Guaranty Company in Baltimore, Maryland.

### CLASS OF 1984

*Jay Gendron* is now with Lorimar-Telepictures Corporation in Culver City, California.

*John Jameson*, now a political consultant in Washington, is the Southern Coordinator for the "Albert Gore for President" campaign. He has recently published an article in *The New Republic* and will soon publish one in *Playboy*.

*Floyd B. McKissick, Jr.*, formerly with the Washington, D.C. law firm of Dickstein, Shapiro & Morin, is now with the Durham branch office of Faison, Brown, Fletcher & Brough.

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

*Daniel Garron Rogers* joined the Dallas law firm of Caldwell & Associates as a legal search consultant in March 1987.

*Jane Williamson* has been promoted to the position of Senior Attorney with the Federal Deposit Insurance Corporation and is working on assisted transactions of failing banks.

### CLASS OF 1985

*Thomas James Gorman* has joined the law firm of Petree Stockton & Robinson in Charlotte, North Carolina in the area of commercial litigation.

*Paul L. Huey* has joined the law firm of Bush, Ross, Gardner, Warren & Rudy in Tampa, Florida to specialize in the areas of commercial litigation, creditors' rights and bankruptcy.

*Marianne O. LaRivee*, a captain in the U.S. Air Force, is now stationed at RAF Upper Heyford near Oxford in the United Kingdom and will return to the U.S. in 1990.



*Thomas J. Gorman '85*

### CLASS OF 1986

*Ron Coleman* joined the Atlanta law firm of Paul, Hastings, Janofsky and Walker in September 1987.

*Sally Coonrad Carroll* is an associate in New York at the law firm of Gaston, Snow, Beekman and Bogue.

*Robert T. Danforth* has joined the law firm of Arnold & Porter in Washington, D.C. as an associate.

*George W. Finkbohner* is now an associate with Finkbohner, Lawler and Olen in Mobile, Alabama.

*Lindsay Glickman* joined the New York City law firm of Skadden, Arps, Slate, Meagher & Flom as an associate in September 1987.

*Deborah Machemer* is now with the law firm of Finley, Kumble in Dallas, Texas.

*Robin Panovka* is an associate with the Atlanta law firm of Alston & Bird.

# Personal Notes

'68—*Brice T. Voran* and his wife, Chris, announce the birth of their second child, Katherine Marie, in February 1987. Voran is now resident partner in Shearman & Sterling's Los Angeles office.

'71—*Frank J. Sizemore III* and his wife, Laurie, announce the birth of a son, Frank J. Sizemore IV on November 7, 1986.

—*Frank P. Ward, Jr.* and his wife, Mitchell Dalton Ward, announce the birth of a daughter, Victoria Blake Ward, on July 15, 1987.

'74—*David William Lowden* and his wife, Constance Adcox, announce the birth of a daughter, Sara Elizabeth Adcox Lowden, on August 20, 1986. Lowden is Chair of the Art Law Committee, Association of the Bar of the City of New York, for 1986-89.

'75—*Janet F. Bentley* gave birth to an 8 lb. 14 oz. baby boy on February 26, 1987.

'76—*Jack Griffeth* and his wife, Nancy, are the proud parents of a baby girl, Jessie LeeAnn Griffeth, born April 29, 1987.

'77—*Scott C. Gayle* is the proud father of a son, Cameron, born on December 18, 1985 and a daughter, Ashleigh, born on May 26, 1979. Gayle is a partner in the law firm of Fisher Fisher Gayle & Craig in High Point, North Carolina.

'78—*Susan Brooks* and *Michael R. Johnson*, both class of 1978, announce the birth of their second son, Steven Brooks Johnson, on June 17, 1987.

'79—*Mark Gunn Burnette* married Cheryl Ann Burkart on March 28, 1987.

—*Terence Hynes* and his wife, Kathryn, announce the birth of their daughter, Shaylyn Michelle, on May 20, 1987.

—*Gray McCalley, Jr.* and his wife, Mary Jo, announce the birth of a baby girl, Catherine Marie, on September 16, 1987. Gray is presently working as Executive Assistant and Senior Advisor to the Ambassador at the U.S. Embassy in Bonn, West Germany.

—*Rita McConnell* and her husband, Steve Mattaini, announce the birth of their second child, Margaret Catherine, on December 31, 1986.

—*Stephen B. Spolar* and his wife, Jody Buchheit Spolar, are the proud parents of Matthew Stilin Spolar, born on May 26, 1987. Spolar is Employee Relations Counsel for Allegheny Ludlum Corporation in Pittsburgh.

'80—*G. William Brown, Jr.* and his wife, Amy Moss, announce the birth of their daughter, Elizabeth Quinn Brown, on November 14, 1986.

—*Hans Christian Linnartz* and his wife, Elizabeth, announce the birth of their second child and first daughter, Esther Louise, on April 11, 1986.

'81—*Jonathan L. Abram* married Eleni M. Constantine on September 7, 1986.

—*Robert E. Casselman* and his wife, Kathy, announce the birth of a daughter, Erica Leigh, on June 12, 1987.

—*Steven Robert Klein* and his wife, Mary Ann, announce the birth of a daughter, Helaina Lynn, on February 27, 1986.

'82—*Sharon M. Fountain* and her husband, *Ben E. Fountain III* '83, announce the birth of a son,

John Issac, on April 30, 1987.

—*Gail Griffith* and her husband, Gary Begeman, announce the birth of a daughter, Sarah Hall Begeman, on November 17, 1986.

—*Susan McKenna* and *Scott Sokol*, both class of '82, were married on June 12, 1987 in Orlando, Florida. Susan is a partner in the law firm of Garwood & McKenna in Orlando. Scott is director of public relations and political education for a professional association and labor union in Orlando.

—*Elizabeth Roth* married Ron Katz, also a lawyer in Palo Alto, on March 22, 1987.

'83—*Timothy Elder* married Susan Wyle Yancey of Atlanta on June 6, 1987.

—*Theodore R. Hainline, Jr.* and his wife, Melody, announce the birth of their second child, Molly Katherine, on July 2, 1987.

—*Robert Zisk* and his wife, *Nancy Levine Zisk*, both class of 1983, announce the birth of their first child and son, Benjamin, on November 1, 1986.

'84—*Patricia M.G. Beaujean* married Jouni Lehtola on August 1, 1987.

—*Duane M. Geck* married Theresa Marie Deily in Silver Spring, Maryland on August 8, 1987. They will both continue to live and work in San Francisco, California.

—*Andrea D. Jones* announces the birth of a son, Ryan Michael Jones, on March 24, 1987.

—*Paul A. Kramer* married Skye M. Morrison in June of 1987.

—*Mark Harris Mirkin* married Elizabeth Slavin on May 24, 1987.

—*Charles Lawrence Shapiro* married Kitt McDonald on June 13, 1987 in New York. Kitt is the daughter of Eartha Kitt, the singer and actress.

'85—*Anna Chacko* married Dr. Phillip Ninan, a psychiatrist, in January in India. She has moved to New York City.

—*Dorothy Anne Hurd* and her husband, George, announce the birth of their 9 lb. son, Eric Harrington Forsythe, on April 23, 1987.

—*John J. Michels, Jr.* and his wife, Sonia, are the proud parents of a son, John J. Michels III, born on December 30, 1986 in Okinawa, Japan.

'86—*Cliff Barsbay* and *Cathy Deery*, both class of '86, were married in Port Jefferson, New York on June 6, 1987.

—*Sally Elizabeth Coonrad* married David Clarke Carroll on March 21, 1987 in Duke Chapel.

—*Marcel Schmocker* and his wife, Rita, announce the birth of a daughter, Stefanie Rita, on July 2, 1987 in Zurich, Switzerland.

—*Martha McKee-Sharpe* announces the birth of a daughter, Anastassia Catherine, on August 29, 1987.

—*Larry Smith* and his wife, Kris, announce the birth of their second child, Rebecca, on February 5, 1987.

'87—*Steven J. Davis* married Helen Mercier in Tulsa, Oklahoma on August 15, 1987. Davis is an as-

sociate in the Real Estate division of Smith & Schnacke in Dayton, Ohio.

—*Jeanine Loebr* married Christopher Bielby on August 15, 1987 in Lincoln Park, New Jersey.

—*Stephanie Lucie* married Carlos Alegria on August 22, 1987 in Grand Haven, Michigan.

—*Christopher Petrini* and *Julie O'Brien*, both class of 1987, were married on May 16, 1987, in Cotuit, Massachusetts and have settled in Chicago.

—*Tish Walker* married Paul E. Szurek on May 30, 1987.

## Obituaries

### CLASS OF 1925

*William "Willie" Sidney Carver* died on January 20, 1987 in Durham, North Carolina. Carver was a real estate agent in Durham.

### CLASS OF 1928

*Alan D. Ivie, Jr.* died on June 23, 1987.

### CLASS OF 1930

*Judge Willard I. Gatling* died on July 9, 1987. Gatling served as judge for the County of Mecklenburg, North Carolina for 20 years. He then served as Chief District Court Judge for the 26th Judicial District for four years and retired in August 1971.

### CLASS OF 1937

*William J. Baird* died on October 31, 1987 in Rochester, Minnesota. Baird was senior partner, founding member and president of Baird and

Baird PSC, where he practiced law with his sons. The Kentucky Bar Association honored him last spring marking his fiftieth anniversary with KBA. Baird was also devoted to community service.

### CLASS OF 1949

*Casimir H. Korowicki* died on February 15, 1987.

### CLASS OF 1950

*E. Robert Marks* died on March 28, 1987.

### CLASS OF 1954

*Janet Hart Sylvester*, the first woman to head a division of the Federal Reserve System, died at her home in Washington on September 20, 1987. Ms. Hart was named director of the Federal Reserve's Office of Saver and Consumer Affairs in 1976 and held the post until she retired in 1982. In 1973 Ms. Hart

received the Federal Woman's Award. She was the author of a novel, *Mandrake Root*, which was published in 1966 by Henry Holt.

### CLASS OF 1974

*Durant "Randi" Escott* died at her home in Charlotte on September 16, 1987. She was senior assistant city attorney for the City of Charlotte since 1980 and also did a substantial amount of legal work for Charlotte's planned Cityfair, a \$22 million downtown festival marketplace that is a joint public-private venture.

### CLASS OF 1978

*Robert S. Kruetzkamp* died in September 1987 following an extended illness. Kruetzkamp had worked for the Cincinnati Reds and Multi-Media Broadcasting Company.

# UPCOMING EVENTS

## ***Conference on Career Choices***

The second annual Conference on Career Choices will be held on February 19, 1988. The following panels will feature Duke Law alumni who will discuss their professional careers and topics of special student concern and interest:

Medical/Legal Careers  
International Legal Careers  
Legal Specialty Areas

Public Interest Careers  
Comparison of Law Firm and City Size  
Personal Decisions and Career Choices

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

## ***Barristers Weekend***

This year's Barristers Weekend will be held on March 26-27, 1988. This special weekend is held annually for members of the Barristers Club. Barristers are alumni, faculty, parents and other 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.

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

## ***Law Alumni Weekend***

The next Law Alumni Weekend will be held on October 21-23, 1988. The following classes will celebrate their reunions in 1988:

Class of 1948 - 40th reunion  
Class of 1953 - 35th reunion  
Class of 1958 - 30th reunion  
Class of 1963 - 25th reunion

Class of 1968 - 20th reunion  
Class of 1973 - 15th reunion  
Class of 1978 - 10th reunion  
Class of 1983 - 5th reunion

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

## ***Urban Property Development Conference***

The third Urban Property Development Conference will be held October 14, 1988. The subject of the conference will be Financial Institutions at the End of the Twentieth Century—Crisis or Adjustment.

For more information, please call Paulette Pridgen at (919) 493-7770.

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## CHANGE OF ADDRESS

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

Firm/Position \_\_\_\_\_

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Business phone \_\_\_\_\_

Home address \_\_\_\_\_

Home phone \_\_\_\_\_

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## PLACEMENT OFFICE

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

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

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

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

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

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

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

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## 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 \_\_\_\_\_

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