TO THE SUPREME COURT

Before a gathering of the White House press corps at a four o’clock news conference on Friday, March 21, 1930, President Herbert Hoover announced his nomination of John J. Parker, Judge of the Court of Appeals for the Fourth Circuit, for Associate Justice of the United States Supreme Court. Although utterly lacking in national visibility, the 44-year-old North Carolinian brought impressive credentials: a distinguished undergraduate academic career at the University of North Carolina from 1903-07, a year of legal education there, a flourishing general law practice largely in his hometown of Monroe and then in the bustling commercial center of Charlotte, and Supreme Court litigation experience as counsel for country banks in their battle with the Federal Reserve Bank of Richmond. Above all, he possessed close ties to the “business respectable” faction of the state Republican party. His contributions to it as a member of John Motley Morehead’s dominant bloc included vigorous but fruitless campaigns as G.O.P. candidate for Congress in 1910, attorney general in 1916, and governor in 1920. Following Morehead’s death in December, 1923, Parker became national committeeman. His yeoman services to the party combined with advocacy skills attained as a courtroom lawyer led to appointment as Special Assistant to the Attorney General of the United States in 1923-24 during which time he unsuccessfully prosecuted alleged war profiteers. At the unusually young age of 40, he had been appointed to the three-member regional appellate bench by Hoover’s predecessor, Calvin Coolidge, on October 3, 1925.

[Judge Parker quickly assumed a leadership role on the Court of Appeals, leading his proponents to praise the nomination of this “apt representative of the ‘New South’.” His critics, however, denounced him as “ uncivilized,” a racist, a “sworn enemy of labor” and representative of big business interests, and an extreme conservative. These diametrically opposed views of Parker’s fitness for the High Court bench led to prolonged debate in the Senate over his nomination.]

In the six-week battle over Parker’s confirmation, his record as a jurist on the United States Court of Appeals compiled over approximately four years received little consideration. Only his single decision affirming a lower court injunction against the United Mine Worker’s unionization campaign in the southern bituminous coalfields drew attention. For black antagonists, his previous political record, not his subsequent judicial performance, disqualified him. These antagonists prevailed on May 7, 1930, when the Senate, on a 41-39 vote refused to advise and consent to President Hoover’s second Supreme Court nomination.

Hindsight would suggest that the Senate had erred. But vision improved only after it became apparent that the judicial record of substitute nominee Owen Josephus Roberts would fall well short of meeting hopes
When counsel for the Great American Insurance Company complacently introduced no testimony and serenely awaited a favorable judgment on grounds that the insured had erroneously sought a remedy at law rather than one in equity, Parker fairly bristled. Hailing from a code pleading state where distinctions between law and equity had been abolished, he demanded to know whether appellant’s counsel anticipated a favorable outcome “merely because the case was heard on the law side...” Such a holding would, he warned, “hark back to the outworn technicalities of a day that is dead...”. Worse still, it would prove conducive to inefficient administration and consequently to burdensome costs imposed on the plaintiff-insured. Nothing required him to find prejudicial error and order a new trial “where all of the evidence in the lower court is before us, where it appears that the case was fully developed, and where the relief obtained at law is exactly what... should have been awarded in equity...”

Reliance on technicalities associated with criminal procedure likewise received a chilly reception. He applied the due process “fair trial” standard in gauging criminal procedures. But it was enough that indictments contained sufficient information “to fairly and reasonably inform the defendants of the character of the offense charged...”. Mere failure of indictment language “to allege that the automobile was in fact stolen when it is alleged that the defendants on receiving it knew it to have been stolen can be nothing more than a defect of form which could not possibly tend to their prejudice...”, he remarked in Wendell v. United States. No explanation of a preference for substance over form in criminal cases appeared in his published opinions. But privately, he exclaimed that “it would be a reproach to the administration of justice to allow defendants to escape conviction on such a technicality.”

B. Unshackling reserved “police powers”

The public service state envisioned by Parker clearly emerged in numerous 1920 campaign addresses. In common with other Southern progressives, his program for affirmative state activity contained a noticeable rural tilt, intended to meet a perennial agricultural problem distinguished by a “exodus of the farm population from the countryside.” Preservation of rural and small-town Carolina, together with that society’s vital moral values demanded expanded governmental services and transfer of their administration from the counties to Raleigh. Farmers would directly benefit from centralized state-sponsored cooperative marketing and from what he called “a liberal system of rural credits.”

The paucity of two hallmarks of twentieth century civilization constituted a major impetus for the rural exodus, Parker believed. In advocating good roads and good schools, he reportedly “went as far; if not farther, than any other candidate.” The motoring buff and member of the state’s Good Roads Association decried North Carolina’s highway construction efforts and called for a program financed by borrowing, the interest and principal to be met by automobile and gasoline taxes. North Carolina schools were as poor as its roads, especially in rural districts. “We must create a state system of public schools;” he urged, “a system in which the state collects the school money and distributes it so as to give the children in every county an equal opportunity for education.” Higher teachers’ salaries, free books, voca-
tional education, and even improved mental health facilities all became possible with a unified and efficient government pursuing priorities vital to a modern state.

No predisposition to second-guess or to nullify governmental acts marked Parker's jurisprudence from 1925 to early 1930. On the contrary, his decisions suggest a solicitude for often hard-pressed state and municipal governments sometimes impaled on unforeseen consequences of their modernization efforts. Even in mundane contract actions, a recognition of an interrelationship between law and politics surfaced. The novice jurist reacted heatedly when a breaching contractor sued Marion County, West Virginia, for payments due, allowed the case to languish on the docket for four years, suddenly brought it to trial in the midst of confusion caused by a transfer of county political control, and won by default. 4 Privately he castigated the plaintiffs for securing a court-ordered award "by means of conduct which renders it unconscionable that the judgment be allowed to stand..." It would fall even if only private parties were involved. "But certainly," he continued, "where defendant is a county and where it appears... that there had been a complete change of the county officials, this court ought not allow a judgment to stand unless it appears that the county was fairly notified that the case was set for trial."

Political turmoil similarly gripped a North Carolina county government which had contracted for construction of an inaccessible highway bridge. An anti-bridge faction subsequently gained control of the Board of Commissioners and cancelled the contract, whereupon the contractor blithely completed the project. His suit for payment received a favorable answer from three dissident members of the Board, none of whom had sat for ten months and one of whom had actually resigned. Yet, acting in the Board's name, they admitted full liability. Parker reversed. 5 The contractor, he said in his case memorandum, "had no right to increase the damages by proceeding with the erection of the bridge in the midst of the wilderness, which is perfectly useless to the county or to anybody else."

Business regulations under reserved state police powers were deemed by Parker as conducive to economic progress, not as threats to economic enterprise. An order by the city fathers of Lincolnton, North Carolina, directing a railroad to replace wooden bridges, formerly specified by ordinance, with more fire resistant concrete structures met with his approval. 6 The railroad's fusillade of objections founded on the Constitution's obligation of contract and commerce clauses as well as on the fourteenth amendment left him unmoved. Perhaps more impressed with the relationship of the new bridge ordinance to the "City Beautiful" movement than to fire safety considerations, Parker reflected on the march of municipal progress occurring since enactment of the wooden bridge ordinance in 1901. From that date, he mused in his case memorandum, "the town of Lincolnton has grown to be much larger than formerly, the business section has spread out beyond the bridges, streets have been paved with concrete, and the old bridges constitute a fire menace and are altogether unsightly and out of keeping with the streets and other improvements within the town..." Lincolnton was not unique. "Progress and development" had visited other municipalities since the turn of the century and required "many things... for the public safety which were not necessary then." After all, "the main street of the city is paved with concrete and asphalt, and a steel or wooden bridge would be absolutely out of keeping with the remainder of the street..." With such aesthetic considerations looming so large in the mind of the "Good Roads" booster, Parker proclaimed privately that "it is nothing but right and proper, in my judgment, that the railroad company should be required to construct a viaduct in keeping with the remainder of the street."

His published opinion in the Lincolnton Case manifested virtual disappearance of "City Beautiful" allusions. Parker quietly dismissed the commerce clause argument as "so frivolous as not to merit discussion," while he quashed the often potent substantive due process argument.

No facts are alleged upon which the conclusion can legitimately be based that the extension of the fire limits was not justified by the growth and development of the town, or that the replacing of wooden by concrete bridges was not required for the safety of the public, or that the building of concrete bridges would entail any undue hardship or unreasonable expense..."
tures to be erected in or near the center of its business section. . . . And, if the town had attempted by contract to part with such rights, the contract would have been void, because contrary to public policy.”

Two years before, Parker had similarly eschewed foisting a contract clause restraint on Lynchburg, Virginia, which in 1908 had granted the Lynchburg Traction and Light Company a trolley franchise. Its terms stipulated a five-cent fare within city limits. Beyond those limits, a six-cent fare had been authorized by the Virginia Corporation Commission. The two decades since issuance of the franchise brought growth to Lynchburg and its annexation of unincorporated areas in the six-cent fare district. When in 1925 the city ordered a fare reduction to five cents within the annexed areas, the Company sought an injunction on grounds that the city had violated an obligation of contract. Parker, however, could find no contract between the city and trolley company mandating a six-cent fare. That higher fare had been granted by the state agency under its police powers, not by the city.

Parker also exercised self-restraint in other state regulatory cases, concurring in a decision upholding the power of Virginia's Commissioner of Fisheries to exclude oyster harvesters from navigable waters of the state allocated to oyster raisers. Similar restraint marked his treatment of Virginia's efforts to combat cedar rust, a fungus disease in which the fungus winters on cedar tree hosts before disseminating spores that subsequently infect apple tree hosts. Thereafter the cedars are reinfected and the cycle continues. Prior to development of antibiotics, the sole method of controlling the disease required elimination of one of the two varieties of host trees. To protect its economically valuable apple crop, Virginia enacted the "Cedar Rust" law establishing procedures for destruction of cedar tree hosts. Enforcement of the law by the state entomologist threatened Kelleher, owner of a 2,200 acre Shenandoah Valley estate, with loss of cedar trees which shaded his cattle and beautified his mansion. He sought to enjoin execution of the Commonwealth's regulatory statute by raising questions of constitutional and statutory interpretation.

To Kelleher's argument that Virginia's law had taken his property without due process of law contrary to the fourteenth amendment, Parker responded,

"[W]e have no doubt that the enactment of the statute was a valid exercise of the police power of the state...[I]t does not authorize the taking of one man's property for another man's benefit, but it is a reasonable regulation of the use of property in furtherance of the public welfare. It authorizes the destruction of trees, which are shown to be of but comparatively little value, only where they constitute a menace to a great industry of the state."  

To be sure, gentleman farmer Kelleher enjoyed a property right in his attractive cedar trees, but the due process clause did not bar Virginia from saying "that in the enjoyment of property the owner shall not use it in such a way as to endanger the rights and property of others.”

Having disposed of the substantive due process issue, Parker turned to the more difficult task of construing the statute. Sections one and two of the Cedar Rust Act of 1914 were shrouded in a degree of ambiguity sufficient to permit federal court nullification by statutory construction. Section one declared cedar trees within one mile of an apple orchard a public nuisance per se and authorized the state entomologist to order their destruction. Section two authorized him to investigate "host" cedar trees upon the request of ten freeholders and, if deemed a threat to apple trees within a two-mile radius, order their destruction. Kelleher's cedars lay within two miles but not within one of an apple orchard. He contended that the two-mile radius in the 1914 Act was a clerical error which if corrected would read "one mile." Not so, replied Parker:

For us to assume that the Virginia legislature intended to change the radius of the second section also, would be to indulge in a mere guess unsupported by the language or the history of the act, and completely at variance with the plain meaning of the language used. Eminently "more reasonable," he thought, "as well as more respectful to the lawmaking body of the state, [was] to assume that, if it had intended to amend the second section at the time it amended the first section it would have done so."

**Caution characterized Parker's response to public utilities regulation.**

Three-judge court colleague Henry Clay McDowell of Virginia's Western District maintained that the 1920 amendment had left in force a one-mile radius rule in those counties adopting the 1914 Act, a condition precedent to the law's effective operation. That the amending legislation of 1920 had established a two-mile radius, thereby destroying Kelleher's vested right "to possess and enjoy cedar trees more than one mile and within two miles of an orchard..." rendered it suspect. And, the failure to mention the local option provision meant to him that the one-mile radius had not been suspended by the 1920 Act and remained the law of those counties which had adopted it between 1914 and 1920, unless, of course, they consented to the amendment. McDowell would dissent on this basis. To his argument Parker remonstrated:

"When the Legislature amended the statute, it changed that [1914] law. It did not leave the old law in existence unaffected by the amendment, as it might have done, and pass a new law for such counties and districts as might thereafter adopt it. It amended the only law which was in existence on the subject; and as that had become by adoption the law of certain districts, it thereby amended the law of those districts."
It would seem self-evident that, if the State has a right to take property for a public use, it has the right while engaged in the act of taking to prevent it from being so mutilated as to destroy the use which it has for the public.  

This power was especially necessary where, as in the case at hand, the extent of the condemned lands were large, the surveying process slow, and the administrative and adjudicatory processes time-consuming. That the Commission should be subjected to a temporary

**Fourteenth amendment substantive due process jurisprudence hardly affected Parker's decisions.**

restraining order appalled Parker. Such a course, he objected, would delay:

- acquisition of lands for the Great Smoky Mountains Park, a great public enterprise which should be of inestimable value to that section of the country as a help toward flood control and as providing a beautiful recreation park for the benefit of the people.

Restraining the Commission would emphatically not serve the purpose of equity; it would not preserve the status quo. Instead, such judicial intervention "would result in deprecating the value of the property for the purpose of which it is desired by the public."

Suncrest Lumber immediately carried Parker's decision to the United States Supreme Court, arguing their case for a restraining order pending appeal before Chief Justice Taft, Circuit Justice for the Fourth Circuit. With the lower court's decree and opinion in hand, Lycurgus R. Varser, attorney for North Carolina, felt confident that Parker's "admirable opinion [would be] ample to convince ... him that the restraining order ... ought not to be issued." The hearing in fact went well for the State. "The Chief Justice complimented your opinion—proper," the Lumberton lawyer and namesake of the Ninth Century B.C. Spartan lawgiver reported to the Tar Heel jurist who had in his Suncrest opinion subordinated private property rights to the public interest. The Taft Court agreed with his judgment and dismissed the company's appeal.  

**C. Nurturing state taxing power**

State taxing power provides an essential support for the public service state. Parker looked benignly on its exercise. A graduated excise tax levied by South Carolina on local retailers of tobacco products was effectuated by stamps affixed to the individual items which had been shipped in interstate commerce and which were ready either for transit out of state or for local sale even if remaining in their original package. Alleging the unconstitutionality of the tax, Charleston tobacco dealers sought to enjoin collection by South Carolina's
Tax Commission. Parker, in authoring the three-judge district court's opinion, did not write on a clean slate.

Early in the life of the Taft Court, a tangled mass of precedents on state taxing powers had been sorted out largely... through the intra-Court lobbying efforts of Justice Brandeis. Brandeis stressed that the key test of constitutionality related to whether or not the state tax fell as a direct burden on goods in their original package but "at rest" following their interstate movement. Also considered was whether or not the tax was nondiscriminatory as between goods shipped in intrastate and those shipped in interstate commerce. These Brandeisian principles filtered into Justice Mahlon Pitney's opinion in Texas Co. v. Brown,19 and into Chief Justice Taft's burial in Sonneborn Bros. v. Cureton,20 of the "original package" doctrine applicable to goods which moved only in interstate commerce.

In denying injunctive relief to the Charleston tobacco dealers, Parker relied on the pair of Taft Court opinions in Sonneborn Bros. and Texas Co. He observed in Doshier v. Query:

[Just as the commerce clause will not protect property from taxation after its interstate journey has ended and it has come to rest and become part of the general mass of property within the state, neither will that clause protect from taxation property that is still at rest and a part of such general mass of property, even though it be intended for export or shipment in interstate commerce, if the movement in foreign or interstate commerce be not actually commenced... And this is true, notwithstanding the goods have been transported in interstate commerce to the place where they are sought to be taxed, and are intended for shipment to other states, if they have reached the destination of their first journey and are being held by their owner for disposition in the ordinary course of business, and the stoppage be not a mere temporary delay in transportation.18

Conceivably, the tax statute might be unconstitutional, but if so, it was because of a conflict with the constitution of South Carolina. And, that was pre-eminently a question to be answered in the first instance by the Palmetto State's Supreme Court.

Less successful was Parker's attempt to free South Carolina's taxing power from injunctive shackles in Southern Railway Co. v. Query.19 Claiming that state assessments had taxed income derived from interstate commerce and therefore had unconstitutionally burdened such commerce, the railroad sought and won, much to Parker's chagrin, an injunction against collection of the disputed taxes. On first impression, he doubted any need for imposing equitable restraints on South Carolina because, as he informed one of the resident trial judges on the three-judge district court, "the remedy at law is plain, adequate and complete." After all, the statute which created the state's Tax Commission had provided that by paying under protest, the taxpayer could sue the Commission for recovery of taxes paid, and the Supreme Court of South Carolina had held that such recovery could include interest as well as principal, a holding which the Fourth Circuit judge gratuitously pronounced as "in accordance with natural justice." Colleague Ernest E. Cochran of the Eastern District of South Carolina, author of the published opinion, took a very different view.

Cochran maintained that in fact the aggrieved taxpayer enjoyed access only to an equitable remedy in federal court. Contrary to Parker's contention, the district judge invoked Smith v. Reeves,20 a decision of the United States Supreme Court which had held that an action at law to recover tax overpayments was a suit against the state tax commission. It was therefore a judgment to be paid directly out of the state treasury and constituted a suit against the state barred by the eleventh amendment—unless the State had consented to be sued. South Carolina had explicitly consented to be sued, but only in its Court of Common Pleas. A perplexed Cochran laid out the legal dilemma in a long letter to Parker. He explained:

If we say that the suit is not one against the State, then we are deciding directly contrary to Smith v. Reeves. If we say that the State has no right to restrict it to the Common Pleas and that therefore a party may sue in the Federal Court, we are directly in conflict with those decisions which say that the State has such a right. If we say that [the statutory consent to suit] in Common Pleas, intended that it might also be brought in another court, then it seems to me we do violence to the English language; for it certainly was the intention of the framers of the Act to restrict the suit to the Common Pleas. If we say that the suit provided for, while it must be brought in the Common Pleas and cannot be brought in the Federal Court, is adequate, then we are in conflict with those decisions which establish with equal firmness the principle that the suit must be available in the Federal Court.

Cochran concluded "that the only way to give effect to these established principles is to hold that in this case the State has consented to be sued in the Common Pleas; that such remedy is not available in the Federal Court, and therefore the remedy at law is inadequate, and the interlocutory injunction should issue."

A dismayed Parker admitted the correctness of Cochran's assessment. "At least, I am not able logically to combat the conclusion," he wrote. "Nevertheless, I have a feeling that it is wrong, without being able to give any very good reason for the feeling." And, reiterating his Senior Circuit Judge, Edmund Waddill, Jr., the Tar Heel jurist guessed he would "have to go along with you, unless I can discover some good ground for holding the contrary." When further research failed to yield an alternative course of jurisprudence, Parker concurred in Cochran's opinion enjoining the tax com-

He believed that unleashing of the individual's energies offered a sure route to realization of the good society.
mission. He acted reluctantly and "with the feeling that we ought not interfere with the state's collection of its tax if it is possible to avoid doing so..."

With the authorities against him, he felt confident that Cochran's "fine piece of work will put the matter squarely up to the Supreme Court, and if that Court thinks that an injunction should not be granted in such cases as this, it will have to modify some of its previous decisions."

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**Broad construction of national commerce power...marked his record.**

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**D. Restraining State Power**

Not all state regulatory actions received Fourth Circuit approval. Caution characterized Parker's response to public utilities regulation. Railroads and electric power companies provided vital elements of the region's economic infrastructure. They were themselves harbinger of progress; their franchises were "valuable not only to the [utility] but to the community which it serves."\(^{21}\) Mullins, South Carolina, therefore could not acquire by prescription a portion of the Atlantic Coast Line's right of way. Nor could the South Carolina Railroad Commission require the Southern Railway to switch cars from a tiny local feeder line onto the regional carrier's tracks.\(^{22}\) The state agency's order conflicted with national commerce power and took "property without due process of law...because [it] required the Southern Railway, without compensation, to open up terminal facilities to competitors."

Fourteenth amendment substantive due process jurisprudence hardly affected Parker's decisions, however much it marked those of the Supreme Court during Taft's chief justiceship. That public power-limiting doctrine did figure in the unpublished three-judge district court opinion delivered by Parker in Bluefield Water Works Improvement Co. v. Public Service Commission.\(^{13}\) The Supreme Court had previously overturned both the Commission and West Virginia's high court in a case involving the same parties. Associate Justice Pierce Butler, writing for the Court, held that reproduction cost, not the original cost of the Company's water works, was the proper rate base. That the agency had "wholly disregarded" the former base notwithstanding the post-war inflationary surge in construction costs led him to... conclude "that a rate of return of 6 percent upon the value of the property is substantially too low to constitute just compensation for the use of the property..." The unmistakable tenor of Butler's message in the Bluefield Water Works litigation doubtlessly encouraged close scrutiny of the Commission's subsequent findings. These, Parker deemed in error. They underrated interest paid by the utility on new construction as well as the Company's "going value," and the seven and one-half percent on capital he deemed inadequate.

"Taking all these things into consideration," the circuit judge opined "that the complainants have made a showing, probably, for, and that they are entitled to, the preliminary injunction [for] which they pray." But he granted the injunction with strings attached. The Commission was restrained from enforcing its order or from interfering with the plaintiffs in putting into effect the schedule of rates in accordance with this order..." The temporary injunction also limited the Company from fixing rates which exceeded by more than ten percent those previously approved by the Commission, and required that strict accounting be made of the rate increase, and that a $25,000 bond be posted from which refunds to ratepayers might be distributed should facts found on a final hearing warrant. The Court subsequently dismissed the suit following agreement by the Commission and the Company on "the fair value for rate making purposes...of the plant and property," on "a fair return...of eight...percent," and on a new rate schedule.

**CONCLUSION**

Whatever Parker's public image molded in the weeks following nomination to the Supreme Court, his judicial record remains as clear today as it was from March to May 1930. No clairvoyance is required now, nor was it needed then to classify Parker's jurisprudence articulated as a member of the United States Court of Appeals for the Fourth Circuit from late 1925 to March 1930. Combined with the public record made as a politician, attorney, and civic leader prior to ascending the appellate bench, his status as a New South progressive is evident. He articulated typical themes of progressivism in his speeches, denouncing turmoil and moral erosion and questing for order and opportunity in society. Uplifting of citizens to new heights required social regulation — control of liquor, suffrage for women, disfranchisement of blacks. Yet in speaking to these impassioned issues of public policy as a jurist, Parker treated them not as a zealot, but with the caution and study befitting a federal judge.

In common with progressives generally, he sought no radical transformation of society. The linchpin of society was the individual and, in the tradition of the previous century, he believed that unleashing of the individual's energies offered a sure route to realization of the good society. Essential to that end was protection of private property, especially that created by enterprising individuals. This theme coursed most promi-
nently through his opinions relating to patents, federal
taxation of business corporations, and in his single
Sherman Anti-Trust Act case between private business-
firm litigants.

Tempering an affinity for property rights was a
recognition of the necessity for the “public service”
state as an instrument for promoting New South eco-
nomic growth. Parker’s embrace of “business progressivism” became manifest in this context. An enthusiasm
for reform of governmental structure surfaced in judicial
opinions giving short shrift to archaic and complex
legal procedures. No “judicial legislator,” his Cedar Rust
and Suncrest Lumber opinions made clear a concern
for unshackling the reserved police powers of the se-
veral states and, in his vindication of state taxing power,
the ability to raise revenues necessary for development
of public services. Restraints on state powers might be
required, especially by the imperatives of the Taft Court’s
jurisprudence. But as suggested in the Bluefield Water
Works case, he sought a middle ground in simulta-
aneously restraining both the state agency and the pri-
Vate enterprise.

As with exercises of state power, so with those of the
national government, the North Carolina jurist proved
no “man against the state.” His decisions in major civil
and criminal litigation favored the federal government
against the interests of private businesses, even inno-
cent enterprises. Broad construction of national com-
merce power was manifested in his controversial labor
injunction opinion, United Mine Workers of America v.
Red Jacket Consolidated Coal and Co., involving
application of the Sherman Anti-Trust Act to unionization
campaigns. Parker’s judicial record likewise reveals a
propensity for defending the essential tenet of the New
South creed: regional economic growth. His record sug-
gests an abiding concern for providing federal judicial
protection to the region’s economic infrastructure, to
its public utilities and rail carriers as well as to its
shippers, entrepreneurs, and consuming members of the
public. His search for the point at which interstate
freight rates applied reflect this concern. So too did
constraints placed on the Interstate Commerce Com-
mision in his Lake Cargo decision, a decision which
encouraged public policy favorable to a labor-intensive
industry of the New South in its intersectional com-
petition for markets. Red Jacket also manifested a
similar interest on Parker’s part. But that case forced a
balancing of deeply felt sympathy for laboring men and
women, a sympathy articulated in his gubernatorial
campaign addresses and in other judicial decisions
involving members of the working class. Yet, his moder-
ate treatment of the scope of the injunction affirmed
against John L. Lewis and his United Mine Workers of
America went largely unnoticed in the passionate
debates on confirmation. And, in the boiling cauldron
of Supreme Court confirmation politics a jurist bearing
New South progressive credentials became a veritable
political ogre to critical elements of Franklin Roosevelt’s
future constituency.

denied, 27 F.2d 71 (1928), cert. denied, 278 U.S. 629 (1928).
2. Belvins v. United States, 12 F.2d 548, 550 (4th Cir.), cert. denied, 278
U.S. 706 (1926).
3. 34 F.2d 92, 94 (4th Cir.), cert. denied, 280 U.S. 589 (1929).
4. Marion County Court v. Ridge, 15 F.2d 969 (4th Cir. 1926).
5. Rockingham County v. Luten Bridge Co., 35 F.2d 301, 304-07 (4th
Cir. 1929).
(4th Cir. 1929).
7. Id.
8. Lynchburg Traction & Light Co. v. City of Lynchburg, 16 F.2d 763 (4th
Cir. 1927).
9. Gloucester Seafood Workers’ Ass’n v. Houston, 35 F.2d 193 (4th Cir.
1929).
11. Id. at 345.
12. Id. at 346.
(W.D.N.C. 1929).
14. Id. at 127.
(1929). Prolonged and tedious negotiations resulted in state payment
to the company of $600,000 for lands taken, but the company underwent
liquidation in 1933.
16. 258 U.S. 466 (1922).
17. 262 U.S. 506 (1923).
18. 21 F.2d 521, 526 (E.D.S.C. 1927).
20. 178 U.S. 436 (1900).
21. Williams v. Atlantic Coast Line Ry., 17 F.2d 17 (4th Cir. 1927).
24. Bluefield Waterworks & Improvement Co. v. Public Service Comm’n
262 U.S. 679 (1923).
25. 18 F.2d 839 (4th Cir. 1927).
Moral Values in Legal Education

Richard C. Maxwell*

The American Bar Association Model Rules of Professional Conduct, adopted in 1983, provide that a lawyer acting as advisor to a client may properly "refer to relevant moral and ethical considerations in giving advice." Further, a lawyer may terminate the representation of a client if "the client insists on a repugnant or imprudent objective." If moral values are to guide professional action, it is fair to ask to what extent moral education is a part of the law school experience.

Law schools teach law; that is, they teach a body of principles, rules, and decisions. They also teach a way of working with these formulations in their application to that level of reality which stands as facts in the classroom. Lawyers must try to predict what will happen to their clients if a particular course of action is taken. They must also try to achieve a beneficial result if their clients have already taken ill-advised actions. To relate these objectives to moral considerations suggests that the lawyer's evaluation of the client's situation can be gauged by some accepted moral standard.

If that standard can be found in religion, the source and authority of the values applied are comfortably explicable in traditional terms. If, however, the reference is to a moral order not founded on generally accepted divine revelation, actions taken in its name must be defended pragmatically or by reference to the human reasoning process. Personal moral standards applied in a legal context are bound to be affected by the moral underpinnings of the legal system.

American law no longer operates, even verbally, as though it rested on supernatural foundations. Legislatures and judges declare law in the American system and when the legislatures declare it, the courts interpret it and sometimes, using the Constitution, our closest equivalent to publicly accepted holy writ, pronounce its nullity.

The work of judges and legislators is frequently subjected to critical analysis. Sometimes this process focuses on the technical nuances of how the job has been performed but frequently the criticism seems to measure the results against some system of values, assuming standards that go beyond a personal morality. The idea that such standards are being utilized is strengthened by the fact that law exists to govern relationships between human beings and not the actions of individuals in a vacuum.

Law exists to govern relationships between human beings and not the actions of individuals in a vacuum.

If the moral content of law is not referred for authority and substance to a formal religious matrix, from what source is this element of the system derived? Lawyers, in common with other human beings, bring to any decision or assertion of opinion a melange of beliefs, traditions, and intuitions as to what is good, bad, useful, and destructive. Sometimes these elements have been carefully nurtured in the formal study of religion, philosophy, history, or economics. The study of law itself can also supply a source of guidance for decisions on moral matters.

The law consists of a myriad of determinations and judgments on human relationships. In law school, many of these determinations are studied and weighed against each other, and against the beliefs, traditions, and intuitions which faculty and students bring into the classroom. In this sense, a great deal of law school time is spent in moral education. Meaning is given, in relation to particular facts, to such words as justice, fairness, and responsibility. Yet, questions of ends and values are a part of legal education only within a rather narrow professional framework.

Law students, in common with other human beings, have a taste for certainty, but legal education does little to satisfy it. The process subjects assertions of certitude in the governance of human affairs to severe tests. This aspect of the educational experience extends to moral values. It becomes obvious that human reason is a limited tool for resolving in a satisfying way differences in the beliefs to which people adhere. It is possible that students are left with the idea that it is not productive to spend too much time in thinking about the ageless questions of good and evil.

In many professional situations the values involved are seen to be
given—they are the values of the client. Law is viewed as a means for achieving goals which the client wishes to achieve. A faith emerges, but it is a faith in process: that the application of reason within a procedural structure governed by the general values of the Constitution will produce good long term results for society or, at least, an acceptable resolution of a current problem.

The idea of improving the human condition in the long run or of decently resolving a dispute between individuals in the short run includes value judgments as to what is improvement and what is decency. Many law students bring with them to law school strongly held views of how the world should work. As their perception as to how the world does work diverges from this model, their expectations of attaining a professional role that will fulfill their high ideals and values may moderate.

It is in the examination of the demands of the professional role that the law school has found its most important mechanism for the direct discussion of moral issues. As noted at the outset of this discussion, the Rules of Professional Conduct make direct reference to moral standards, providing for "optional withdrawal" from representation of a client who wishes to take an advantage of another that the lawyer finds "repugnant." This advantage is by hypothesis legal, since an illegal course of conduct, under the Rules, calls for "mandatory withdrawal" from representation of the client who insists upon it. Where the results the client seeks are merely "repugnant," the lawyer's course of action is a matter of individual preference. If one lawyer withdraws, the client is free to seek another who will exercise his individual moral preferences differently.

What does this mean for the professional education of lawyers? The tradition of loyalty and commitment to the client will often mean that the lawyer will choose to give candid moral advice to the client but will then follow the client's wishes and do for the client's cause, if that is the client's wish, that which is lawful even though unfair or unjust. At the action stage of the lawyer/client relationship, the value system of the lawyer becomes irrelevant. It is to be hoped, however, that some experience in examining troubled situations in terms of moral values will increase a student's skill in dealing with such problems and lend force to the use of "relevant moral and ethical considerations in giving advice." At least, a student so exposed will enter practice sensitized to the difficulty of asserting non-obligatory moral principles when acting in a professional role which places a very high value on loyalty to the client.

Law students... have a taste for certainty, but legal education does little to satisfy it.

At the action stage of the lawyer/client relationship, the value system of the lawyer becomes irrelevant.
Thoughts on Attorney Competence

J. Porter Durham*

Lord Coke captured the essence of the problem which those concerned about young lawyer competence clearly see:

No man can be a complete lawyer by universality of knowledge without experience in particular cases, by bare experiences without universality of knowledge; he must be both speculative and active, for the science of laws, I assure you, must join hands with experience.¹

Each day, the law student encounters the handiwork of incomplete lawyers and the criticisms of a lawyer-weary society. Often, the cases studied exhibit poor legal skills which leave one party without adequate representation and at the mercy of an unsavory opponent with a weaker case. Although such study is the prevalent method of "learning the law," many students believe the experience one-dimensional, lacking in practical content. After three years of casebook learning and a few selected encounters with limited clinical programs, the graduate is expected to pass the bar and begin practice, completely prepared and fully "competent."

During the past fifteen years it has been argued that the novitiate, as well as the profession as a whole, lacks some yet defined quality or status. Some in the profession believe that there is an absence of skill at bar—an inability to do whatever it is that lawyers are supposed to do. Howard H. Kestin, chief administrative law judge and director of the New Jersey Office of Administrative Law, has said flatly:

Law practice is both a science and an art. Law school graduates have firm foundations in the science of law, but they know little of the art of practice—the application of the science—perhaps less than their entering counterparts in other professions.²

Others suggest that there are problems with the lawyer's attitude and personal skills. As Professors Shaffer and Redmount have stated:

Lawyers prefer an impersonal coolness. They avoid strictly human encounters. They seize...opportunities to put distance between themselves and people who need them. Problems are seen as opportunities for investigation, defense, abstract persuasion, and argument, rather than as opportunities for involvement. Even when the problem calls for moralism...the moralism selected is the lawyer's moralism: lawyers are uninterested in the moral impulses of their clients.

[Lawyers] tend to deal with human feelings by ignoring them when possible, and battering them away when they will not be ignored. They prefer faith in words to faith in people.³

Still others contend that the American lawyer has lost his social and public character. In the Preface to Joel Seligman's The High Citadel, Ralph Nader challenges lawyers and law schools to remember the unique public character of their mission, as summarized by A.Z. Reid years earlier:

Practicing lawyers do not merely render to the community a social service, which the community is interested in having them render well. They are part of the governing mechanism of the state. [L]awyers were instituted, as a body of public servants, essential for the maintenance of private rights.⁴

The criticism and the not so subtle reminders of our professional mission from within the profession have been matched in intensity by those outside of it. The public has little or no faith in the legal system, or in the lawyer's ability to handle problems and to address the major issues of the day with skill or intelligence. Ann Strick, in her book Injustice For All, broadly attacked the adversarial nature of the legal system and stated that it subverts justice and victimizes the victim.⁵ Morris Harrel, ABA President from 1982 to 1983, argued that the public's lack of trust in the profession had become so intense that the ABA should commit whatever resources necessary to enhance the public's understanding of the profession and to deliver the "highest quality of justice" possible.⁶

Historically, the lawyer has suffered great slings and arrows. Students are told routinely that this criticism is attributable to the fact that lawyers are often litigious adversaries who find themselves embroiled in knotty problems which are unpleasant and highly personal. Law...
yers are the "champions" of unpopular causes which are perceived as inherently evil or "lawless." However, this familiar litany has not satisfied those who continue to challenge the lawyer's character and his competence and to question his role in society.

Each day, the law student encounters the handiwork of incomplete lawyers and the criticisms of a lawyer-weary society.

In response to the criticism, and out of an awareness of some of these problems, many members of the profession and interested scholars have spoken out and offered criticisms of their own. Derek Bok has suggested that the law and the legal system have become too obscure, too expensive, and too burdensome. He contends that the law schools are only havens for good minds unable to find other direction, and that often, the talent is wasted there. President Giamatti of Yale has suggested that undergraduate schools should teach general and pre-law courses to better inform the public and better prepare the interested student. Justice Sandra Day O'Connor has been highly critical of law schools "preoccupied with legalisms" and neglectful of the teaching of practical skills and, perhaps more importantly, ethical responsibility. The American Bar Association has cited with approval New Jersey and New Hampshire to strengthen the bar by requiring "transition education" between law school and law practice. However, at the same time it is admitted that the number of these programs is small and that, overall, the competence problem is "so real, in fact, that it qualifies as a crisis in our profession."

In an effort to address the "competence problem" in North Carolina, the state bar association studied the feasibility of creating practical skills courses, local bar support groups, and programs to strengthen trial advocacy skills. Those efforts were considered positive post-law school steps toward acquainting the law school graduate with the practical aspects of his profession, thereby enhancing his professional competence. It was believed that another possible benefit, increased "social" competence, would accrue as well. Perhaps this heightened sensitivity to social needs and a greater sense of professional commitment would restore to the profession some of the elan that it has lost.

However, these worthy efforts will be of little or no value if law school graduates who come to the bar are already "professional misfits" with little practical training, social insight, or personal integrity. Thus, the various state bars should focus their attention not on "gap bridging" or transitional education, but on the law schools themselves. What happens within a law school's walls is critical, because it is the seed bed of the profession.

**State bars should focus their attention not on "gap bridging" or transitional education, but on the law schools themselves.**

The desire to enhance the new lawyer's practical skills begs a broader question about the nature and form of legal education. Law schools currently rely, in large part, on a standard curriculum, taught using the casebook method and the Socratic dialogue. Some believe, however, that law students should participate in a very different kind of educational experience before they ever reach the local bar. Stanford Professor Lawrence M. Friedman has argued that legal education should consist of one-half clinical training and one-half intellectual training—essentially toughening the mind while honing the skills. This course of study, known as "Curriculum B," was tested at Stanford University and has, according to Professor Paul Brest, produced lawyers who are more skeptical, more sensitive, and more reflective, as well as more technically able. Duke Law School recently expanded its curricular and extra-curricular programs to include a unique commercial practice course which pits one student team against another in simulated commercial litigation. The problems are created and the progress of the actions are supervised by several attorneys across the country. Duke's new Private Adjudication Center will provide needed negotiations experience to balance the emphasis on oral advocacy skills. These programs are, in effect, like those recommended in the Gramtton Report, which argued strenuously for instruction in basic skills all lawyers need: effective writing, persuasive speech, proper negotiation techniques, and personal counseling.

By and large, however, the profession remains wedded to the conventional methods of instruction. New topics of some significance are often forced into the casebook mold whether they fit or not. One important example should be related.

In the aftermath of the Watergate scandal, the so-called "lawyers' scandal," the study of legal ethics, using the ABA Code of Professional Responsibility, became a part of the law school curriculum. Unfortunately, rather than teaching this course with very practical hypothetical situations as models over a semester, schools often wedge it into a one-week session, using a casebook. Students go through the motions of "learning about" ethics, quickly complete the
requirements, and lose, or never discover, the real significance of the subject matter. If anything, their cynicism about "legal ethics" grows.

**SOCIAL COMPETENCE**

In 1617, Lord Bacon implored the justices of the Star Chamber to "do good to the people, love them, and give them justice, [but] let it be as the Psalm saith, 'look for nothing in return, neither praise, nor profit.'" He was telling them to be mindful of the public welfare and of their responsibility as professionals to society generally, without thought of personal gain. He was describing what can be called social competence—the ability to deal with other lawyers, other troubled people, or complex moral or ethical dilemmas with sensitivity, patience, and conscience. This type of "competence" is a vital complement to practical competence and its renewal may well be the only way that the profession can rescue itself from low public esteem.

Law students are usually bright, competitive people. They often bring to school great notions of peace and justice and certain skills which they hope will be refined to serve positive ends and to help them become "good lawyers." It is this combination of highly talented and highly motivated people which creates, in the law school, a fertile environment for discourse on sensitive and controversial topics (within the context of the law). These same people, once graduated, take up the practice of law, or engage in other fields where their knowledge may be applied.

However, the practicing attorney is a reflection, not only of the skill and ideas he brought to the law school or of the training he received there, but also of the conditions under which he was trained. Often, the progressive dialogues can become skewed, and the learning process cut off for many students by school reward systems which reinforce certain narrowly defined skills or attributes while ignoring others. Students, in their drive to "succeed" in law school and win the honors that will assure easy job placement, distort healthy competition and further change an already intense environment. As pressures mount, getting on the law review or making the moot court team may become more important than the learning and talent such activities seek to distinguish. Some choose to pursue these goals at any cost, with certain ends justifying any means. In this climate, it becomes easier to forget or to ignore the most important and most basic of the lawyer's professional values: honor, duty to client, and community responsibility. The conscience and character of the law student are often battered or broken by the law school process. Seldom recognized and never rewarded, they languish. The notions of peace and justice are buried by piles of cases and statutes, seldom to be heard from again. It has been argued that the debilitation of law students is not a function of the law school environment but of the inadequacy of the students themselves. A study conducted by Dean Paul D. Carrington while at the University of Michigan Law School indicated that one student and faculty morale. He argues that one way to avoid this problem is to identify, by profile, the people likely to become "turned-off," "teed-off," or "overly lonely," and reject them before they enter the school.

Yet, Professor Shaffer, in the Preface to Swygert and Battey's *Maximizing the Law School Experience,* presents a pessimistic view of the law school's interaction with and development of personal character and conscience:

It is not true that the American lawyer-heroes found their moral substance in the profession. They found their moral substance...in their families, their church, and their community. [L]awyers of character, lawyers worthy of moral leadership America thrusts on them, were good lawyers because they were good people to begin with. They had the goodness before they became lawyers. The moral challenge in their learning the law was to hold on [to their integrity].

**CONCLUSION**

Students are told throughout their first year of law school that the experience will shape them professionally. If this is the case, perhaps the mold should be reexamined. The public's perception of lawyers as leeching cutthroats, bent on winning at any cost may be accurate—and may be a direct result of a climate which is character-debilitating rather than character enhancing. The current environment at many of the country's best schools stifles the very ethical and human sensibilities without which even the most technically proficient graduates cannot practice effectively. Moreover, without these sensibilities, the lawyer cannot ade-
quately face the challenges which society places before him, or confront the problems which he, as a lawyer, cannot ignore.

In order to achieve the goals of greater practical and social competence, the members of the legal profession must insist that law schools accept not only good students but good people as well; that they teach basic skills with basic theory; and that they frame the competitive spirit with conscience. Only if the legal profession reassesses some of its most basic assumptions about the form and nature of legal education and the current role of lawyers in society will it overcome the view of some within the profession and many outside of it that:

*The things we admire in men, kindness and generosity, openness, honesty, understanding, and feeling are the concomitants of failure in our system. And those traits we detest, sharpness, greed, acquisitiveness, meanness, egotism, and self-interest are the traits of success.*

[1] Porter Durham, a 1985 J.D. graduate and former President of the Duke Bar Association, presented the substance of this paper in a statement to the Committee on the Competence of New Admittees of the North Carolina Bar Association, on March 30, 1984.
I. INTRODUCTION

Much has changed since 1781 when Thomas Jefferson wrote of “freedom” and “coercion,” and even more since Plato discussed these topics two millennia hence. Different ways of life have engendered different societal and personal philosophies, values, and ideals. For instance, the United States’ short lifetime has witnessed the abolition of slavery, the demise of monarchies, the prohibition of torture, the banning of child labor, the prevalence of premarital sex, and the creation of no-fault divorce.

Despite the world’s vast transformations, we use the same phrases to laud and condemn. Very different conceptions of good and evil are expressed with identical language: “freedom,” “equality,” “justice,” “misery,” “shame,” and “coercion.” A major subset of the recurring terms of moral discourse are “virtue words” and “vice words.”

Virtue words and vice words are both protean and nonlexically normative.

First, like the Greek god Proteus, each has the capacity to retain its own essential identity while simultaneously assuming a variety of distinct and even contradictory forms. Virtue words and vice words possess . . . the quality of being less than fully specified and hence . . . capable of further specification.

Virtue words and vice words convey judgments of right or wrong without being defined as expressing normative values.

Peter Westen.

Peter Westen, Professor of Law at the University of Michigan, delivered the address excerpted below as the 1984-85 Currie Lecture at Duke Law School. The text will appear in full in a forthcoming issue of the DUKE LAW JOURNAL. Considerable controversy resulted from publication of The Empty Idea of Equality, 95 HARV. L. REV. 537 (Jan. 1982), an article with a theme similar to this lecture. Interestingly enough, Mr. Westen said he had changed his mind since writing the Equality article. He no longer feels we can segregate the language of law from that of everyday life. He now feels we should “unpack” such concepts to fully realize their hidden prescriptive/descriptive elements.

Three special guests attended the Lecture: Mrs. Brainerd Currie and Mr. & Mrs. John H. Lewis. Mrs. Currie’s husband taught Conflict of Laws at Duke Law School; the lecture series is in his memory. Mr. Lewis (J.D. 1967) is the current patron of the lecture. Also in the audience were Professor Dellinger, who clerked with Mr. Westen on the U.S. Supreme Court, and Professor Beale, who had been his student.

[Some concepts in normative discourse, like the concept of “rights” and the concept of “duress,” are normative by definition. They are “value concepts . . . .” It is paradoxical to speak negatively of rights or to speak positively of duress, because the relationship between rights and legitimacy, and duress and illegitimacy, is not contingent. It is lexical . . . . One does not misuse language when one condemns . . . .]
equality or praises inequality, because while statements of equality and inequality tend to be statements of good and bad, and right and wrong, respectively, the relationship between equality and virtue and inequality and vice is not logical. It is contingent.

Because virtue words and vice words are protean, they are versatile. Deeply-held moral beliefs can be expressed by the same term even though morally inconsistent. Because they are non-lexically normative, they

Very different conceptions of good and evil are expressed with identical language.

persuade without being conclusory. Moral discourse is tilted in the direction the speaker wishes, yet an opponent cannot protest that the issue has simply been defined away. Combined, these two features of virtue words and vice words generate great rhetorical force. "Freedom," a virtue word prototype, will be analyzed in detail to enhance our understanding of its rhetorical power.

Freedom is protean, because freedom is a single, generic concept that can simultaneously encompass many different and morally contradictory conceptions. Freedom is also non-lexically normative, it tends to be "laudatory" without being defined as [such] . . . it is generally assumed to be something right and good; yet there is nothing contradictory about "bad" or "undesirable" freedoms.

"Coercion," a vice word prototype, will be "unpacked" in the same manner to reveal its core concepts. Like freedom, coercion is a single concept that is sufficiently open-textured to encompass a range of diverse and mutually inconsistent norms. As well, the word can be used correctly, yet advance normatively inconsistent positions.

[Coercion] . . . is generally derogatory, but there is nothing contradictory about the notion of justified or legitimate coercion.

Shared notions of good and evil drive virtue words and vice words less than their connotative meaning. Much of their rhetorical force is semantic, not substantive.

II. FREEDOM

[ Freedoms] consist of three implicit terms: an agent or class of agents, X, who possess the stated freedom; a constraint or a set of constraints, Y, that inhibits agent X from doing or being something he may wish . . . ; and the goal, Z, that constraint Y inhibits agent X from doing or being if he so chooses. The concept of freedom is a generic relationship among X, Y, and Z: It is the relationship of an agent X, from a constraint Y, to do or be a goal, Z, that he may desire.

Depending upon which of two relations exists between agents X and constraints Y, freedoms are either descriptive or prescriptive. While the distinction between these categories is significant, both types of freedoms are equally genuine. Descriptive relationships are where

X is unconstrained by Y to pursue Z, without regard to whether he also ought to be unconstrained . . . . An example is "The prisoner is free to walk without shackles." From descriptive statements, nothing prescriptive necessarily follows.

The Bill of Rights refers to prescriptive freedoms. These exist where

X stands in a relationship to Y and Z such that he is and ought to be unconstrained by Y to pursue Z.

Every statement of freedom, then, expresses either an "is" or an "is and ought to be." To speak of "freedom," therefore, is either to say something neutral—[which] . . . cannot be inferred to be either good or bad—or to say that something ought to be, but it is never to say that something ought not to be. To be sure, one can say that a particular descriptive freedom is undesirable, or that a particular prescriptive freedom is unsound, or that a particular agent ought not to be free from Y to pursue Z. But in order to convey that a particular freedom is unjust or unsound, one must say so expressly, because the word freedom . . . does not itself ever say that "X ought not to be free from Y to do or be Z."

III. COERCION

Although a person who is coerced is not free, coercion is not merely the converse of freedom. An agent can lose or gain freedom without being coerced. Moreover, unlike freedom, coercion presupposes a human agent (X-I). It is an interpersonal relation wherein one agent affects the behavior of another.

X-I must knowingly bring a constraint upon X for the purpose or with the expectation of causing X to do or become Z-1 against her will.

[The "absence of will" alone does not suffice to render the event "against the will" unless the event is also against [personal] wishes. . . . Suppose a man] wanted to jump but being too scared to do so on his own, hoped someone would push him, we would not say that he entered the water "against his will" . . . [One] can constraining X to do Z-1 "against the will" by so structuring the relative consequences of X's doing Z-1 as opposed to not doing Z-1 as to cause X to choose [what] . . . would not otherwise be chosen.

A constraint is coercive regardless of whether it achieves its purpose. The term "coerce" alone does not imply success, but "coerce into" does.

To say that X-I "coerced X into" doing something means that X chose to do something . . . that but for the constraint or promise of constraint X-I brought to bear, X would not have chosen to do.
X must also be aware of the constraint that X-I is bringing to bear to force the course of action, Z-1. Finally, coercion must render Z-I more "eligible" (attractive) in X's eyes than it would otherwise be under the circumstances. It must supply the actor with a reason to do X-I's bidding. Like freedom, all coercion is either prescriptive or descriptive, depending on the relevant baseline. Prescriptive, or normative, coercion leaves X in a worse position relative to a baseline level than she ought to be for refusing to do what X-I proposes. Descriptive coercion exists when X is left worse off than she otherwise expects to be, relative to a particular baseline. The combination of prescriptive and descriptive qualities renders "coercion" a vice word. The essential elements of coercion, then, are:

[A] constraint or promise of a constraint, Y, that X-I knowingly brings to bear on X in order that X choose to do something, Z-1, that X would not otherwise do and that X does not wish to be constrained to do—where X knows that X-I is bringing or promising to bring Y to bear on him for that purpose, where Y renders X's doing Z-1 more eligible to X than Z-1 would otherwise be, and where Y leaves X worse off either than actually expected otherwise or than he ought to be for refusing to do X-I's bidding.

IV. CONCLUSION

What can we learn from "freedom" and "coercion" about virtue words and vice words? What gives freedom and coercion their protean, open-textured quality? What is it that makes "freedom" sound good and "coercion" sound bad without their being defined as good and bad?

"Freedom" and "coercion" each have three features that explain their being virtue words and vice words. Both consist of certain fixed elements, as well as variables. They are, therefore, sufficiently elastic to encompass morally inconsistent conceptions.

The second significant feature that freedom and coercion both possess is that neither can be reduced solely to prescriptive statements, because both also take descriptive forms. ... [Finally], just as freedom and coercion cannot be reduced exclusively to prescriptive statements of "ought" or "ought not," they cannot be reduced exclusively to descriptive statements of "is."...

Freedom and coercion are useful, because they serve the same purpose in moral discourse that large, multi-purpose vessels serve in the field: They can contain and carry a wide diversity of particular contents without altering their nature. ... The words "freedom" and "liberty" are related, because they both refer to a relationship in which an agent X is unhindered by a constraint Y to do something Z. But liberty is less versatile and, to that extent, less useful than freedom, because liberty is a subset of all freedoms. We use "liberty" to refer to a relationship in which a particular class of agents (i.e., purposeful agents) are unhindered by a particular class of constraints (i.e., human constraints), to pursue their goals. ...

It is linguistically useful to have special-purpose words like "liberty" that are tailored to a narrow range of tasks; but it is also linguistically useful to have multi-purpose words like "freedom" that can perform many tasks.

The same is true of the relationship between "coercion" and "duress." Coercion and duress are related, because they both involve threats that X-I brings to bear on X to do something, Z-1, that X would not otherwise choose to do. Coercion is broader and, to that extent, more versatile than duress; because duress is solely a prescriptive concept encompassing constraints to leave X worse off than she ought to be left, while coercion can encompass either prescriptive or descriptive constraints. Again, it is useful to have special-purpose words like duress that take only a prescriptive form. But it is also useful to have multi-purpose words like ... coercion that can express both descriptive and prescriptive relationships.

Although the capacity of "freedom" and "coercion" to express both descriptive and prescriptive relations is linguistically useful, it is also rhetorically treacherous because it causes us to unthinkingly blend the two kinds of relationships together. Instead of recognizing that prescriptive freedoms are good because they are defined to be good, and that descriptive freedoms themselves are neither good nor bad, we carelessly come to believe that all freedoms are presumptively good. Instead of remembering that prescriptive coercion is bad because it is defined to be bad, and that descriptive coercion itself is neither good nor bad, we carelessly assume that all coercion is presumptively bad. Rather than demand moral arguments in favor of particular freedoms, and moral arguments against particular kinds of coercion, we come to believe that freedom is itself something to favor and coercion itself something to oppose. ...
A Conference Report

Gun Control

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed. —U.S. Constitution, amendment II

The meaning of the second amendment to the Constitution and its impact on gun control legislation served as not only the beginning point, but also an underlying theme, of the Law and Contemporary Problems Editorial Conference on Gun Control. The conference, which was held at the Law School and the Sheraton University Center on October 19-21, 1984, featured a great deal of spirited discussion in addition to the presentation of materials prepared for a forthcoming Law and Contemporary Problems Symposium on the issue. The conference host and moderator, as well as the Special Editor of the Symposium, was Don Kates, a San Francisco attorney known for his activity in the area of gun control.

The controversial nature of gun control was highlighted from the start of the conference, when it became apparent that the participants had diverse views of the meaning of the short, but ambiguous, second amendment. The first topic of discussion, “The Second Amendment,” was introduced by Professor Robert Shalhope of the History Department of the University of Oklahoma, who presented a paper entitled “The Armed Citizen in the Early Republic.” Professor Shalhope concentrated on explaining the premises underlying the amendment by examining the philosophical framework from which its authors began. He noted that, in the current controversy over private possession and use of firearms, those favoring freedom of individual ownership stress the “right to bear arms” phrase while their opponents emphasize the “well regulated Militia” phrase to support arguments restricting the use of firearms by those not connected with the militia. Professor Shalhope concentrated on the “interrelationship linking arms, the individual, and society” as viewed through the eyes of eighteenth century libertarians. He concluded that the individual right to bear arms was considered essential to prevent individuals from being subjected to the tyranny of governments, while the “well ordered Militia” phrase was directed toward the philosophy of communal responsibility for the safety of the community. According to his reading of the reasons for the amendment, “The Second Amendment included both of its provisions because the Founders intended that both of them be taken seriously. They intended to balance as best they could individual rights with communal responsibilities.”

Mr. Kates presented a slightly different historical viewpoint while summarizing an article he had written for the University of Michigan Law Review, 82 Mich. L. Rev. 204-273 (Nov. 1983). According to Mr. Kates, the view that the second amendment was intended to protect states’ rights to arm their militias is based on a twentieth century definition of “militia”: the eighteenth century viewpoint was that all citizens should be armed and ready to defend their colony. Mr. Kates stated, however, that even if one accepts the wider, individual rights view of the purpose of the second amendment, gun control is not altogether precluded. He found that the right to bear arms had three purposes in eighteenth century America: individual protection; citizen law enforcement; and military use. Thus, he concluded that any weapon that is not useful for all three purposes can be banned without violating the second amendment (for example, .22 caliber handguns could be banned because they have no military value).

A third historical perspective was introduced by one of the commentators, Mr. David Caplan, a New York City attorney who, in addition to his patent law practice, is a member of the National Board of the National Rifle Association. Mr. Caplan suggested that the second amendment should be analyzed in the context of the eighteenth century common law right to bear arms, which protected all non-threatening private ownership and use of arms. According to him, there was a tremendous communal benefit to allowing citizens to do away with felonious predators. Mr. Caplan also stressed that, insofar as private ownership of firearms presents a potential—albeit slight—threat of armed rebellion, that threat is a guarantee against a takeover of the government by despoits.

Finally, a pragmatic view of the constitutional question was offered by Professor William Murphy of the University of North Carolina School of Law. Professor Murphy pointed out that no constitutionally guaranteed rights, except the right to believe, are absolute; all of them are subject to being balanced away by ends vs. means analysis of an infringing law. Professor Murphy also pointed out that, even if one or more of the foregoing historical analyses is correct, the Supreme Court has exhibited a tendency to make selective use of history—sometimes even ignoring it altogether. He also cautioned that any decision made by the Court on gun
control legislation would be based, at least in part, on contemporary policy.

The second topic explored on the first day of the conference was mandatory penalties for gun use. Professor Alan Lizotte of the Rutgers University Department of Sociology discussed research that he had done with Majorie S. Zatz for the Center for the Study of Justice at Arizona State University. Professor Lizotte pointed out that one strategy that has been attempted for controlling the use of guns by criminals is the enactment of laws providing for enhanced sentences for those who commit a crime with a firearm. After reviewing other studies on the efficacy of these laws, he reported on his and Zatz’s study, “The Use and Abuse of Sentence Enhancement for Firearms Offenses in California.” They studied length of prison sentences given in felony convictions in California over a three-year period. They found that, although criminals who used a gun during the commission of a felony should have received a sentence of at least one year longer than those who committed the same offense without a gun, this was not usually the case. In fact, it was only when they considered those who had been convicted of five or more felonies within the three-year period that they found any statistically significant variation in sentences between gun-users and those who committed their crimes without the use of firearms. Thus, they concluded that whether mandatory sentence enhancement affects gun usage by criminals cannot be determined until judges begin enforcing the laws that have been written.

Other participants in the conference included Professor Robert Batey of Stetson University College of Law, who discussed “Strict Construction of Firearms Offenses: The Supreme Court and the Gun Control Act of 1968,” concluding that the Court’s liberal reading of that act has led to “abusive investigations and dubious prosecutions,” which, in turn, have strengthened opposition to “even the mildest forms of gun control.” Professor James B. Jacobs, of the New York University School of Law, considered “Exceptions to a General Prohibition on Handgun Possession: Do They Swallow up the Rule?” Professor Jacobs pointed out that even statutes that purportedly prohibit private ownership and use of handguns, such as the widely publicized Morton Grove, Illinois, law, contain broad exceptions for police officers, private security guards, gun collectors, and so on, thus leading one to question whether these laws can properly be characterized as “prohibiting” firearms.

Professor Daniel D. Polsby of Northwestern University School of Law offered “Reflections on Violence, Guns and the Defensive Use of Lethal Force.” Analyzing the self-defense use of firearms, in part under “games strategies,” Professor Polsby concluded that “some amount of private gun possession” might be helpful in “keeping violence in the world to a minimum.” Professor Polsby’s use of utilitarian theory was challenged in a thoughtful essay, “Close Encounters of the Lethal Kind: The Use of Deadly Force in Self-Defense,” presented by Professor Lance Stell of the Davidson College Department of Philosophy.

Professor Margaret Howard, of the Vanderbilt University School of Law, gave the last presentation on the second day. Her presentation on “Husband-Wife Homicide: An Essay from a Family Law Perspective” provided some intriguing information (for instance, current studies show that in spousal homicide cases, husbands and wives are victims in approximately equal ratios, although more wives are killed in the bedroom while more husbands are killed in the kitchen), but Professor Howard was unable to determine whether gun control legislation would alleviate the problem of spousal homicides.

On the final day of the conference, Professor Gary Kleck of Florida State University’s School of Criminology discussed “Policy Lessons from Recent Gun Control Research.” After finding that privately owned guns do have defensive value for their owners and do deter criminal behavior to some extent, Professor Kleck concluded that the status quo as to private gun ownership should be maintained for the most part. He would, however, support laws prohibiting the sale of guns to those with a history of violent mental instability or a record of violent criminal offenses. He would also support a registration or licensing system by which civil liability could be imposed on those who transferred guns to someone without a permit.

The final presentation on the agenda, a discussion by Don Kates and Professor Phil Cook of Duke University’s Institute of Policy Sciences on “Strict Liability for Gun Manufacturers,” was cancelled because the intense discussions on the earlier topics had caused the schedule to go awry.
The focus during the second day of the conference was on employment discrimination law, particularly Title VII of the Civil Rights Act of 1964. The two presentations reviewing the first twenty years under Title VII were particularly interesting because the speakers presenting the two sides of the issue had often faced each other in the courtroom. Discussing the employer's side of the issue were Thornton H. Brooks and M. Daniel McGinn of the Greensboro, N.C., firm of Brooks, Pierce, McLendon, Humphrey & Leonard. They discussed "Second Generation Problems Facing Employers in Employment Discrimination Cases: Continuing Violations, Pendent State Claims, and Double Attorneys' Fees." Although Mssrs. Brooks and McGinn felt that the use of continuing violation theory and the appending of state law claims to Title VII cases greatly expanded the burden of proof, they also acknowledged that the theory was often used in ADEA cases.

Yarbrough noted that a case brought under disparate treatment theory should be easier for a displaced homemaker to prove than would be a case brought under the disparate impact theory more often used in ADEA cases.

Donald Horowitz
den on the employer, they appeared even more concerned with the chilling effect on the defense of an action brought about by the employer's prospect of being forced to pay not only its own attorneys' fees, but also those of the plaintiff. They noted that, in several recent cases, employers have been forced to pay plaintiffs' attorneys' fees of $2,000,000 and more, in addition to backpay awards to the plaintiffs and their own attorneys' fees. They concluded that some system must be devised to handle employment discrimination claims without the tremendous expenses currently involved in litigation.

Presenting the plaintiffs' view of twenty years of Title VII was Julius L. Chambers, now Director of the NAACP Legal Defense Fund, but formerly a direct adversary of Mssrs. Brooks and McGinn as a member of the former Charlotte firm of Chambers, Stein, Ferguson & Becton. Although Mr. Chambers agreed that new ways to litigate Title VII cases should be found, his concern was that these new ways must lead to the provision of meaningful relief for victorious plaintiffs. He noted that the provision of meaningful relief was hindered by the Supreme Court's expansive reading of the "bona fide seniority system" exception to Title VII and by the Reagan administration's opposition to affirmative action. In fact, he concluded, despite twenty years of litigation, Title VII appears not to have accomplished its aims; the continuing earnings and unemployment gap between blacks and whites indicate that much remains to be done.

The final presentation of the conference was an extremely lucid discussion on the statistical proof of employment discrimination through utilization of multiple regression analysis. Barbara A. Norris, a solo practitioner from Albany, California, managed to make multiple regression analysis seem understandable, a truly amazing feat in the eyes of any nonstatistician who has ever attempted to fathom the mysteries of the subject. Commentary on the mornings' presentations was offered by Professor Douglas Laycock of the University of Texas Law School.
A Conference Report

Tax Symposium

The tax legislation enacted during President Reagan's first term and that proposed early in his second term were the topics of discussion at a symposium held at the Law School, January 10-12. Professor Richard Schmalbeck, who organized the symposium in conjunction with Law and Contemporary Problems, described the goal of the conference:

"We wanted to examine why we have had the explosion of tax legislation in recent years, what that legislation has done to our tax system, and where we might be headed in the future. The papers presented were a mix of comprehensive treatments of these major themes, and more concrete analyses of specific applications."

During the first day of the symposium, participants took a retrospective view of the tax changes which have occurred over the past four years. Session topics included "Movement toward a Consumption Base," presented by Professor Charles O. Galvin of Vanderbilt University Law School; "Reaganomics: The Revolution in American Political Economy," presented by Rutgers University Professor Charles E. Jacob, and "Taxation of Capital Income," presented by Duke Law School Professor Pamela B. Gann.

Professor Galvin began his presentation by describing the accretion system of taxing income. Under a pure accretion system, all assets would be inventoried each year, liabilities would be deducted, and the taxpayer's net worth would be determined at market value. The difference between beginning year and end-year net worth, plus the taxpayer's expenditures for consumption for the period, would reflect the taxpayer's taxable income for the year. Such a pure system would, in Galvin's estimation, "immeasurably simplify the Code and tax each individual on real economic income." It would also mean the elimination of provisions regarding income exclusion; consumption deductions such as personal interest and taxes, medical expenses, and charitable contributions; tax free exchanges; corporate reorganizations; and the capital gain-ordinary income distinction. "Only through such a system could we expect as simple and as equitable a statute as we could hope to devise in a complex economy involving over 200 million people."

Galvin noted, however, that there are significant objections to such a system. These objections are, primarily, that asset valuation each year would be difficult for the taxpayer to determine and the IRS to administer; that taxpayers with substantial asset appreciation could have significant wherewithal problems at tax time; and that the transitional problems of providing everyone with a "fresh start" each year would be troublesome.

Under an accretion system, according to Galvin, upper bracket taxpayers would pay more tax, even though rates would remain constant, because net unrealized appreciation, currently excluded accessions to wealth, and large consumption expenditures would fall into the base, making it larger. Galvin speculated that "[t]he overall effect of using the same rates would be to raise somewhat more than twice the revenue as at present, [and] to shift disproportionately more of that additional burden to the upper brackets." Lower and middle income taxpayers would pay more than they do currently to the extent that deductions were disallowed. However, this would be a proportionate increase, with lower income taxpayers relying on the zero bracket amount to cover personal deductions.

Professor Galvin then discussed the consumption system, in which taxpayer savings and investment fall outside of the tax base. The base, under this system, is measured by only that amount which is consumed during the period. For the vast majority of taxpayers in the middle and lower brackets, this system would produce results similar to those of the present system, with the exception that currently deductible personal consumption items would be included in the base, thereby enlarging it. For upper bracket taxpayers, the base would be smaller because capital income would drop out of the system.

In Galvin's opinion, the exclusive use of one of these systems would be preferable to the present system, which is a messy hybrid of the two, designed in random
A pure accretion system... would...

"immeasurably simplify the Code and tax each individual on real economic income."

fashion to promote various social and economic goals. The current system, however, has failed to achieve broadly these goals and has resulted in unfairness throughout and wide-scale evasion. Thus, concludes Galvin, the President's tax reform efforts should focus on moving toward a pure accretion system or a pure consumption system. But, cautions Galvin, neither system would provide adequate revenue to overcome the federal deficit and pay off the national debt, given the present rate structure. He therefore suggests that a broad based value added tax (VAT) system should be layered on top of a new system, with appropriate minimum or vanishing credits to protect lower bracket taxpayers.

Professor Charles Jacob shifted the day's discussion to an assessment of Reaganomics, which spurred lively conversation and sharp criticism from Duke Political Science Professor James David Barber. Jacob began his presentation by asserting that "the first year of the Reagan Administration produced a set of changes in political-economic relationships so novel as to merit the denomination revolutionary." The evidence of such a revolution, argued Jacob, lay in the specific actions of the Administration: a reduction in personal taxes of thirty percent over three years; accelerated depreciation allowances for business; 49 billion dollars in domestic program spending cuts; and a non-incremental approach to defense spending. Jacob went on to say that these fundamental alterations in American domestic revenue collection and spending policies were the result of the application of specific political resources marshalled by the Administration: to set the policy agenda, to secure adoption by Congress, and to manage the people involved in the process. One of the most significant resources used in the "revolution," according to Jacob, was the presidential leadership exhibited by Ronald Reagan. His ability to adhere uniformly to basic values and political concepts, such as an unfettered economy and the primacy of individualism, and to manage subordinates and public opinion effectively, created an environment and a system ripe for revolutionary changes. So effective was the revolution, asserted Jacob, that the Congress passed the Tax Equity and Fiscal Responsibility Act (TEFRA) a year later. Yet, Jacob assessed this move as a "Thermodorean reaction," rather than a counter-revolution—an event which involved consolidation and fine tuning of the Reagan revolution.

Reacting to the presentation, Professor James David Barber argued that Reagan's 1981 legislative victories were primarily explained by a conjunction of political circumstances, such as media misinterpretation of the 1980 election, the disarray of the Democrats, and the accident of his near assassination. Such circumstances are unlikely to be repeated. Nor does the evidence support the supposition that American political values have changed or that the Reagan "revolution" represents the death or lapse of top level pragmatism.

The neutral taxation of capital income was the topic of Professor Pamela Gann's presentation. As Gann explained, the first Reagan Administration responded to the poor economic performance of the late 1970's and early 1980's as if income taxation of capital were "the culprit." The Economic Recovery Tax Act (ERTA) lowered the effective tax rates on capital income even though Administration economists and others were unsure to what the nation's sluggish and inflationary economy was to be attributed. Some argued that over-taxation of capital income was resulting from the interaction of an unindexed tax base and high inflation. Others countered that overall effective tax rates had not significantly increased because of inflation and that the economic slowdown was a function of more profound social and economic forces and in only small measure attributable to the federal income tax.

Nevertheless, Gann continued, the Administration proceeded with ERTA, a package of "reforms" which unevenly lowered effective tax rates and left the base unindexed. With the lowering of inflation, the ERTA system created a new imbalance which resulted in "very low positive and even negative effective tax rates for many investments." These misallocation effects have prompted those involved in policy making to urge that capital income should be taxed more neutrally with respect to investment choice.

Gann then argued that a neutral income tax system was achievable even though detractors argued that the creation of a neutral system would require more political will than Congress can muster, and a more precise measure of capital income than has yet been seen. Gann suggested that the major problems with income measurement had been solved in large part and that at no time before had there been a more clear understanding of the workings of a neutral system. In fact, the Treasury Department's 1984 tax reform proposals demonstrate that elements of neutrality can be placed in legislative form and administered if passed. The primary stumbling block, believed Gann, was the mood of Congress. She concluded by asking "where is the political will to achieve the goal of neutrality?"

Interesting presentations were also made by Professor Charles T. Clotfelter of the Duke University Department of Economics as well as Mr. Don S. Samuelson of Samuelson Associates in Chicago. Professor Clotfelter's evaluation of "Charitable Giving and Tax Legislation in the Reagan Era" provided unusual insight into the changing patterns of charitable giving in the United States. His presentation demonstrated that,
although the Reagan philosophy relies heavily on the willingness and ability of the private sector to make a host of charitable contributions to support various social programs, the Reagan tax reform plans have the potential of having a negative impact on charitable giving. In 1983, individual donors contributed 54 billion dollars to nonprofit charitable organizations. Bequests and corporate contributions equalled 7 billion dollars. Current income and estate tax laws permit deductions for charitable gifts to individuals, while corporations may deduct charitable gifts of up to 10 percent of net income. The traditional view has been that an increase in tax liability causes a decline in contributions, while a tax cut stimulates giving, if charitable giving is considered a normal good and demand for it increases as disposable income increases.

However, Clotfelter asserted that the recent Reagan reforms, while creating a system under which more lower and middle income taxpayers were able to make charitable contributions, caused the cost of charitable giving to corporations and wealthy individuals to rise 60 percent. Thus, between 1981 and 1986, gifts to religious organizations, given primarily by lower and middle income taxpayers, are expected to increase 14 percent in real dollars. In sharp contrast, contributions to cultural organizations, colleges and universities, and other educational institutions are projected to decline between 14 and 17 percent, in real terms, because of the increased cost to upper-income individuals who support such programs and institutions.

Likewise, in the estate tax area, Clotfelter foresees similar increased cost of giving and thus fewer contributed dollars generated than under the prior tax system. Yet, the giving picture is more promising now than if a “flat” tax were introduced. According to Clotfelter, the removal of the charitable deduction, along with all other such deductions, would remove the “subsidy” for giving which taxpayers now enjoy. Without this incentive, it has been estimated that individual charitable contributions would drop by as much as one quarter.

Professor S. Samuelson’s review of real estate taxation during the Reagan years focused on the use of municipal bonds. He recounted the specific, detailed provisions of municipal bond tax legislation of the Reagan years, noting that, in his opinion, none of the measures would have significant impact on municipal bonds as a whole. However, Samuelson pointed out that changes made in the law with respect to Industrial Development Bonds or “IDB’s” would result in fewer issues and different purposes for those issues. Specifically, it was noted that the elimination of an exemption for certain types of small issue IDB’s seemed to suggest that a public purpose test would be imposed at the federal level during the small issue review process. Samuelson argued that the thrust of all such changes was to provide the federal government with more control over the uses of tax-exempt financing and to limit the volume of tax exempt debt by reducing IDB borrowing. The result of increased controls on bonds and reduced availability of inexpensive debt financing, Samuelson asserted, would be increased tax revenue for the government, lower yields on available exempt bonds, and increased ownership of bonds by the wealthy. This effect, in turn, would result in reduced benefits from tax exemption and an increase in the effective progressivity of the tax structure.

The second day of the symposium was devoted primarily to discussion of the Treasury Department’s tax reform proposals first announced in December, 1984. Presentations were made by Mr. Willard B. Taylor of the Sullivan and Cromwell law firm in New York City, and Professor C. Gordon Bale of the law faculty at Queen’s University in Canada.

Mr. Taylor’s paper outlined the recent changes to Subchapter C and the tax policies which lay behind those proposals. Taylor discussed the fact that changes in Subchapter C had been accompanied by a continuing reduction in effective income tax rates. Interestingly, the income tax receipts from corporations in 1950 provided 28.3 percent of the total receipts for that year. By comparison, this figure had declined in 1981 to 11.5 percent, and in 1983, to under 7 percent. Taylor went on to say that many of the changes made to Subchapter C strengthened the system of double taxation of corporate income rather than achieving further integration. Changes which made the most difference included the elimination of non-recognition of income for distribution of property; the expansion of earnings and profits; the extension of the accumulated earnings tax provisions; and the change in the treatment of acquisitions.

While not faulting the changes wrought by Subchapter C legislation, Taylor did argue that the piecemeal repeal of the General Utilities doctrine was confusing and distorting; that pass-through entities had not been adequately treated; and that recapture provisions were inadequate to meet the demands of the Accelerated Cost Recovery System (ACRS).

Dr. Bale provided conference participants with a Canadian view of the Treasury Department’s proposals. Interestingly, the Carter Royal Commission developed many of the same reform proposals nearly two decades ago. As the Canadian government discovered, however, political realities greatly reduced the extent to which the measures could be implemented, even though the tax base would have been broadened and revenues enhanced.

The symposium concluded with a round table discussion of all the proposals at issue. The discussion was conducted by Professor S. Malcolm Gallis of the Duke University Department of Economics.
Duke Goes to Phoenix

Duke Law School has traditionally sought to provide a high quality legal education that would prepare its graduates to practice in any area of the United States. At the same time, the school has endeavored to maintain a geographically diverse student body. It is therefore not surprising that quite a few Duke graduates today have successful and rewarding careers not only on the Eastern Seaboard but also in distant cities such as Los Angeles, Houston, and San Francisco.

It is perhaps somewhat more unusual to find Duke graduates practicing law in a city like Phoenix, Arizona, often associated with movie westerns and the law of the six-gun. However, Phoenix has long outgrown its reputation as a rough and ready cowtown and a number of Duke alumni and alumnae are pursuing interesting careers there.

The Phoenix metropolitan area, which includes such suburbs as the posh Scottsdale area and the university town of Tempe, now has a population of about 1.7 million. Phoenix proper has a population of approximately 750,000. The city has grown culturally as well. It has its own symphony orchestra, a metropolitan ballet company, and a number of museums. And, of course, Phoenix is renowned for its fair weather. Although temperatures soar well above the 100 degrees Fahrenheit mark in the summer months, Phoenix residents enjoy winter temperatures in the 60's and 70's and sunshine 60% of the year.

The number of lawyers practicing in Phoenix has quadrupled in the past twenty years. On July 5, 1984, the Arizona State Bar Association estimated that there were about 4,647 lawyers in the Phoenix metropolitan area—3,600 in Phoenix proper. About thirty of those lawyers are Duke Law School graduates. They practice in a variety of areas, ranging from medical malpractice to environmental law.

One Duke graduate is a highly-respected judge on the Arizona Court of Appeals. Judge Thomas Kleinschmidt grew up in Clayton, Missouri. He decided to attend Duke in 1962 when a representative of the school visited his college. When he graduated in 1965, Kleinschmidt felt Duke had provided him with a "strong springboard from which to begin [his] career." Kleinschmidt chose to move to Phoenix after having clerked there for a summer with Jennings, Strauss, Salmon & Trask, the predecessor of Jennings, Strauss & Salmon. After being admitted to the bar in 1966, Kleinschmidt continued to work at Jennings, Strauss and eventually became a partner in the firm.

Anticipating appointment to the bench and anxious to diversify his background, Kleinschmidt left Jennings, Strauss in 1971 to work for the Public Defender's Office under Tom Karas, another Duke alumnus. In 1977, Kleinschmidt was appointed to the Superior Court for Maricopa County. He found trial work "enormously satisfying" and earned a reputation as an excellent trial judge.

Five years later, Kleinschmidt was appointed to the Arizona Court of Appeals. He finds the thoughtful analysis required by appellate work as rewarding as trial work. According to Karas, Kleinschmidt is "an outstanding appellate judge."

Among his recent opinions are State v. Stewart, an armed robbery case which concerned the troubling issue of shackling defendants at trial, and State v. Holstan, which discussed the issue of whether or not a trial judge should be required to articulate his reasons for accepting a sentence stipulated in a plea bargain when the stipulated sentence is to a term longer than the presumptive term for the reduced charge.

Kleinschmidt enjoys his work immensely, and has a great deal of respect for the legal system in Arizona. "It is largely free of the seamy customs one hears of in some areas. . . . The system has a good clean tradition and works the way it should.”

Roger Ferland, unlike Kleinschmidt, is a Phoenix native. He chose to attend Duke because of its reputation. He was unsure of where he wanted to practice after graduating and wanted to leave his options open. Ferland also found Duke's small urban setting appealing. Commenting on the education he received at Duke, Ferland said the school "taught me to think like a competent, ethical attorney."

When Ferland graduated in 1974, he returned to Phoenix to practice. At that time, he became associated with Paul Castro's 1974 campaign for governor of Arizona. He was responsible for drafting the candidate's issues papers. After the campaign, Ferland accepted an appointment as Administrative Counsel for the Arizona Department of Health Services. He assisted in the drafting of the Hospital Certification of Need Laws and Regulations and was involved in a number of administrative decisions made under them. While in that position, Ferland said, "I saw Professor Havighurst's concepts substantially borne out in the real world." He also commented that he had perceived the direct influence of Professor...
Arthur Larson's work.

In 1977, Ferland became Senior Counsel to the Environmental Protection Section of the Attorney General's Office. While there, he did environmental work exclusively. He was largely responsible for rewriting all of Arizona's Air Pollution Regulations in 1979. The new regulations were innovative in that they committed to words a complex graph designed by University of Arizona specialists to ensure that, given variations in meteorological conditions and emissions content, there would never be excessive amounts of sulphur dioxide pollution in Arizona's atmosphere.

Three and a half years after the regulations were submitted, they were approved by the Environmental Protection Agency. Shortly thereafter, the Environmental Defense Fund sued the Environmental Protection Agency for its approval of the regulations. In *Kamp v. Hernandez* (Feb. 5, 1985), a Ninth Circuit panel affirmed the EPA's approval of Arizona's "multipoint implementation plan for the control of SO₂ emissions from copper smelters." The EDF petitioned for rehearing en banc.

Since 1981, Ferland has been in private practice, doing environmental defense work for the Phoenix firm of Twitty, Sievewright & Mills. Ferland regards his practice as something like preventive medicine. He often requests his clients to read pertinent cases before meeting with him. "It is my firm belief that clients need to be educated about relevant issues of environmental law so that they can make intelligent decisions in their corporate planning."

Ferland recently wrote an article on alternative regulatory approaches that appeared in the 1984 edition of the *Rocky Mountain Mineral Law Institute*. In September, he addressed a group of corporate environmental affairs specialists at a Hazardous Wastes Symposium held in Phoenix. He spoke about the legal issues that arise when a purchaser of real property discovers the purchased land to be contaminated with hazardous wastes.

According to Ferland, "The essence of environmental law is the resolution of conflict between the equally valid interests of the public in a clean environment and business in survival." Ferland finds the creative challenges involved in resolving that conflict particularly rewarding.

Larry Haddy was born in Iowa and spent most of his life there until he went into the service. In 1968, he was stationed in Fort Huachaca, Arizona, and "fell in love with the state." In 1970, when Haddy was in Vietnam, he was admitted to Duke Law School. "I still remember the day my mud-splattered acceptance letter arrived in camp," Haddy returned to the United States to enter Duke that fall.

Haddy had not forgotten his days in Fort Huachaca and decided to practice in Phoenix because it was the largest city in Arizona. He spent the summer after his second year working as a Superior Court bailiff in Phoenix and, after graduating in 1973, he returned to Phoenix to clerk for the Honorable Walter E. Craig, a federal district court judge. Following his clerkship, Haddy joined the small Phoenix firm of Carson, Messenger, Elliot, Laughlin & Reagan, where he became a litigation partner doing primarily bank and insurance defense work.

In 1981, the opportunity to strike out on his own arose and Haddy left Carson, Messenger. He and two other attorneys, Karasek and Rayes, set up an overhead-sharing arrangement. They share only common expenses; otherwise, each attorney is responsible for his own risks and reaps the full benefit of his rewards.

Haddy describes his present practice as a "general civil practice." He handles matters ranging from real estate and commercial litigation to personal injury and domestic relations cases. He also does some bankruptcy work. Any criminal cases that come into the office are handled by his associates.

Haddy finds the independence and diversity of his practice satisfying. He also very much enjoys living and working in Phoenix. "It's a vacation land year-round." According to Haddy, the city's warm and relaxed atmosphere is also reflected in the legal sphere. "Problems like late discovery are often handled with a simple phone call; you don't have to file papers with the court."

Three of four Duke graduates who are now members of the Phoenix firm of Evans, Kitchell & Jenckes were also interviewed for this article. They share Haddy's appreciation of Phoenix's lifestyle and legal climate.

Andy Friedman, a native of New Jersey, moved to Phoenix after graduating from Duke in 1978. What initially attracted him to Phoenix was Evans, Kitchell. The firm's atmosphere and litigation practice appealed to him. Today, he is a litigation partner at the firm and handles a variety of civil cases. Friedman finds Phoenix
culturally interesting and enjoys the fact that one can live in very pleasant neighborhoods within five minutes of one’s job. He also appreciates the informal manner in which matters like extensions can be handled.

Al Shrago, a member of the class of ’77, is a native of North Carolina. He too moved to Phoenix after graduating from Duke primarily because of Evans, Kitchell. He had clerked there after his second year and felt “the firm was the sort of place in which I could practice for the rest of my life.” Like Friedman, Shrago is a litigation partner at the firm. Last February the United States Supreme Court heard argument in Kerr-McGee Corp. v. Navajo Tribe, a case in which Shrago was lead counsel for the business. The Court decided that Kerr-McGee will have to pay taxes, imposed by the Navajo tribe, on mineral leases on Navajo property.

Phoenix, according to Shrago, is unique among cities of its size: “It’s a major metropolitan area with most of the opportunities available elsewhere, professionally and otherwise, yet it offers a more small-town quality of lifestyle.” In particular, it is a city that offers attractive opportunities to lawyers recently graduated from law school.

Bob Hackett graduated some ten years earlier than Shrago and Friedman. Professor Weistart was then a member of the student body. After graduating, Hackett returned to New York to practice. He had spent four years with a Wall Street firm when Evans, Kitchell, as he put it, “made me an offer I couldn’t refuse.” He is now a partner in the firm’s corporate department. Hackett misses neither the practice nor the lifestyle of New York. He finds Phoenix “rich and diverse culturally” and he enjoys the more relaxed atmosphere of the city.

Friedman, Shrago, and Hackett share positive feelings about the quality of the legal education they received at Duke. Duke provided them with the analytical skills that they all agree are the key to good legal craftsmanship, whether in the field of litigation or corporate work. Friedman, in particular, remembers Donald Beskind’s Trial Practice course. He recalls, “Beskind opened my eyes to the fact that you don’t have to be bombastic to be a good trial lawyer. The course was one of the primary motivating factors that led to my choice to go into litigation.”

Tom Karas, originally from Chicago, moved to Phoenix after he graduated from Duke in 1959. Since that time, he has devoted his career to criminal law. Karas began his professional life as a Maricopa County Attorney. He then went on to become an Assistant United States Attorney, Chief of the Criminal Division for the District of Arizona.

In 1965, Phoenix became the home of the first Public Defender Pilot Program in the United States. Karas was asked to run the program. Of the nine lawyers Karas hired, five are now judges. Kleinschmidt was one of those five lawyers. Kleinschmidt recalls, “Karas was wonderful to work for. He was fiercely independent, scrupulously honest, diligent, and inventive about probing areas of the law to develop new rights.”

Karas remembers how he and Kleinschmidt worked together on cases involving sections of the United States Code that then provided for punishment applicable only to American Indian criminal offenders. United States v. Cleveland was the first case in which the court held that such disparate punishment violated the equal protection component of the Fifth Amendment’s Due Process Clause. Six or seven other sections fell in cases following United States v. Cleveland and the entire chapter was eventually amended to provide equal punishment for offenders of all races.

In 1971, the Public Defender program became national. Karas remained at the Phoenix office until 1975, when he left to join Lewis & Roca, one of the largest firms in Phoenix. Karas had been a partner at Lewis & Roca for seventeen months when he decided that he needed more independence. He has been a sole practitioner ever since.

Today, Karas is considered one of the foremost criminal defense lawyers in Arizona. He is listed in both The Best Lawyers in America and The Directory of Legal Professions. About fifty percent of Karas’s usual caseload involves charges of white collar crime; the rest are charges such as murder and rape. He is very selective about the cases he takes. They must involve fact situations or legal issues of particular interest to him.

For example, in State v. Flynn, Karas successfully defended Flynn, a highly respected physician, president of the Arizona Medical Association, and an Arizona State Senator who was instrumental in the passage of Arizona’s Child Abuse Reporting Statute. After the statute was passed, Flynn was indicted for allegedly failing to report a child abuse case. It was one of the first cases in the United States in which a physician was prosecuted for failure to report child abuse.

Karas has also been active outside his practice. He sat on the American Bar Association Criminal Justice Section for eight years during which he became Vice-Chairman, Chairman-Elect, and finally, Chairman of the Section. Then Dean Kenneth Pye also sat on the Section for several of the years when Karas was there. Karas recalls, “Pye was a real healing presence between the prosecution and defense factions of the Section.” When Pye left to become Chancellor at Duke University, he was sorely missed.

It was largely Karas’s initiative that led to the use of video-tapes and the institution of a more demonstrative
educational approach at the National College for Criminal Defense in Houston. He chaired two terms of the Board of Regents of the College. Karas now serves on the Board of Governors of the Arizona State Bar.

Karas remembers Duke for its small classes and its rigorous educational program. He attributes a good deal of his success to the training he received at Duke.

Another Duke alumni who looks back at Duke from the perspective of a number of years of practice is Norman Herring. Herring was a member of the first graduating class of Duke Law School. Born in a silver mining camp in Nevada, Herring and his family moved to Douglas, Arizona, when he was still a small boy. One of his ancestors was a prominent lawyer in Arizona in the Territorial Days. When Herring entered Duke Law School in 1931 as a transfer student from the University of Arizona Law School, he had no intention of practicing anywhere other than Arizona. He is, and always had been, as he puts it, "a desert man."

Herring chose to attend Duke because, "I wanted a first-rate legal education and the broadening experience of living somewhere other than Arizona." According to Herring, his class was hand-picked for its high degree of scholarship and for its geographic diversity. The student-professor ratio was nearly one-to-one in those days. Justin Miller, then Dean of the Law School, held early morning classes over coffee at his home.

Herring also remembers his sales and contracts professor, Malcolm McDermott. Professor McDermott apparently wore glasses on a string and when making a particularly salient point, would let the glasses fall from his nose and fix the class with a stony gaze. "'Gentlemen, McDermott would say, 'This is the law.'"

When Herring returned to Arizona in 1933, there were only three or four hundred lawyers in the state. Herring felt that the intense educational experience he had had at Duke made him one of the best-trained lawyers in the state. Duke had also, Herring says, instilled in him a strong sense that "the basic responsibility of a lawyer to society is greater than the lawyer's need for money."

Herring was admitted to the Arizona bar in 1934 and began his career as a general practitioner. He worked in Tucson and Douglas for some years before settling in Phoenix. In 1949, while still in Tucson, he began to specialize in personal injury and worker's compensation litigation. He attended a number of medical seminars for lawyers taught by Professor Hubert Winston Smith. Gradually, Herring found that he had a natural aptitude for medical lore. If he carefully studied anatomy and the relevant literature, he could become an "instant expert" in a particular area of medicine. He was one of the first members of the National Association of Claimants Counsel of America, the forerunner of the American Trial Lawyers Association.

Since 1959, Herring has been legally blind. He has no central vision and only 2% peripheral vision. Nonetheless, Herring still maintains a vigorous practice. In 1968, he passed the California Bar Exam with one of the highest scores. He is one of the best-known medical malpractice lawyers in Phoenix. Last year, he was the subject of an article on medical malpractice that appeared in the Phoenix Gazette, a local newspaper.

As he stated in that article, Herring feels he is "the place of last resort for people injured by doctors' carelessness." However, Herring declines to accept about nine of every ten cases that come to him. He does careful preliminary research of all potential cases and accepts only those in which he feels the plaintiff's legal expenses will be justified by the probable award. Malpractice awards and settlements are not only a means of earning a living to Herring. They also serve to fulfill the ethical duty he feels lawyers owe to society by deter ring bad doctors and raising the standard of practice of medicine.

Duke Law School is still probably best-known in the East. However, many Duke graduates have chosen to pursue their careers in the Western states. A number of them are now living in Phoenix, Arizona. They have found the city's climate and lifestyle ideal and its practice of law both broad and challenging.
Obituaries

Charles H. Livengood, Jr.

Charles H. Livengood, Jr., a nationally known labor law expert, died at Duke Hospital on October 10, 1984, after a long illness. He was 73.

Professor Livengood, a Durham native, attended Duke University and graduated in 1931. He later entered Harvard University and earned his law degree in 1934. He was associated with two New York law firms before joining the United States Department of Labor as regional attorney for Kentucky and Tennessee shortly before World War II. During the war, he served as a lieutenant commander in the Navy. He was later cited for meritorious service during the Solomon Islands campaign.

After the war, Professor Livengood returned to Durham, where he briefly entered private practice before joining the United States Department of Labor as regional attorney for Kentucky and Tennessee shortly before World War II. During the war, he served as a lieutenant commander in the Navy. He was later cited for meritorious service during the Solomon Islands campaign.

Professor Francis Paschal, remembering Professor Livengood's years at Duke, noted that Professor Livengood had the reputation of being the finest seminar instructor at the law school, and was regarded highly by his students. Professor Paschal also recalled Professor Livengood's good humor and spirit, often masked by a certain reserve. Professor John Weistart, a student and colleague of Professor Livengood, noted his clarity and precision in writing.

Professor Livengood held several governmental posts throughout his career. He served as a consultant to the United States Senate subcommittee on labor relations in 1950. Between 1957 and 1960, he was an arbitrator with the Federal Mediation and Conciliation Service, the American Arbitration Association, and the North Carolina Department of Labor. He had been a member of the state General Statutes Commission since 1966, serving as chairman in 1970, and vice-chairman from 1962 to 1970. Professor Livengood is survived by his wife, Virginia, and a son, Charles H. Livengood, III.

John S. Bradway

On January 2, 1985, Professor of Law Emeritus John S. Bradway died after a brief illness in Eureka, California. Born in 1890 in Swarthmore, Pennsylvania, Professor Bradway earned his undergraduate degree at Haverford College and his LL.B. from the University of Pennsylvania. He held honorary degrees from Haverford College and California Western University. He was a member of Phi Beta Kappa and Order of the Coif.

After service in the Navy during World War I, several years in private practice in Philadelphia, and brief teaching assignments at the University of Pennsylvania and the University of Southern California, Professor Bradway came to Duke in 1931.

During his time at Duke, Professor Bradway focused his research activities on the interrelationship of law and social work, on clinical legal aid instruction, and on domestic relations. He is probably best remembered for his emphasis on clinical training for law students through legal aid programs for the poor. He was the Founder and Director of the Duke Legal Aid Clinic, and authored numerous books on the subject, including Clinical Instruction for Law Practice, Basic Legal Aid Clinic Materials and Exercises, and Law and Social Work. Mr. Matthew S. Rae, Jr., a graduate of the law school, pupil of Professor Bradway, and past Supreme Justice of Phi Alpha Delta Law Fraternity, said of him:

Thousands of underprivileged citizens who never heard of him owe Professor Bradway their thanks for
his pioneering work which resulted in today's national system of legal aid clinics. He indeed left the nation richer than he found it.

From 1922 to 1942, Professor Bradway served as Secretary and President of the National Association of Legal Aid Organizations. In 1948, he chaired the Legal Aid Committee of the American Bar Association. He also served on numerous state commissions and boards, including the North Carolina Probation Commission, and the Commission to Study Domestic Relations Laws. He was president of the North Carolina Mental Hygiene Society and the State Legislative Council from 1947 to 1949. Professor Bradway retired from Duke in 1959.

After leaving Duke, Professor Bradway taught at California Western University School of Law in San Diego and at Hastings College of Law from 1960 to 1965. He later returned to California Western, where he taught until his final retirement from teaching in 1973, at the age of 83. At the time of his death, Professor Bradway was working on a collection of essays dealing with law and legal education.

For Attorneys, CPAs, Trust Officers, CLU's, and Other Estate and Financial Planners

The Duke University School of Law and The Duke University Estate Planning Council will present the Seventh Annual Estate Planning Conference on the campus of Duke University in Durham, North Carolina, October 17-18, 1984. An outstanding and nationally known faculty will present a program of timely and practical interest to all members of the estate planning team.

Subjects on the program will include: The Treasury View of Tax Reform; Gifts and Sales of Partial Interests in Property (Life Estates and Remainders); Income Tax Planning; The Role of Charitable Giving in Estate Planning; The Use of Insurance in Estate Planning; Estate Tax Planning; Gift Loans—Proper Subject for a Gift; The New South Executive; The Marital Deduction Revisited; General Administration of Estates; IRD—The Atomic Bomb in the Estate of a Professional Partner; The Year in Review—An Estate Planner's Perspective on Tax Developments.

The conference is designed for continuing education credit. Participation is limited to 175. Fee $250. Information write or call:
Roland R. Wilkins, Director
7th Annual Duke University Estate Planning Conference
PO. Box 3541
Durham, NC 27710
Telephone: (919) 684-4429

Agenda
Law Alumni Weekend, November 1–2, 1985

Friday, November 1, 1985
2:00 p.m. Registration Desk Opens—Lobby, Law School
3:00 p.m. Law Alumni Council Meeting—Law School
6:00 p.m. Cocktails, Lobby, Paul M. Gross Chemical Laboratory
7:30 p.m. Dinner on your own

Saturday, November 2, 1985
9:00 a.m. Coffee—Danish, Hallway, adjacent to Moot Courtroom
9:15 a.m. Professional Program—Moot Courtroom
11:00 a.m. Pig Pickin' BBQ Luncheon, Back Lawn, Law School

1:30 p.m. Duke vs. Georgia Tech

REUNION CLASS PARTIES
6:30 p.m.* Cocktails, Sheraton University Center (each reunion class will have its own party)
8:00 p.m.* Dinner, Sheraton University Center (each reunion class will have its own party)

*Should the University decide to reschedule the afternoon football game to an evening game, the reunion parties will be held earlier (i.e., 4:00 p.m. for cocktails and 5:00 p.m. for dinner).
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