# Arizona State
# LAW FORUM


SPRING 1979

Arizona State
LAW FORUM

VOLUME 2, NUMBER 1 SPRING 1979



Edited by Stephen E. Lee and Nancy Zohner.

Published twice a year by Arizona State University College of Law. Produced by ASU Bureau of Publications. Special thanks to ASU Development Center.



**Address correction:**
Changes of address should be sent to the editorial offices, College of Law, Arizona State University, Tempe, Arizona 85281, (602) 965-6181.

**Photo credits:**
*Page 1:* Barbara Jarvis. *Page 4:* College of Law. *Pages 5-9:* College of Law. *Page 10 (top):* Fred Fitzhugh; *(bottom):* Barbara Jarvis. *Page 11:* College of Law. *Page 13:* David Kaye. *Page 14:* Barbara Jarvis. *Page 15, col. 1:* College of Law; *col. 2:* Markow Photography; *col. 3:* The Arizona Republic. *Page 16:* Reni Photos. *Page 17:* Charles R. Conley. *Page 18, col. 2 (top):* Charles R. Conley; *(bottom):* Barbara Jarvis. *Page 19, col. 1:* Fred Fitzhugh; *col. 2:* State Bar of Arizona; *col. 3:* Barbara Jarvis. *Page 20:* Barbara Jarvis. *Page 21:* Barbara Jarvis.

Please use the enclosed postage paid card to let us know address changes and news. We also welcome personal notes, clippings, photographs, and other forms of communication about events of interest in the lives of our alumni. Photos will be credited and returned after publication if so requested.

# Matheson New Dean

Associate Dean Milton Schroeder

Dean Alan Matheson

Alan Matheson was appointed as the third Dean of the College of Law on February 22, 1979 by ASU President John Schwada, subject to confirmation by the Board of Regents. Dean Matheson had served almost one year as Acting Dean, after the resignation of Ernest Gellhorn. After a thorough and lengthy national search, an advisory committee to President Schwada recommended Dean Matheson as the best available candidate; the President concurred with the committee recommendation.

At the time of his appointment as Acting Dean, Matheson was Associate Dean and Professor of Law. He has been at the law school almost since its founding — he joined the faculty during the school's first semester, in the fall of 1967. Since that time, he has continuously served the school both as an administrator and as a teaching faculty member, except during a one-semester sabbatical leave spent at the University of Southampton, England, in the fall of 1974. He also served the school as Acting Dean once before, when then Dean Willard Pedrick took a sabbatical leave in Australia during the spring of 1973.

Dean Matheson was educated at the University of Utah, where he received his undergraduate, master's, and law degrees. He was elected to Phi Beta Kappa, Order of the Coif, and the chief editorship of the *Utah Law Review*. Thereafter, he studied and served as an Associate in Law at the Columbia Law School. He served as Assistant to the President of Utah State University for six years before joining the ASU law faculty.

Milton Schroeder was named Acting Associate Dean by Dean Matheson in July 1978. Dean Schroeder joined the ASU law faculty in 1969. Although he had no direct previous experience in administration, he has acted as chairman of a number of important faculty committees, including the 1976 Task Force on the Curriculum, and he prepared a self-study to evaluate the school's program upon its tenth anniversary.

Immediately before he became Acting Associate Dean, Schroeder accepted President Schwada's request to head an advisory committee to assist in the selection of a new dean. The committee included Professors Stephen Lee, Bea Moulton, and Hal Bruff; Phoenix attorneys Edward Jacobson and Louis McClennen; and ex officio, Vice President Karl Dannenfeldt (who was replaced upon his retirement by Provost Paige Mulhollan). The committee advertised the position widely; invited applications from numerous persons inside and outside legal education; carefully evaluated the numerous resulting applications; and invited several candidates to extensive interviews with faculty, administration, and itself at the University. Its final recommendation to President Schwada of Dean Matheson's selection was carefully considered, but warmly made.

# Cartter Report Names ASU

ASU's favorable rating in the Cartter Report may no longer be recent news, but it is still worth examining. Last year, the College of Law was ranked among the top 30 law schools in the nation in the widely-circulated report and was also voted most likely to improve. The report reflected a survey of law teachers and deans throughout the United States. The survey was conducted by the academic senate of the University of California at Berkeley, and the resulting report was named for the original chairman of the study committee, the late Allan Cartter.

Those polled were asked to evaluate each of the top 90 law schools as to Educational Attractiveness (on a scale of 1 to 4) and as to Faculty Quality (on a scale of 1 to 5). The emphasis in Educational Attractiveness was on recommending schools to prospective students; those surveyed were asked to "consider the reputation and accessibility of faculty, curricula, innovative programs, library resources, other educational facilities, quality of students, prominence of alumni, and other factors which contribute to an effective and professional environment." For Faculty Quality, they were directed to "consider only the scholarly competence and professional achievements of the current faculty." Incidentally, among factors suggested to them, the respondents indicated that they considered student quality, library resources, and faculty research competence among the most important in evaluating the quality of schools, and university strength and faculty external activities among the least important.

The survey polled 44 law deans and 264 law faculty members. The faculty were selected from among various specializations and represented younger as well as older teachers. The deans and faculty were remarkably similar in their rankings. Although only 52 percent of those surveyed responded, the committee found no significant biases in response rates (or in ratings) from different parts of the country; deans and faculty from more highly-rated schools did more often respond, but the committee found that their ratings did not differ from respondents at lower-ranked schools.

The study committee recognized that law faculty and deans are not the only experts on the quality of law schools. Present and prospective employers of graduates, as well as prospective law students and their advisors, also evaluate schools. The Cartter Report was limited to the smaller group because of the cost and time required in identifying and surveying the larger.

Those surveyed were also asked which schools would "significantly improve their ranking over the next five years because of administrative leadership, quality of younger faculty, innovative programs, resource availability, etc." The schools that received the most votes were drawn from throughout the general rankings. There was not the same consensus on improving schools as there was on present quality of schools — no school appeared on more than about 30 percent of respondents' lists — but ASU was more often mentioned than any other school.

**Law Schools Most Likely To Improve**

1. **Arizona State**
2. Miami
3. Florida
4. Cornell
5. Washington U.
6. U.C. — Davis
7. San Diego
8. Georgia
9. Houston
10. Maryland

**Top Ten Law Schools In Cartter Report**

1. Harvard
2. Yale
3. Stanford
4. Michigan
5. Chicago
6. U.C. — Berkeley
7. Columbia
8. Pennsylvania
9. Virginia
10. UCLA

**Second Ten**

Cornell
Duke
Illinois
Minnesota
N.Y.U.
North Carolina
Northwestern
U.S.C.
Texas
Wisconsin

**Third Ten**

**Arizona State**
Boston U.
U.C. — Davis
U.C. — Hastings
Georgetown
Indiana
Iowa
Utah
Vanderbilt
Washington



# Among Top Law Schools

In a similar survey conducted by the same study committee, ASU's College of Education was also ranked in the third ten nationally and was also voted most likely to improve. The ASU College of Business Administration was in the fourth ten and eighth most likely to improve nationally. Only law, education, and business schools were studied by the committee.

The accompanying tables are taken from the final version of the Cartter Report. Only the top ten schools were ranked in order; others were ranked only in groups of ten.

**Fourth Ten**

Arizona
Boston College
Colorado
Florida
George Washington
Ohio State
Oregon
S.M.U.
SUNY — Buffalo
Washington U.

**Fifth Ten**

Case Western
Denver
Georgia
Kansas
L.S.U.
Miami
Notre Dame
Pittsburgh
Rutgers
Tulane

**Sixth Ten**

Connecticut
Emory
Fordham
Kentucky
Missouri
Nebraska
Oklahoma
Rutgers — Camden
Tennessee
Wayne State

**Seventh Ten**

Alabama
Arkansas
Cincinnati
Florida State
Houston
Indiana — Indpls.
Maryland
San Diego
Villanova
Temple

# 1977 Entering Class Indices Rate Favorably

As the Cartter Report indicates, an important factor in determining educational attractiveness of a law school is the quality of the student body, but comparative academic quality of students is very hard to measure. In past years, the College of Law has attempted to measure the academic potential of incoming students by assigning an index number to each that gives approximately equal weight to the Law School Admission Test score and the undergraduate grade point average (by multiplying the latter by 200 and adding to the LSAT).

Last summer, the American Bar Association released the median LSAT score and the median undergraduate grade point average of the incoming class of each of the nation's 164 law schools in Fall, 1977 (a few months after the Cartter Report was published). ASU's median LSAT was 35th highest, and its median grade point average was 27th. If all the median figures are combined under the ASU index, the resulting comparative figures would indicate that the quality of the 1977 ASU entering class was the 25th best in the nation. Other schools use these factors differently, and the ASU class might not rank as highly under some other school's measurement of academic potential.

Denise Blommel, Professor Michael A. Berch, Ruth Koester, and Karen Kennedy are pictured at the National Moot Court competition held in New York City in December 1977.

# ASU Moot Court Team 2nd in U.S.

In the regional Moot Court competition held in Albuquerque November 3 through 5, 1977, two ASU teams faced 13 teams from seven schools in a double elimination competition. The first ASU team, consisting of Richard Gerry, Kevin Hayes, and Frank Fanning, was eliminated in the third round. ASU's second team, Denise Blommel, Karen Kennedy, and Ruth Koester, won best orals but lost on the brief and the round, and was judged second place overall.

The three women and adviser Michael Berch of the law school faculty traveled to New York in mid-December for the nationals, where 29 teams argued in a single elimination competition. The ASU team won in the first round against Loyola (New Orleans), making history as the first ASU team ever to get past the first round of nationals. The next day they argued and won over Seton Hall, which had won best brief. (After this round, Denise recalled, Professor Berch lit a candle to St. Jude in St. Patrick's Cathedral.) Later in the day they won the quarter final round against Idaho. In the semifinals the next day, ASU faced an all-male team from the University of Texas (whose cheering section included Charles Alan Wright) and won, even though the timekeeper failed to call time on the Texas argument.

That evening Karen and Denise, "too tired to be frightened," faced Dickinson in the finals before a seven-judge panel. Dickinson won the round, one woman on the Dickinson team was named best speaker, and Denise was named second best oralist.



# Punishment by Death

MICHAEL L. ALTMAN

England abolished the death penalty in 1965. The vote in the House of Commons in support of abolition was 200 to 98; in the House of Lords, the vote was 169 to 75. This overwhelming Parliamentary vote of approval for abolition is especially interesting because substantial support came from the ranks of both the Labour and Conservative parties even though the government did not support abolition and a contemporaneous opinion poll revealed that 79 per cent of the people of England either favored the retention of the death penalty or expressed uncertainty about abolishing it.[1] How could abolition be voted in this political climate? One M.P. offered this insight:

> We don't, in matters of life or death, think it is right to decide what is just or unjust by a spot unconsidered reaction taken on the street corner or in a club or pub.[2]

If this observation is accurate, and the literature on the subject suggests that it is, it may indicate that Parliament is less democratic and more civilized[3] than most American legislatures, at least on the subject of the death penalty.

England was not always so civilized regarding capital punishment. Only 150 years ago, the criminal statutes in England included approximately 225 offenses that were punishable by death, and a leading commentator suggests that this figure understates the actual scope of capital offenses in British law at that time.[4] The broad reach of this "Bloody Code" is indicated by a few examples of the variety of offenses included: not only the traditional murder, rape, robbery, and treason, but also sheep stealing, picking a pocket, shoplifting, forgery, consorting with gypsies, and stealing turnips.

British history shows how much our attitudes about the use of capital punishment have changed; I think most would agree that the death penalty is now an issue only when murder has been committed. British history shows, however, how little the arguments for the death penalty have changed during the last 150 years. For example, regarding the eighteenth and early nineteenth centuries, Leon Radzinowicz observed:

> The unscientific approach to crime and criminals created an attitude of mind propitious to the inception

Professor Altman organized, directed, and moderated a symposium at the law school in the fall of 1977 entitled "The Punishment of Death." Four renowned scholars of the subject debated the death penalty — Professor Charles Black of the Yale Law School and author of *Capital Punishment: The Inevitability of Caprice and Mistake* (1974); Professor Hugo Bedeau of Tufts University, author of *The Courts, the Constitution and Capital Punishment* (1977); Professor Ernest van den Haag, author of *Punishing Criminals* (1975); and Professor Antonin Scalia of the University of Chicago Law School. Bedeau and van den Haag subsequently published papers in the *Arizona State Law Journal.*

In the spring of 1978, Professor Altman was on leave in England teaching at the University of Southampton. In this article, he reflects on the death penalty in light of his experience in England.

Professor Charles Black of Yale University Law School, constitutional scholar and critic of the death penalty, addresses the conference. Seated behind him is Professor Michael Altman of the ASU faculty.

of a doctrine of crude intimidation, with its simplicity and strong appeal to the instinct of self-preservation.[5]

"Intimidation," an asserted justification for capital punishment 150 years ago, is now called deterrence, and Radzinowicz' description of the attitudes at that time as "unscientific" and "crude" is undoubtedly based upon his conclusion that the death penalty did not seem to work very well as an intimidator. The fact that the death penalty did not intimidate many is suggested by the data that he has collected indicating that crime was increasing in the early nineteenth century notwithstanding so many capital offenses. For example, 82 people were convicted of sheep stealing in 1810, while 306 were convicted in 1817. Moreover, the future sheep thieves and criminals of England could not be unaware of the fact that misconduct would be dealt with severely. Hanging days were treated as public holidays. Sometimes, tens of thousands of people watched the hangman at work at Tyburn, and gallows dotted the English countryside; the bodies were often left hanging in chains ("gibbeted") for years after the execution. In many cases, as an additional "intimidator," the body of the criminal was publicly dissected, and to prevent treason (which included wives killing husbands, servants killing masters, and inferior clerics killing their superiors), the law imposed a penalty of drawing, hanging (not until dead), disemboweling, and beheading. Women convicted of treason were treated more humanely; they were only burned to death.

The frequent public executions and their accompanying rituals apparently did not reduce the crime rate, for the London of 150 years ago was often described as an unsafe place; some suggested a need to execute more people, while others argued for "breaking upon the wheel" and other forms of torture before death. Of course, we will never know whether crime rates would have been even higher without so many capital offenses, nor will we know what would have happened if all instead of only some of the people who were convicted of capital offenses were executed. It is difficult not to conclude, however, that the theory of maximum deterrence was a failure if criminal activity, particularly that not involving crimes of passion, continued unabated under the shadow of the gallows, the gibbets, and the dissections. One would have also thought that this bloody period in British history would promote an extreme sense of caution about any argument that the use of the death penalty deters crime.

I previously observed that abolition resulted in England in part because Parliament may be more civilized than many American legislatures, if being civilized relates in part to the rate at which people kill each other. The English people also seem to be more civilized than Americans. In 1976, the murder rate per 100,000 inhabitants in England and Wales was 1.0, while in the United States, it was 8.8. In addition, there were not any police officers murdered in England and Wales in 1976, while 111 were homicide victims in the United States. Of course, guns are more available in the United States than in England, and 64 per cent of those murdered in the United States in 1976 were killed by guns, while the comparable figure in England and Wales is 8 per cent.

Even though the risk of being murdered is almost nine times greater in the United States than in England, and even though it is said that there are more guns than people in America, I am still willing to assert the thesis that the critical difference between England and America regarding the death penalty is not that the English people are more civilized, but that Parliament is more civilized than most American legislatures. Parliament is more civilized because it is willing to disregard the public opinion of the day and to avoid a denial of human life without justification.

The justifications asserted to support capital punishment are discussed in *Gregg v. Georgia*,[6] a principal

*[The] assertion that retribution may constitute a justification for capital punishment cannot be supported theoretically . . .*



United States Supreme Court case upholding the constitutionality of the death penalty. Mr. Justice Stewart, writing for a plurality of the Supreme Court, offered two justifications: retribution and deterrence. Justice Stewart had to find some justification for the death penalty, for he apparently accepted the argument that without justification the death penalty would be "cruel" within the meaning of the Eighth Amendment's prohibition of "cruel and unusual punishment." As explained below, his assertion that *retribution* may constitute a justification for capital punishment cannot be supported theoretically; while a justification of *deterrence* can be theoretically supported, the factual premises upon which it depends are too unlikely to support executing a person for commiting a murder.

With regard to retribution, Mr. Justice Stewart's support is stated in the negative. He states that the death penalty as retribution is not "inconsistent with our respect for the dignity of men" and it is not "invariably disproportionate." The first point — not inconsistent with respect for dignity — is a bit obscure as a retributivist argument. If he means that that which is inconsistent with our sense of dignity is necessarily undeserved, then he is only giving us one criterion for determining what is undeserved and not giving us a clue for deciding what *is* deserved. I also would have thought that if retribution is to be a justification for the death penalty, then there ought to be some assertion, consistent with retributivist theory, as to why the death penalty is deserved more than life imprisonment.

*. . . while a justification of deterrence can be theoretically supported, the factual premises upon which it depends are too unlikely to support executing a person for commiting a murder.*

Mr. Justice Stewart's reference to proportionality might seem to provide some insight into why he thinks the death penalty may be deserved. He argues that the death penalty can be deserved for murder because it is proportionate to the crime — a life for a life *(lex talionis)*. If this is Mr. Justice Stewart's theory, and it seems to be, it should be noted that there do not appear to be any contemporary philosophers (retributivists included), penologists, or criminologists who would credit *lex talionis* as a defensible justification for the death penalty. The reasons for discrediting *lex talionis* are quite obvious. No country in the western world would think of exacting

Professor Antonin Scalia of the University of Chicago Law School and an Assistant Attorney General in the Ford Administration, defends the death penalty.

punishment in kind from the criminal simply because he commits a serious crime. We do not mug a mugger, rape a rapist, or burn down the home of an arsonist, nor do we execute the family of a person who has murdered the family of another. Why then should we kill a murderer when we do not exact punishment in kind for other serious offenses? The point is that *lex talionis* is totally discredited in our jurisprudence, and it is not rational to extract it from the Old Testament for one offense and equate it with retribution. I do not mean to suggest that retribution is not an important part of Anglo-American criminal jurisprudence; it is. It is also a subject that has received considerable attention and support from quite respectable contemporary philosophers, criminal law professors, and practitioners. Retribution does not mean *lex talionis,* however, notwithstanding Mr. Justice Stewart, and in this short article, I can do no more than commend to the reader the rich literature on retribution that has emerged in recent years.

The second major justification for the death penalty, which Justice Stewart suggests is sufficiently credible to permit a state legislature to adopt a limited death penalty statute, is deterrence. The argument that the death penalty deters is clearly the critical theoretical argument upon which the legitimacy of the death penalty depends. It is a utilitarian argument, which of course may be and is rejected by those who reject utilitarianism or at least reject reliance upon utilitarian considerations to determine life and death issues. The utilitarian argument is

that if the death penalty, as opposed to an alternative punishment such as life imprisonment, results in less innocent victims being murdered than murderers executed (after discounting the risk of error), then the death penalty is justified as a life-saving measure. This utilitarian argument, that the law should always favor life over death, is a very appealing argument, or at the very least an argument that cannot be regarded as irrational. Perhaps it is immoral for the law to authorize the state to deprive a person of life, but it is not irrational. Here I must concede that I am sufficiently a rationalist to accept the utilitarian argument that if the death penalty deters (as previously described), it could be justified if administered in a fair and nondiscriminatory manner. I have no hesitation asserting, however, that it is not possible to impose the death penalty fairly, given the constraints and practices of our criminal justice system. Much has been said on this subject by Professor Charles Black, in his eloquent book *Capital Punishment: The Inevitability of Caprice and Mistake* and in his various other articles on this subject. Moreover, there seems to be an increasing awareness throughout the United States, among people of all political persuasions, that the criminal justice system operates arbitrarily.

Even if the arbitrariness of the system is not a sufficient reason to abandon the death penalty, there still must be support for the theory of deterrence. Intuition strongly inclines one to conclude that less people would be murdered if there were a real threat of execution; it was this intuition that supported the Bloody Code in England 150 years ago, and it is the same intuition that undoubtedly contributes to the results of American public opinion polls showing strong public support for the death penalty. Intuition is not always accurate, however, and studied consideration of the deterrence issue leads me to the conclusion that the death penalty does not have a greater deterrent effect on murder than life imprisonment.

Unfortunately, examination of the burgeoning literature on the subject of the death penalty and deterrence is not an easy task for those of us who confuse quadratic equations with abstract art and who until recently

*. . . the cold-blooded killer for hire will not be deterred by the death penalty because his cold calculations surely assume that he will not be caught.*

Tufts University Philosophy Professor Hugo Bedeau, an opponent of the death penalty, addresses the conference.

thought that regression analysis is a method of analysis that is not progressive. That literature must be carefully examined, however, and examination must begin with Isaac Ehrlich's pioneering article of 1975, in which he concluded that during the period 1933 to 1969, an additional execution per year could have resulted in seven or eight fewer murders.[7] Ehrlich's conclusions, data, and statistical methods have been discredited by others who have subsequently analyzed and applied his method. In the most coherent such article, Professor Hans Zeisel not only summarizes the existing literature so that it is understandable, but also makes regression analysis seem comprehensible; after completing a very persuasive analysis, he concludes:

> This then is the proper summary of the evidence on the deterrent effect of the death penalty: if there is one, it can only be minute, since not one of the many research approaches — from the simplest to the most sophisticated — was able to find it. The proper question, therefore, is whether an effect that is at best so small that nobody has been able to detect it, justifies the awesome moral costs of the death penalty.[8]

Professor Zeisel has no difficulty answering that question in the negative after disposing of two classic examples, often put forth by death penalty proponents and accepted blindly by the Court in *Gregg*. First, he observes that the cold-blooded killer for hire will not be deterred by the death penalty because his cold calculations surely assume that he will not be caught. Second, he responds to the argument regarding the need to deter life prisoners from committing murders (the so-called "free murder" problem) by noting that the actual numbers of such murders are small, and in any case, murder by "lifers" is not free because most have some hope of being released, and the rest must know that a prison has its own way of punishing multiple murderers. Professor Zeisel concludes his careful analysis of the statistics and arguments with this observation:

> In the end one must remain skeptical as to the power of evidence to change ancient beliefs and sentiments. The greater hope lies in the expectation that with better times our sentiments will reach the "standards of decency that mark the progress of a maturing society."[9]

That observation brings us back to the beginning of this article. American legislatures, if not American culture, need to become more civilized before they can vote, as did Parliament in 1965, to abolish the death penalty. Until that day arrives, abolitionists can only take solace in how far we have progressed toward abolition while fighting the same fight for a change in values that has been fought for centuries. In the immediate future, which does not seem to include a change of heart or law to save many of those now on death row, I would suggest a change of tactics. For the time being, while myth and politics would seem to preclude total abolition, abolitionists ought to argue an alternative position.

If the death penalty is to continue, it should only be permitted in those cases that are used as examples by proponents to appeal to our most primitive and deepest fears: (1) mass murderers, (2) murders by hijackers, (3) murders by life prisoners, and (4) murders for hire. This would deal with Charles Manson, Gary Tison, the Baader Meinhoff, Adolf Eichmann, and Don Bolles' killers; it would also permit most of those on death row to receive a reprieve from death. Each of these suggested categories of capital murder can be defined with reasonable precision to avoid the problem of the death penalty being misused (if it must be used at all). The death penalty is

Ernest van den Haag, a psychoanalyst in private practice who supports the death penalty, presents his argument.

*The death penalty is about to be misused because the cases of most now on death row do not compare with the extreme examples that predominate during legislative debate . . .*

about to be misused because the cases of most now on death row do not compare with the extreme examples that predominate during legislative debate, but do fit within the broad legislative categories that emerged after the abolitionists lost their fight.

The United States will some day join the growing number of abolitionist countries. Until that time, we must keep in mind that 81.6 per cent of those murdered in the United States in 1976 were murdered by relatives, friends, neighbors, and acquaintances. And, 64 per cent of those murdered were killed by a gun, which is such an available, quick, and effective method to vent anger, relieve frustration, and soothe passion.

Murderers must be punished effectively, but the death penalty is not necessary. Perhaps statistics will not persuade. However, the declining murder rate since 1974, the decline in the population most likely to kill (those under 25), and a reduction in the societal tensions that dominated the turbulent 1960's may well permit legislative reduction of the number of capital cases to narrower and more precise categories as a prelude to complete abolition.

## NOTES

1. B. Grenier, *Capital Punishment: New Material 1965-1972* (published by the Solicitor General of Canada 1972). For a discussion of the politics of capital punishment in England prior to passage of The Murder (Abolition of Death Penalty) Act of 1965, Ch. 71 of the Statutes of Great Britain, see, C. Hollis, *The Homicide Act* (1964) and J.B. Christoph, *Capital Punishment and British Politics* (1962).
2. Quoted in B. Grenier, *supra* note 1, at 3.
3. For the purpose of this article, I am using a primitive definition of civilized relating to the rate at which people unnecessarily kill or unnecessarily authorize the killing of others.
4. L. Radzinowicz, *A History of the English Criminal Law and its Administration from 1750*, p. 5 (1948).
5. Radzinowicz, *supra* note 4, at 34, includes a comprehensive discussion of the death penalty — the laws, the practices, and the theories — that prevailed in the period 1750-1850.
6. 428 U.S. 153 (1976).
7. See "The Deterrent Effect of Capital Punishment: A Question of Life or Death," 65 *Am. Econ. Rev.* 397 (1975).
8. Zeisel, "The Deterrent Effect of the Death Penalty," 1976 *Sup. Ct. Rev.* 317, 338.
9. Zeisel, *supra* at 343.

## DeConcini to Speak At Annual Dinner

Dennis DeConcini, United States Senator from Arizona, will be the featured speaker at the 13th annual Law Alumni-Law Society Dinner on Thursday, April 19, 1979. The dinner will take place at Mountain Shadows at 7 p.m., preceded be a no-host cocktail hour at 6 p.m.

DeConcini will speak on pending judicial appointments and legislation affecting the federal court system.

Reservations can be secured by contacting Mrs. Virginia Stewart at the College of Law, 965-5808.

Barbara Babcock, Assistant Attorney General, Civil Division, of the U.S. Department of Justice, was principal speaker at the May 1978 graduation ceremony.

Professor Robert Misner talks with participants in the conference held at the Law School last fall to acquaint Arizona judges with the new Arizona Criminal Code.



In March, the *Arizona State Law Journal* hosted an Evidence Symposium at the law school honoring Professor Edward W. Cleary upon his retirement. The participants included many nationally-renowned scholars, including Irving Younger of Cornell, Albert Jenner of the Chicago bar, Dean John Strong (Nebraska), Dean Emeritus Mason Ladd (Iowa), Vaughn Ball (Georgia), Ronald Carlson (Washington University), Arthur Travers (Colorado), and Christopher Mueller (Wyoming), as well as Professor Michael Berch of ASU. Papers from the Symposium were published in a special issue of the *Journal.* Professor Cleary is shown above with *Journal* editors Judy Sirkis and David Durfee.

In November, 1978, ASU hosted a Discovery Conference to consider the merit of proposed amendments to the Federal Rules of Civil Procedure. The Conference was organized and run by the students and instructors in a third-year, Advanced Civil Procedure Seminar at the law school; the instructors were Phoenix Attorney John P. Frank and Judge Mary M. Schroeder of the Arizona Court of Appeals. Among those participating in the two-day Conference were Dean Paul Carrington of Duke; Professors Ed Cooper of Michigan, Maurice Rosenberg of Columbia, and David Shapiro of Harvard; federal judges from the Second, Third, Fifth, and Seventh Circuits; representatives from the Department of Justice and the Federal Judicial Center in Washington, D.C.; and attorneys in private practice or with public interest law firms in Los Angeles, Washington, Miami, Boston, Philadelphia, and Phoenix.

Discovery Conference organizers Judge Mary Schroeder, John P. Frank, Ron Kilgard, Thomas Irvine, Pat Finley, Susan Plimpton, and Nancy Beck are shown outside the U.S. District courthouse in Los Angeles.

# Of Prosecutors, Presidents and Publicity

DAVID H. KAYE

This article is adapted from a more complete review in 1977 *Arizona State Law Journal* 697 of *The Right and the Power: The Prosecution of Watergate*, by Leon Jaworski, published by Reader's Digest Press, New York, 1976.

Professor Kaye served as Assistant Watergate Special Prosecutor from June 1973 to December 1974. The views expressed here are nonofficial and do not necessarily reflect the opinions of any other members of the Watergate Special Prosecution Force.

---

For eleven fingernail-biting months, Leon Jaworski was the Special Prosecutor. During this period, four former Cabinet officers and various White House officials were charged with violations of the federal criminal code. A president, hounded by the sound of his own tape-recorded voice, was driven from office and later pardoned by the man he had named as his successor.

This is the basic plot of *The Right and the Power*, Mr. Jaworski's best-selling history of his term as the second of four Watergate Special Prosecutors. Yet even the most exciting of plots cannot ensure a good book, and most reviewers have been unimpressed by Mr. Jaworski's skill as a raconteur. Facets of *The Right and the Power* that may be of particular concern to the legal community, however, have not received much critical attention. Is it, one might ask, professionally responsible for a former prosecutor to disclose disparaging and previously private information about the subjects of the criminal investigations he supervised? Is it proper for a former government official to release selectively, and for his own purposes, portions of staff memoranda as part of his memoirs? Or does the First Amendment's right of free expression insulate such disclosures from criticism? Are the Special Prosecutor's explanations of his controversial plea bargaining decisions complete and convincing? Should the prosecutor, who had no doubt of President Nixon's culpability or the grand jury's willingness to indict, have declined to name the President as a defendant or co-conspirator? These are but a few of the questions that leap to mind as one leafs through Mr. Jaworski's memoirs.

In this article, I shall discuss only one of these matters — the decision not to indict the President. Mr. Jaworski explains that he persuaded the grand jury to issue its non-accusatory, sealed report to the House Judiciary Committee rather than a public indictment because he did not consider an indictment to be either "legally sound" or "in the nation's interest." Although the argument about legal soundness is the more elaborate of the two, Mr. Jaworski does not attempt to support his conclusion with quotations from staff memoranda as he is wont to do elsewhere in the book, and the position he adopts is puzzling. He writes: "I did not believe the United States Supreme Court would permit indictment of a sitting President for obstruction of justice — *especially when the House Judiciary Committee was then engaged in an inquiry into whether the President should be impeached on that very ground.*"

The meaning of this statement is not entirely clear. It is not a claim that a sitting president is immune from criminal process. Although such a view would seem to be mistaken, reasonable arguments could be adduced on its behalf. But Mr. Jaworski cannot have adopted this position, for he argued in *United States v. Nixon*, the Watergate tapes case, that the indictability of an incumbent president was an "open and substantial question." Furthermore, in *The Right and the Power*, he asserts that "legally an indictment could be returned against a sitting President for the offense of murder." Why murder but not obstruction of justice? Both offenses supply grounds for impeachment and indictment. Since Mr. Jaworski does not hold the view that impeachment must necessarily precede indictment — this would render a sitting president immune from criminal process — the answer must lie, not in the nature of the crime, but in the adscititious fact that a House committee was investigating impeachment for obstruction of justice. Thus, although he does not articulate it in this form, Mr. Jaworski is espousing a primary jurisdiction theory of impeachment.

His view seems to be that a prosecutor should — indeed, must — delay an indictment until Congress has had sufficient opportunity to impeach and convict. Presumably, if Congress fails to act, the prosecutor may proceed. On the other hand, if Congress does act — whether by rejecting impeachment, impeaching but not convicting, or impeaching and convicting — the prosecutor may also proceed. Under this primary jurisdiction theory, all the Constitution requires of the prosecutor is that he delay the indictment to enable Congress to consider whether the president should be removed from office. As Mr. Jaworski put it, "[t]he proper constitutional process . . . would be for the Committee to proceed first with its impeachment inquiry."

But why? As a matter of political pragmatism, of course, it may make sense for a prosecutor to await the verdict of the people's representatives. Maintaining public and legislative support was *sine qua non* to the politically vulnerable and self-conscious Special Prosecutor's



David Kaye

Office. Mr. Jaworski, however, purports not to have made only this kind of political judgment. Rather, he claims that he chose not to indict because to have done so would not have been "legally sound."

While Mr. Jaworski provides only *ex cathedra* pronouncements to support his primary jurisdiction approach to presidential indictability, several considerations might be advanced in its favor. First, concurrent proceedings create some risk of conflicts in the scheduling of hearings and the availability of witnesses and evidence. Second, an indictment might prejudice Congress in its deliberations. Third, there is always the possibility that dual proceedings will produce seemingly conflicting results. But these arguments are not particularly overwhelming, and not one of them sheds any light on why the impeachment process should supersede the criminal process.

To justify Mr. Jaworski's primary jurisdiction theory, we must probe more deeply. We might look to the rationale usually invoked to support the homologous administrative law doctrine. Typically, because of their assumed expertise, administrative agencies are deemed to have primary jurisdiction over certain issues that might otherwise first be adjudicated in court. This basis for the primary jurisdiction doctrine, however, is plainly inapposite here, since Congress is hardly better equipped than the courts are to initiate and evaluate charges of criminality. Nevertheless, Congress does possess a political sensitivity and accountability not necessarily present in the institutions of the criminal law. Is this sufficient reason to construe the Constitution as leaving it to Congress to deal with presidential misconduct in the first instance?

The short answer must be "No," for the Constitution, according to the premises of Mr. Jaworski's argument, creates more than one means of dealing with miscreant presidents. Thus, the avowedly political nature of the legislature should preclude Congress from delegating its impeachment power to an independent agency. Likewise, it should prevent anything short of a constitutional amendment from authorizing prosecutors and courts to conduct impeachments. An indictment is not an impeachment, however, and a criminal conviction is not a removal from office. A prosecutor may, of course, believe that the nation's priorities dictate first removing a criminal from office and branding him as a criminal later, if at all. Attorney General Elliot Richardson's willingness to allow Vice President Spiro Agnew to plead *nolo contendere* if only he would resign the vice presidency seems to exemplify this attitude. Similarly, a prosecutor, fearing that an indictment might impede the imperative process of removal (because of possibly invalidating prejudicial pretrial publicity or the logistics of dual proceedings), might conclude that it is better for the nation to defer any indictment and punishment of the officeholder while Congress devotes itself to cleansing the office. But a prosecutor who follows this course is exercising his discretion. Depending on the circumstances, the choice may be wise or misguided, commendable or tragic. In any event, the decision to indict is the prosecutor's, and it must be justified on prudential — not legal — grounds. In sum, if Mr. Jaworski acted, as he says he did, on the premise that he was legally foreclosed from prosecuting President Nixon while the Congress was considering impeachment, he operated on a false assumption.

Furthermore, if the Special Prosecutor's analysis of the susceptibility of the President to indictment seems questionable, his understanding of the law bearing on the decision not to cite President Nixon in the Watergate obstruction of justice indictment as an unindicted co-conspirator is surely unsettling. Mr. Jaworski states that he did not want the grand jury to cite the President, even as an unindicted co-conspirator, so as to foreclose President Nixon from contending that he had been prejudiced before the House Judiciary Committee by the grand jury's findings. Nevertheless, Mr. Jaworski insists that it was essential to have the grand jury identify the President on the record as an unindicted co-conspirator:

> We needed to name the President as a co-conspirator prior to trial in order to make admissible as evidence his statements in the tape recordings at the trial of those we planned to indict in the cover-up case. Without so naming the President, some of his statements in the recordings would not be admissible as evidence.

Mr. Jaworski does not explain how a grand jury finding of membership in the conspiracy is related to the admissibility of the taped statements of President Nixon. And, at the oral argument in *United States v. Nixon*, Mr. Jaworski had no small difficulty explaining the related issue of the significance of the grand jury's finding to the

enforcement of the trial subpoena for the tape recordings:

> *Justice Douglas:* I don't see the relevancy of the fact that the grand jury indicted [sic] the President as co-conspirator to the legal issue as to the duty to deliver pursuant to the subpoena that you are asking for.
>
> *Mr. Jaworski:* The only relevance, Mr. Justice, lies in it being necessary to show under Rule 17(c), that there is some relevance to the material that we seek to subpoena.
>
> . . . .
>
> *Justice Stewart:* You would be here, Mr. Jaworski, whether or not the President had been named as an indicted [sic] co-conspirator. That simply gives you another string to your bow — isn't that about it?
>
> *Mr. Jaworski:* It is true that it admits some evidence that would otherwise not be admissible.
>
> *Justice Stewart:* Right. But even had the President not been named, you would still have subpoenaed at least part of this material.
>
> *Mr. Jaworski:* There is no question about that.
>
> *Justice Stewart:* And you would still be here.
>
> *Mr. Jaworski:* That is right, sir. But in order to present the full picture, and in order to present — that also is a part of it.
>
> . . . .
>
> *Justice Brennan:* You don't suggest that the grand jury finding is binding on the Court or not?
>
> *Mr. Jaworski:* I do suggest that it makes a prima facie case. And I think under the authorities it so does.
>
> *Justice Brennan:* Let me understand this, Mr. Jaworski. You don't suggest that your right to this evidence depends upon the President having been named an unindicted co-conspirator.
>
> *Mr. Jaworski:* No, sir.
>
> *Justice Brennan:* And so for the purposes of our decision, we can just lay that fact aside, could we?
>
> . . . .
>
> *Mr. Jaworski:* Yes . . .
>
> *Justice Powell:* Mr. Jaworski, as I understand your brief you go beyond what you have addressed so far. I think you say that the mere fact that the President was named as an unindicted co-conspirator forecloses his claim of privilege.
>
> . . . .
>
> *Mr. Jaworski:* We certainly make that as one of the points which I intend to discuss at a later point.
>
> *Justice Powell:* That reduces him in and of itself to the status of any other person accused of a crime?
>
> *Mr. Jaworski:* I don't say that it forecloses. What I think we suggest is that it does present a situation here that should not make the application of executive privilege appropriate. We do say that.
>
> *Justice Marshall:* But only prima facie.
>
> *Mr. Jaworski:* Prima facie — that is correct . . .

In *The Right and the Power*, Mr. Jaworski's recollection of this exchange seems clouded. He writes:

> A Justice broke in: "I don't see the relevancy of the fact that the grand jury indicted [sic] the President as a co-conspirator to the legal issue as to the duty to deliver pursuant to the subpoena that you are asking for."
>
> . . . We thrashed out the question, and I made my point that the President's status as a co-conspirator *made absolute our right to the tapes.*

Thus, it is hard to know what Mr. Jaworski was thinking. He might have had two reasons for believing that a grand jury finding of membership in the conspiracy was crucial to the admissibility of the taped statements of President Nixon. The first is the co-conspirator exception to the hearsay rule. A grand jury finding that a person is a co-conspirator, however, is neither a necessary nor a sufficient condition for the admission of his out-of-court statements in a case against the other conspirators. In fact, numerous cases hold that the co-conspirator exception to the hearsay rule may be invoked even when no conspiracy has been charged.

The other thought that might support Mr. Jaworski's belief that President Nixon's tape-recorded conversations would have been inadmissible without the grand jury's secretly naming the President as a conspirator concerns the fact that the President's statements were recorded on magnetic tape. This may sound a bit mysterious, but the Special Prosecutor apparently perceived a connection:

> We subpoenaed Nixon because we thought at first that we would need him to verify the authenticity of the tapes. But James Neal, who was to prosecute, had a nagging hunch that Nixon, for one reason or another, would not appear for trial. So he set his team to hunting another means of establishing the tapes' authenticity, and the young lawyers found it in the law books. Recordings, they learned, are presumptively correct when they leave the hands of a co-conspirator provided certain facts can be established.

If the Special Prosecutor's staff actually made this discovery, it is strange that they did not so inform the court when they sought to introduce the recordings at trial. The government's trial memorandum on the admissibility of tape recordings argued that the recorded conversations were admissible as declarations in furtherance of the conspiracy and were authentic and accurate. The government did not argue, however, that the fact that the conversations were recorded by a conspirator made the recordings, as Jaworski would have it, "presumptively correct." Authenticity and accuracy is one issue, and conspiracy, another.

In short, when Mr. Jaworski's explanation of his decision to have the grand jury secretly name President Nixon as a co-conspirator but not indict him for conspiracy is unpacked and inspected, one senses that Mr. Jaworski offers the public not so much a rationale for his decision as a rationalization. The Special Prosecutor, unfortunately, does not tell it like it is. He tells it as he would like it remembered. In this way, Mr. Jaworski tells us more about himself than the events he describes.



# Alumni News

## CLASS OF 1970

**Michael Gallagher** is now a partner in the Phoenix firm of Gallagher & Kennedy. He was previously associated with Snell & Wilmer. He has been appointed Chairman of the Governor's Council on Professional Sports and is presently serving as president of the Phoenix Association of Defense Counsel.

**Sarah D. Grant**, chief staff attorney for the Arizona Supreme Court, was one of six Phoenix attorneys nominated by the Maricopa County Commission on Trial Court Appointments to fill two vacancies on the Maricopa County Superior Court. The Commission screened 76 applicants for the two positions.

**Robert L. Hungerford, Jr.** was elected chairman of the Maricopa County Republican Committee at the party's convention in September 1978. Hungerford, who practices in Scottsdale with **Joseph B. Heilman**, '77, served in the Arizona legislature from 1970 to 1976 and has been active in the ASU Alumni Association's legislative liaison group for the past three years.

**Richard A. Jones** has been promoted to Assistant District Counsel, Western Region, Internal Revenue Service. He has transferred to the San Francisco office of the IRS.

**John Lancy** is now senior partner in Lancy & Newburg, a four-man Phoenix firm.

**Robert A. McConnell** has been appointed attorney for the Maricopa County Republican Committee.

**Joe Sims** has been named a resident fellow of the American Enterprise Institute for Public Policy Research as of October, 1978.

Sims is also counsel with the firm of Jones, Day, Reavis & Pogue and a contributor to the *Legal Times*. He was with the antitrust division of the United States Department of Justice from 1970 to September 1978. For the last three years, he held the post of Deputy Assistant Attorney General, first for legislation, planning, appeals, and administration, and then for regulated industries, economics and foreign trade.

The American Enterprise Institute is a nonpartisan, nonprofit, publicly supported educational and research organization which disseminates information on public policy issues through print and broadcast media. While at AEI, Sims will study antitrust and regulatory affairs.

## CLASS OF 1971

**Ben Hanley** has been re-elected for a fourth term in the Arizona legislature.

**Roslyn Moore** has joined the Phoenix firm of Logan & Aguirre and is engaged primarily in labor litigation, representing employees and unions. She previously worked for the Greyhound Corporation for two years. She is a member of the Arizona Women's Commission and Arizona Big Sisters and is a director of the New Arizona Family and the ASU Law Alumni Association.

## CLASS OF 1972

**Harriet C. Babbitt** clerked for Arizona Supreme Court Chief Justice Jack D.H. Hays after graduation and is currently a trial attorney and shareholder in the Phoenix firm of Robbins, Green, O'Grady & Abbuhl, specializing in personal injury law. She is married to Bruce Babbitt, former Attorney General and current Governor of Arizona. Her role as wife of the governor requires a certain amount of her time, but she maintains her priorities are her legal work and their two children, Christopher, 4, and T.J., 2. She notes, "I do give speeches and do things on weekends if they seem worthwhile or are in a special area of interest." Some of those interests are women's rights, public support for the arts, and solar energy development.

**Michael McNeff** is now a sergeant with the Arizona Highway Patrol. He previously served as legal advisor for the Department of Public Safety. His father, **Ed McNeff**, is a December 1978 graduate of the law school.

The McNeffs are the first father-son graduates, but are not the first family with two generations of ASU law graduates. **Ruth Finn**, '70, was followed in law school and joined in practice by her daughter **Ellie Finn**, '72, who is currently president of the Alumni Association. **Dan Norton**, '71, was followed by his daughter, **Jacqueline Norton**, '76.

## CLASS OF 1973

**Alice Bendheim** is President of the Arizona Civil Liberties Union and serves on the national board of the American Civil Liberties Union.

**Terry Croghan** has become associated with the Los Angeles firm of Sedgwick, Detert, Moran & Arnold. Croghan was formerly assistant United States Attorney for the Central District of California.

**Bartow Farr** is associated with the Washington, D.C. law firm of Rogovin, Stern & Huge, engaged in general litigation. He previously was with the office of the Solicitor General of the United States.

**Dan O'Hanlon,** who has been a trial attorney for the Department of Justice in Washington, D.C. since 1974, has been named coordinator of the Legal Assistant Program of the Community College of Marshall University in Huntington, West Virginia. The program prepares graduates as paralegal specialists who work under the direct supervision of an attorney.

### CLASS OF 1974

**Claudeen Bates Arthur** has been named field solicitor for the Department of the Interior and will provide legal services and advice to the Bureau of Indian Affairs' Window Rock office, the Bureau's largest. Ms. Arthur, the first Navajo woman to receive a law degree, worked after graduation with DNA, the Navajo legal aid service, and in 1976 opened a law practice in Shiprock, New Mexico. She left her practice in 1977 to join the Solicitor's staff in Washington, D.C.

**Steve Haasis** recently joined the law firm of John M. Urquhart in San Diego, in a practice consisting largely of personal injury litigation.

**Jud Holtey** has opened his own law office in San Diego.

**John P. Zanotti** has been promoted to Senior Corporate Director, Legal, and Assistant Secretary of Harte-Hanks Communications, Inc. The San Antonio-based communications company owns and operates newspapers and television and radio stations. Prior to joining Harte-Hanks, Zanotti was with the Los Angeles firm of O'Melveny & Myers.

### CLASS OF 1975

**Danny E. Adams** has been promoted to Special Assistant to the Chief of the Common Carrier Bureau of the Federal Communications Commission in Washington, D.C.

**James R. Feltham** was recently promoted from legislative assistant to administrative assistant to U.S. House Minority Leader John Rhodes of Arizona.

**Keith Larsen** is practicing law in Salt Lake City, where a substantial amount of his work concerns environmental and natural resource law. In addition, he owns and operates K.G. Larsen Financial, an insurance and investment service firm, and is President of Adak Energy Corporation, an oil and gas exploration and development firm.

Douglas L. Slotten, second from left, receives Outstanding Handicapped Federal Employee of the Year Award from Civil Service Commission Chairman Alan K. Campbell and Commissioner Ersa S. Poston, right. Slotten was accompanied by Federal Communications Commissioner Joseph R. Fogarty (left).

**Doug Slotten,** an attorney with the Federal Communications Commission, has been named an Outstanding Handicapped Federal Employee of the Year. He is one of 10 government employees in the nation to receive the presidential award this year.

Slotten, who has been with the FCC since graduation, first served as Attorney-Adviser (General) with the Certificates of Compliance Division, Cable Television Bureau, where his duties included drafting memorandum opinions and orders for Commission action, guiding junior attorneys, and serving as a spokesman for the Bureau before various groups.

He recently assumed the position of Attorney-Adviser (Public Utilities) with the Policy and Rules Division, Common Carrier Bureau, where he assists in the development of policies for the regulation of domestic and international communication common carriers.

**Steve Twist** was named Special Assistant Attorney General by Attorney General Bob Corbin. Twist works on the Attorney General's legislative program, prosecutes cases with the Special Prosecutions Division, and handles administrative duties.

Twist previously practiced with **Daniel F. Sullivan,** '73, but spent most of his time serving as majority counsel to the Arizona House of Representatives.

### CLASS OF 1976

**Donald Aden** joined AZL Resources, Inc., an integrated agribusiness corporation, as Assistant Corporate Counsel in 1975, and has been Corporate Counsel since 1977. He is also an arbitrator for the Better Business Bureau consumer arbitration program.

**Robert J. Hartmann** received a master's degree in law of taxation and has become associated with the Phoenix firm of Bonn & Anderson, P.A., specializing in federal and state income taxation and estate and business planning.

**Richard H. Lee** has joined Sparks & Silver, P.C., of Scottsdale, as an associate. Prior to joining the firm, he clerked for the Hon. George Edwards of the United States Court of Appeals, Sixth Circuit.

### CLASS OF 1977

**Dan Cooper** has joined the staff of the Navajo Legal Aid & Defender office in Window Rock, Arizona.

**Louraine Rees Gutterman** now works for the City of Phoenix.

**Glenda Ulfers** is Risk Control Manager and Hospital Attorney for Queen of the Valley Hospital in West Covina, California.

**Don Wilson** has joined Solomon, Relihan, Blake & Richter in Tempe. He previously practiced in Yuma.

### CLASS OF 1978

**Dianne Crosby** works for the Internal Revenue Service in Reno, Nevada. She is married to **Paul Haefner,** '78, who is with State Farm Insurance Company.

## Alumni Association Elects 1979 Board Members

Members of the 1979 Board of Directors of the ASU Law Alumni Association are as follows: **Gloria Aguilar,** '73; **Judy Bailey,** '75; **Dan Drake,** '74; **Ellie Finn,** '72; **Shirley Frondorf,** '73; **Mike Gallagher,** '70; **Fred Gamble,** '74; **Jolyon Grant,** '71; **John Holman,** '75; **Ted Jarvi,** '73; **Kevin Kane,** '71; **Pat Metzger,** '76; **Roslyn Moore,** '71; **Joe Mott,** '76; **Steve Myers,** '74; **Pat Norris,** '77; **Linda Scott,** '74; and **Mike Scott,** '71.



# Faculty Activities

## 1977-78 School Year

**Professor Michael L. Altman** directed the conference "The Punishment of Death" at the law school and lectured at the National District Attorneys Association conference on "Proposed New Juvenile Justice Standards." During the Spring Semester, he was a Visiting Professor of Law at the University of Southampton, England, and lectured at the University of Kent on clinical education. He published a report on information systems for the ABA Juvenile Justice Standards Project.

**Professor Michael A. Berch** taught at the University of Tennessee Law School during the summer of 1977 and the Spring Semester in 1978. He spoke at the Evidence Symposium honoring Professor Cleary in March and coached the school's very successful national moot court team. He published "Trial and Tribulation" in *The Forum.*

**Professor Harold H. Bruff** was a Visiting Professor at the University of North Carolina Law School during the Fall Semester. He testified before the U.S. House Rules Committee on setting a federal debt limit and made a presentation on "Presidential Participation in Agency Rulemaking" before the Administrative Law Section of the AALS. He was appointed Chairman of the Separation of Powers Committee of the ABA Section on Administrative Law. He prepared a report on "Presidential Power and Administrative Rulemaking" for the ABA Commission on Law and the Economy and published an article on congressional control of administrative regulation in the *Harvard Law Review* with Dean Gellhorn.

**Professor William C. Canby, Jr.** spoke before several groups on the subject of lawyer advertising following his success in *Bates v. State Bar of Arizona.* He conducted seminars for the Arizona Attorney General's staff on Indian Law in December, and presented a paper on Indian Criminal Jurisdiction to the Native American Law Section of the AALS. He was also a panelist at the American Enterprise Institute Conference on Antitrust and the Medical Profession. Professor Canby is a board member of the Faculty Association at ASU, of the Maricopa County Legal Aid Society, of the Arizona Coalition for the Right to Choose, and of the Arizona Center for Law in the Public Interest. He published "Physician Advertising" in the *Duke Law Journal* with Dean Gellhorn.

**Professor Edward W. Cleary** was the featured speaker before the Evidence Symposium held in his honor at the Law School in March and completed a supplement to his edition of *McCormick on Evidence.* After his retirement in May, he and his wife, Margaret, visited China, but he returned to teach Evidence and Problems in Litigation in Spring, 1979. With Professor Misner, he is preparing Model District Court Rules for the U.S. District Judges Association for the Ninth Circuit.

**Professor Richard W. Effland** spoke on trends in probate law to numerous groups, including the ASU Law Alumni Symposium, the Estate Planning Institute, the National College of the State Judiciary, and at the National Conference on the Uniform Probate Code. He also spoke on the law of the aging to ASU's School of Social Work and on community property to the Wisconsin state bar. He is a member of the Arizona State Bar's Continuing Education Committee and of the ABA Section of Real Property, Probate and Trust Law, Committee on Significant Current Trends.

**Professor Dale B. Furnish** spent the year as a Visiting Professor at the University of Illinois College of Law. He completed his introduction and annotated translation of Articles 1 and 9 of the UCC for the Institute of Juridicial Investigation at the National Autonomous University of Mexico. He lectured in Ecuador, Panama, Costa Rica, and Honduras, and presented a paper at a regional meeting of the American Society of International Law. He submitted a report on commercial arbitration to the International Congress of Comparative Law and served as one of

seven foreign commentators invited by the Peruvian government to review the private international law provisions of the proposed new Civil Code. He is Chairman of the AALS Section on Creditor-Debtor Relations and President-elect of the Section on Comparative Law. He is a member of the Board of Editors of the *American Journal of Comparative Law* and wrote an article on commercial arbitration for that journal.

**Former Dean Ernest Gellhorn** is Chairman of the ABA Industry Regulation Committee; Law School Chairman of the Ninth Circuit Judicial Conference; Chairman of the AALS Section on Administration of Law Schools; and a Director of Citizens Communications Center, Washington, D.C. He co-authored articles with Professors Bruff and Canby and published an article on the FTC in an American Enterprise Institute journal.

Dean Gellhorn left the College of Law in April to accept the deanship at the University of Washington; in March 1979, he resigned the Washington deanship and will return to the University of Virginia faculty in the fall of 1979.

**Associate Professor David H. Kaye** participated in the Summer Humanities Seminar for Law Teachers at Harvard University and is a member of the Test Development

and Research Committee of the LSAT Council. He led an ASU faculty seminar on mathematics in law.

**Former Professor Douglas Leslie** was Visiting Professor of Law at the University of Virginia College of Law during the entire year and then accepted an offer to join that faculty permanently. During his year on leave of absence from ASU, he completed work on a case book which has been published by Little, Brown & Co., *Cases and Materials on Labor Law: Process and Policy.*

**Associate Professor Gary T. Lowenthal** served as faculty advisor for the Jenckes Oral Advocacy Competition. He participated in the Rio Rico seminar with legislators and criminal justice officials on the new Arizona Criminal Code.

**Dean Alan A. Matheson** presented a paper on the federal Administrative Procedure Act at the National College of State Judiciary. He was Chairman of a Salary Study Committee for the Tempe School District and a member of the Faculty Search Committee for Academic Vice President. He wrote the introduction to an administrative law symposium in the *Willamette Law Journal.*

**Professor Robert L. Misner** was a featured speaker on the Speedy Trial Act at the Ninth Circuit Judicial Conference and spoke on the topic before several other associations. While on leave, he served as Deputy Attorney General and acted as Governor Babbitt's legislative liaison on prison matters. He continues as an advisor to the Arizona Attorney General and to the Department of Corrections, and serves on the Governor's Commission on Corrections, the Maricopa County Advisory Commission on Detention, and the Arizona Legislative Ad Hoc Committee on Corrections. In addition, Professor Misner published articles in the *Stanford Law Review* (on arrestees as informants), in the *Arizona State Law Journal* (on the Speedy Trial Act), and in the *Journal of Legal Education* (on teaching contracts with contracts).



**Professor John P. Morris** was a Visiting Professor at the University of Western Australia and prepared cases and materials on the Australian Trade Practice Act of 1974. He lectured in Australia to various organizations under the auspices of the USIA. He has been nominated to the National Commission for the Review of Antitrust Laws and Procedures.

**Professor Beatrice A. Moulton** completed her casebook on clinical instruction. She is a director of the Society of American Law Teachers; is a member of the ABA Committee on Clinical Legal Education, Section on Legal Education, and of the Maricopa County Board of Community Legal Services; is a director of Tempe-Mesa Chapter of the Arizona Civil Liberties Union, Vice President of the Arizona Center for Law in the Public Interest, and a member of the Budget Committee of the ASU Faculty Association. In addition, she was named as one of four public members to the National Advisory Committee on Training for the Legal Services Corporation; served on the Corporation's Task Force on Recruitment, Retention and Training; and assisted with planning the training of 3,000 new lawyers for the Corporation in 1978-79.

**Professor Willard H. Pedrick** delivered the Julius Rosenthal Lectures at Northwestern University on "Death, Taxes and Living." He presented a paper on "Tort Law and the Alleviation of Suffering" to the AALS and lectured at numerous bar association meetings and estate planning councils. He is a Consultant to the Study Council on Torts and Liability Insurance of the Arizona Legislative Council. He chaired the AALS reaccreditation committee for the Iowa Law School, is a consultant to Pepperdine University Law School in its application for AALS membership, and is a trustee of California Western Law School. He published on grantor powers in the *Northwestern Law Review* and on tax reform for *Taxes Magazine*, as well as putting out new editions of his torts and his estate and gift taxation casebooks.

**Professor Jonathan Rose** organized a program on Current Developments in Antitrust for the Arizona State Bar. He conducted special investigations on bidding procedures of the Department of Education and on occupational licensing agencies for the Attorney General and consulted with the New Mexico Attorney General on antitrust. He spoke to the National League of Cities and Towns and an American Public Power Association seminar on antitrust.

**Acting Associate Dean Milton R. Schroeder** was Chairman of President Schwada's Dean Search Committee. He participated in a seminar at the ABA Appellate Judges Conference on "Taking Issue," and he lectured on property law for the Bureau of Land Management training program. Professor Schroeder was on sabbatical leave during the spring. He wrote on the Magnuson-Moss Warranty Act for the *California Law Review.*

**Professor Robert Strong** resigned after nine years on the faculty, but will continue to live in Phoenix.

**Professor Donald N. Zillman** lectured before numerous groups during the year and spoke at the FTC's Solar Competition Symposium in Washington. He was a member of the Department of Education's Discipline Task Force and is a Consultant to the Study Council on Torts and Liability Insurance of the Arizona Legislative Council. He wrote on free speech and military command in the *Utah Law Review* and on the Federal Torts Claims Act in the *Military Law Review* and published a casebook on military law.

## Evans New Civil Clinic Director

**Lynwood (Woody) Evans** has been Director of the Law School's Civil Clinic since August 1978. Evans was previously a lobbyist at the Arizona legislature for legal services and has also held positions in the Civil Rights division of the Attorney General's office and public defender's office in Tucson. Evans received his legal education at the University of Missouri Law School and, prior to coming to Arizona, was a staff attorney for the National Juvenile Law Center at the St. Louis University School of Law.

# New Faculty

**Ira M. Ellman** joined the faculty in January 1978. He received his undergraduate degree from Reed College, M.A. from the University of Illinois and J.D. from the University of California at Berkeley. Prior to joining the ASU faculty, he served as a consultant to the Assembly Select Committee on Revision of the Non-Profit Corporations Code for the State of California. He previously was associated with McCutchen, Doyle, Brown & Enersen, San Francisco; was an assistant to Senator Adlai Stevenson, Jr.; and served one year as law clerk for United States Supreme Court Justice William O. Douglas. His teaching areas include Civil Procedure, Legislative Process, Family Law, and Non-Profit Corporations.

**Hannah Arterian Furnish** joined the faculty in January 1979. She received her B.A. from Elmira College and J.D. from the University of Iowa. She was a Note and Comment Editor on the *Iowa Law Review* and is a member of Order of the Coif. From 1973 to 1978 she practiced with the New York firm of Dewey, Ballantine, Bushby, Palmer & Wood, specializing in corporate tax with an emphasis on exempt organizations. She was a visiting professor at the University of Iowa in the spring of 1977 and an Associate Professor there during 1978. Her teaching areas are Constitutional Law, Federal Tax Problems of Exempt Organizations, Property II, Employment Discrimination, and Labor Law. Other areas of interest are remedies available for harassment on the job and the overlap between the protection of Title VII and the N.L.R.A.

**Dennis S. Karjala** joined the ASU faculty in January 1978 and has taught Corporations, Securities Regulation, Federal Income Taxation, and Business Planning.

Professor Karjala received his undergraduate degree in electrical engineering/physics at Princeton and master's and Ph.D. degrees in electrical engineering from the University of Illinois (Urbana). He attended law school at the University of California at Berkeley, where he was Editor-in-Chief of the *California Law Review*. After graduation he joined the San Francisco firm of McCutchen, Doyle, Brown & Enersen, where he engaged in a general business and corporate practice.

He will spend most of 1980 in Japan on a Fulbright lectureship, teaching broad aspects of U.S. business law in American Studies programs.



Barcelo

Kay

Pulaski

Treece

# Visiting Faculty

**John J. (Jack) Barcelo** is visiting from Cornell Law School in Ithaca, New York. Professor Barcelo received his undergraduate and law education from Tulane University, was a Fulbright Scholar in 1966-67 at the University of Bonn, Germany, and received the S.J.D. degree from Harvard University last year. His teaching areas are International Business Transactions, Conflicts, and Torts.

Professor Barcelo observes that one difference between Cornell and ASU is the "more relaxed attitude of students at ASU, compared to the pressure which most students at Cornell appear to be under" and attributes this to the cultural differences between East and West. In addition, he notes, students at Cornell "are looking to employment across the nation and this probably increases their competitiveness."

**Wendell P. Kay,** visiting from Anchorage, Alaska, received an A.B. from DePauw University and J.D. degree from Northwestern University. His teaching areas are Trial Techniques and Remedies, and he is teaching Practice Court while at ASU. His areas of interest are trials, criminal law, and civil rights. About ASU he comments, "Great bunch of students in a great winter-time location! Much easier place to play golf in the winter than Alaska . . ."

**Charles Pulaski,** visiting from the University of Iowa, received his undergraduate education at Yale College and law degree from Yale Law School. His teaching areas include criminal procedures, legal profession, trial advocacy. While at ASU, he is working with the Criminal Prosecutor Internship program. He reports being favorably impressed by the Arizona weather.

**Samuel Sutton** of the Phoenix firm Cahill, Sutton & Thomas, who was pictured in the last issue, is again teaching Property II.

**James Treece** is visiting from the University of Texas Law School in Austin. He received B.A., M.A., and J.D. degrees from the University of Illinois. Professor Treece's teaching areas are Torts and Copyright Law, and he is a co-author of the Torts casebook used in first-year classes at ASU. He comments, "The students at ASU are hard working, eager and quick to learn, and very able. Arizona and the nation will be very well served by the graduates of this law school."

100078
Arizona State Law Forum
College of Law
Arizona State University
Tempe, Arizona 85281

Non-Profit
Organization
U.S. Postage
**PAID**
Permit No. 1
Tempe, AZ 85281

**Address Correction Requested**