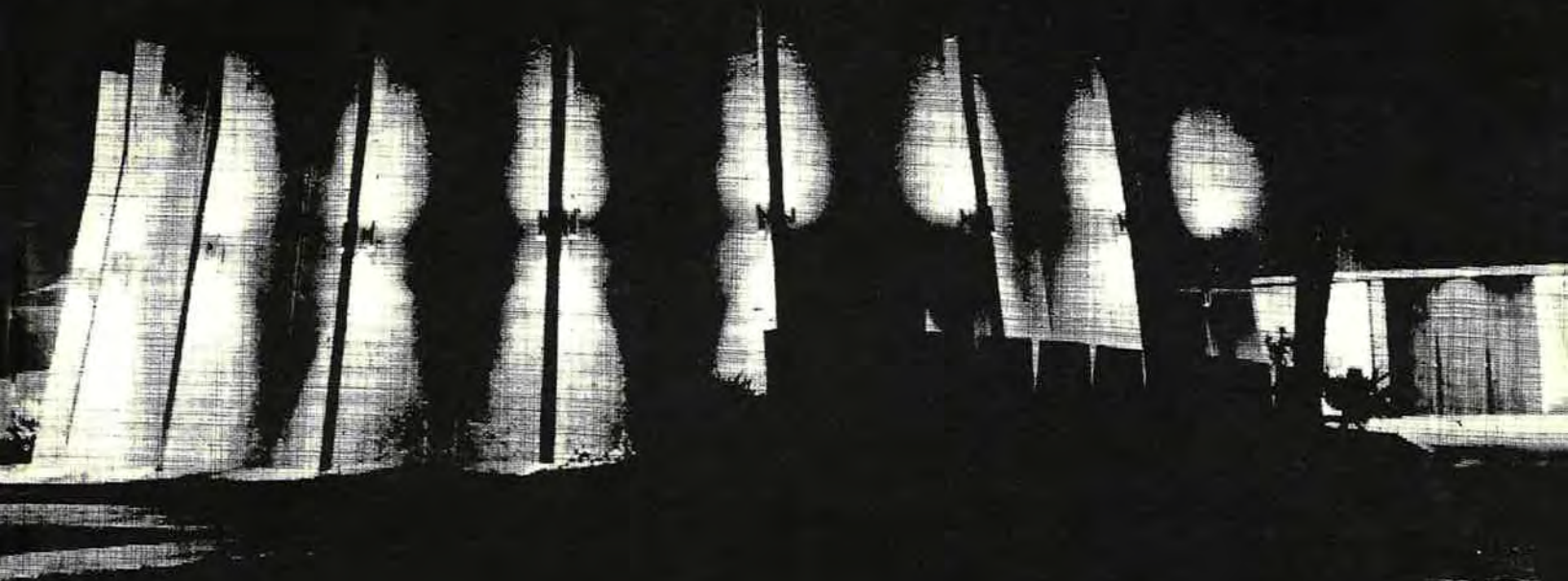


Arizona State LAW FORUM



WINTER 1977



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We 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.



Arizona State Law Forum is designed for all the friends of ASU law school, but principally for its alumni. There has been a special camaraderie among ASU law students and, we hope, a special concern with the school itself. This closeness can develop into a continuing interest if nurtured, and the *Forum* is one of our attempts to nurture it.

This seems an appropriate time to begin an alumni magazine. We now have a substantial body of alumni — about 1,000 — and the members of our tenth class are almost midway in their legal studies. Moreover, the Alumni Association has become truly active and now plays a part in the life of the school equal to the longer-lived Law Society.

The *Forum* will, twice a year, bring you news about your classmates and other alumni, as well as items about recent activities of the school and its faculty. We do not aspire to publish scholarly, law-review-type analyses — we will carry pieces designed to be read. We will also include features about the law and legal education.

In this first issue Dean Ernest Gellhorn not only reports on the past

year at the school, but also discusses the impact of the *Bakke* case on future years at this school and all other law schools. (In *Bakke* this fall, the United States Supreme Court heard arguments on the constitutionality of the special minority admissions program at the U.C.-Davis medical school.) You will find Dean Gellhorn's discussion an enlightening perspective on an often-discussed but seldom analyzed problem.

Bill Canby's reflections on the *Bates* case are both thoughtful and provocative. As you probably know, Bill represented Bates and O'Steen from the inception of their dispute with the Arizona bar through the Supreme Court decision; no one has considered lawyers' advertising more carefully.

We hope you will find the *Forum* interesting and lively. We will depend on you for news of the alumni — please use the enclosed card to report on your activities and those of your acquaintances. We would also like to hear from you with ideas for articles or features, or simply with greetings.

Stephen E. Lee
Nancy Zohner

Report of the Dean: 1976-77

An expanded version of this Report was submitted to Arizona State University President John W. Schwada on July 1, 1977. Dean Gellhorn was chairman of the Association of American Law Schools Committee on Special Admissions that advised the AALS Executive Committee on the Bakke case and aided in preparation of its amicus brief submitted to the United States Supreme Court. The discussion in the first part of this Report is similar to parts of that brief.

Dear Mr. President:

This report summarizes the activities of the College of Law, its students, faculty, administration, and staff, during the past year.

Before focusing on the Arizona State University Law School, however, it is appropriate to review those developments that are likely to affect legal education in the future. This year one event stands out as likely to change the status and condition of legal education—and, indeed,

of the legal profession. It is the decision of the California Supreme Court announced on September 16, 1976, in *Bakke v. Regents of University of California*, holding that the University of California at Davis medical school's practice of relying upon race as a factor in making admissions decisions violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

I.

Although the decision of the California court in *Bakke* involves entry into medical school, the admissions processes of law schools are sufficiently similar that law schools are likely to be affected directly by any decision in this case. Almost all law schools, public or private, large or small, have some form of special program that admits minority students with lower numerical credentials in order to increase the number of qualified members of racial minorities in professional schools. The decision of the California court imperils these programs that have opened the doors of law schools to minorities and changed them from virtually all-white islands into more representative institutions mirroring the multi-racial character of our society.

Much could be and has been said about *Bakke*, the commands of the Constitution, the desirability or undesirability of "reverse discrimination," and the social needs of our society if the promise of *Brown v. Board of Education* in 1954 or the commitment of the Civil Rights Act of 1964 are to be fulfilled. I will not add to that literature here except to note that I find the legal issue in *Bakke* both difficult and troublesome. Race and ethnic differences have, in the not very distant past, been used to divide this nation and to deprive large segments of our society of their basic rights and needs. The legacy of racism, discrimination, and prejudice continues to plague the country. It poisons our society and causes untold

turmoil and grief. Hence I am most reluctant to approve the use of race as a factor in admissions for any reason—even if benign and beneficial—for fear of its abuse, its impact on those for whom the benefit is intended, and its effects on those who are not similarly favored.

Despite these worries, I am nevertheless persuaded that the nation's professional schools have acted responsibly and constitutionally—indeed, that they have had no other reasonable choice—and I am hopeful the Supreme Court will overturn the California court's ruling. I am convinced that minority admissions programs giving preference to a limited number of qualified minority applicants, in accordance with accepted constitutional standards established under the Equal Protection Clause, serve "compelling state interests." Indeed, I can conceive of no governmental interests more compelling than racially integrating the nation's law schools, substantially increasing the number of minority persons practicing law, and achieving real equality for minority groups whose members have historically been denied opportunities that are their rights as Americans. Numerous decisions of the Supreme Court recognize that the Constitution permits consideration of race in the service of such goals, and the highest courts in New York and Washington have upheld similar professional school programs against the same constitutional challenge. But self-interest is never a certain guide as to how the nation's highest court will decide a sensitive, emotion-laden social issue. In any case, my comments here will examine what is at stake, at least in the law schools, in *Bakke* and will consider why the law schools of the country have spoken virtually with one voice to support the concept of minority admissions programs.

To understand what the law schools have done with the unwavering support of the American Bar Association and the Association of American Law Schools, one must go back more than a decade and review the events of the mid-1960's. Only 700 black students were then enrolled in all accredited law schools in the country—1.3 percent of the total enrollment of 54,265 students—and 267 of them, more than one-third, were enrolled in what were essentially segregated black law schools. It was at this point that the nation's law schools began to take affirmative steps to achieve more than a token enrollment of minority students.

The first effort was directed at recruitment of applicants. Since the profession had historically been all but closed to minorities, minority students had to be persuaded to consider law as a career. Law teachers and lawyers met with minority student groups; the Law School Admission Test was administered to minority students without charge; fee waivers were granted to minority applicants; summer programs were held to give minority college students an understanding of what law study might involve; and scholarships were offered specially for minority applicants to overcome the financial hurdles that dissuaded so many. These efforts were



successful, and the number of minority applicants to law schools has jumped sharply so that now (and for the past several years) the ratio of law school applicants to baccalaureate degrees granted has been the same for blacks, Chicanos, and Indians as for whites.

On the other hand, at the same time that law schools were seeking to admit increasing numbers of minority students, they were also being deluged with ever-growing numbers of applicants of all backgrounds. The number of highly-qualified, indeed exceptionally well-qualified, non-minority students was growing disproportionately. Thus, law schools were seeking to increase minority student enrollment at the same time that the application flood was causing them to ration their available spaces by selecting students on an increasingly higher standard. Unless something had been done, it would have been the minority students once again who would have been squeezed out.

The response to this dilemma, at almost every law school in the country, was to adopt an admissions standard for minority applicants that had been applied at most schools for all applicants before the rise in applications. The admissions clock was, in effect, turned back ten to fifteen years for applicants from minority groups, and all those who were deemed to be qualified were admitted. Numerical credentials such as test scores and undergraduate grade averages as well as other indicators of academic success were set at a lower level for minority



applicants — but still at a level that sought to assure that all those admitted were fully capable of studying law. At the same time, however, the fact that the study of law was now open to minorities who had heretofore been almost totally excluded, plus the coming of the generation first affected by *Brown v. Board of Education*, resulted in a substantial improvement in both the number and the quality of applicants from minority groups.

The results of these programs have been substantial. In little over a decade, the law schools have increased their enrollment of minority students from 1.3 percent of all law students to over 8.1 percent. Whereas there were only around 3,000 black attorneys in the entire nation in the mid-1960's, a decade later the law schools are graduating that number of minority lawyers annually, over half of whom are black.

The premise of these special admissions programs is that, in time, they will disappear. They are essentially a transitional device to correct a time lag. Each law school is dedicated to attaining the highest possible level of achievement in its student body. Special admissions programs represent a compromise with that goal, a compromise made necessary by the schools' almost universal perception of a pressing social need to provide more minority lawyers than can possibly be produced without these programs. But as the number of minorities who can gain admission through the regular admissions procedures increases, the necessity and justification for special admissions will disappear.

The success of minority admissions programs and their importance is underscored when one examines what would occur if they were prohibited by an affirmation of the California court's decision in *Bakke*. The unpleasant but unalterable reality is that the California decision would mean a return to the virtually all-white law school student bodies that existed prior to the mid-1960's. More specifically, as a result of the programs described above, 2,128 black, 542 Chicano, and 133 Indian students were admitted to the Fall 1976 entering class of the nation's law schools. They represented 5.3 percent, 1.4 percent and 0.3 percent, respectively, of the nationwide total of 40,000 students who were admitted into law school. A recent analysis of all law school admissions shows, however, that if the schools had not taken race into account in making their admissions decisions, but had otherwise adhered to the admissions criteria they employ, the number of black students actually admitted would have been reduced to no more than 700, the number of Chicanos to no more than 300, and the number of Indians to almost zero. This study made several simplifying assumptions (e.g., that minority applicants would enroll in any school that admitted them, wherever it was located and whatever its resources) and therefore substantially overstates the number of minority students who probably would have enrolled under a race-blind system. Thus, the nation's two largest racial minorities, representing nearly 14 percent of the population, would

probably have no more than 500 of their number in each year's entering class, or little more than 1 percent representation in the nation's law schools.

The reason for this result is the unfortunate but ineradicable fact that, as a group, minorities in the pool of law school applicants achieve substantially lower LSAT scores and undergraduate grades than whites. The effect of a race-blind system must inevitably be to curtail sharply the number of blacks, Chicanos, and Indians admitted to law school. Of course, law schools do not select their students solely by "the numbers." Non-quantitative predictors of success (letters of recommendation, experience, etc.) and other non-racial criteria affecting admissions (e.g., residence, the school's interest in student diversity) are also taken into account. However, there is no reason to assume that if race were not a factor in the admissions process, the applications of minorities would be affected differently from those of non-minorities by such other factors.

Arguments have been made time to time that substantial minority enrollments in professional schools can be maintained without using racial admission criteria. It is clear, however, that none of the other programs suggested would work. The California court suggested, for example, that universities "might increase minority enrollment by instituting aggressive programs to identify, recruit, and provide remedial schooling for disadvantaged students of all races . . ." But, as explained above, the law schools have already directed precisely such efforts toward minority students. An expansion of these efforts to other groups would not increase the number of minority applicants.

A whole family of other suggestions for maintaining minority enrollments, while avoiding the use of race as an admission factor, depends upon reducing the influence of



the quantitative predictors in the admissions process. These range from the extreme suggestion that the LSAT be abandoned to more modest proposals to place greater reliance on personal interviews, recommendations, and the like as a way of predicting academic performance and potential contribution to society. Some of these suggestions rest upon the assumption that the LSAT is "culturally biased," that it underpredicts the probable academic performance of minority applicants. The simple fact is that this contention is untrue; five separate studies conducted over the past half dozen years have found that the combination of LSAT and GPA, with all their limitations, is the best available predictor of legal academic achievement, for both majority and minority students.

If the non-quantitative predictors of academic performance (such as letters of recommendation) were to be given greater weight, minority student performance on these predictors would, on the average, have to be significantly more favorable than those of whites if the former were to compete successfully for admission. But there is no reason to suppose that they are; indeed, there is no reason to suppose that such subjective factors are distributed on other than a random basis among applicants of all races. There is, accordingly, no reason to suppose that greater emphasis upon "soft data" would lead to admission of any but a very small number of minority applicants.

One can similarly put aside the California court's suggestion that professional schools specifically rely more on "matters relating to the needs of the profession and society, such as an applicant's professional goals" as a method of increasing the number of minority lawyers. If this "professional goals" standard were defined to include a need for more minority lawyers, this alternative is no alternative at all, but a restatement of precisely the admissions programs being challenged. In any event, reliance on the stated goals of applicants for admission is pursuit of a chimera: applicants will inevitably say that which they believe will secure admittance, and there is often little relationship between even the sincerely expressed goals of an applicant not yet in school and the professional career eventually pursued.

These considerations need not be pressed, however, because there is a far greater difficulty. If all law schools are to admit students on the basis of their stated professional goals, they must inevitably evaluate and rate these goals comparatively. Is it better, for example, to train a lawyer who says he wants to attack corporations or one who seeks to defend them? Is a law practice in the field of securities regulation more or less valuable to society than the representation of labor unions? Choices among applicants on any such basis would thrust the schools into an unwanted and unauthorized role of social arbiter. The schools can properly assess the community's overall need for lawyers; they should not be placed in the position of evaluating which professional goal is more desirable.

Another superficially more plausible means that has been suggested for maintaining minority enrollment is to convert special admissions programs into programs for the economically disadvantaged. The underlying theory seems to be that a substantial number of minority group members will gain admission to law schools under such a program because minorities are disproportionately included among the disadvantaged. This theory, however, disregards the facts. Although racial minorities are disproportionately included among the economically disadvantaged, approximately two-thirds of all disadvantaged families are white. Even if one were to assume that disadvantaged minorities would apply for admission to law school in proportion to their numbers, the size of special admissions programs would have to be trebled to maintain the present representation of minorities in law schools. A school that now specially admits 10 percent minorities would be required to extend its special admissions program for the disadvantaged to 30 percent of the class. This redirection of law school admissions seems highly questionable. But even if a school were willing to expand its program to this extent, the likely inability of the school to provide financial assistance to so sharply increased a number of disadvantaged students would necessarily lead to a very substantial reduction in the number of minority students enrolled if the program were to operate in a racially neutral manner.

One justification often advanced for such alternatives as programs for the disadvantaged or reduced reliance on quantitative predictors argues that the vice of explicit minority programs is their open reliance on race as a factor. This justification seems to rest upon the premise that these alternative programs permit race to be taken into account *sub rosa* and are therefore acceptable even if they are manipulated to result in special



minority admissions. This reasoning seems unappealing and undesirable. Public institutions should be willing to articulate their policies openly and honestly, and schools dedicated to teaching the role of law in our society should not base their admissions policies on flouting it.

II.

It is too early to forecast precisely what effect any decision by the Supreme Court in *Bakke* will have on the ASU Law School or even on state law schools generally. This discussion of the case has assumed that the Court's options are either to uphold the California court broadly, invalidating all preferential admissions programs, or alternatively to reverse and rule, again broadly, that such benign programs operated under careful policies and with fair procedures meet all constitutional standards. There are other possibilities, however, and these programs may continue under the cloud that overhangs them today.

For now, this law school, like most accredited schools, has continued a cautious yet progressive admissions program. The popularity of legal education, at least at ASU, continues to increase with each passing year. Last year I reported that over 1,300 applicants had sought the 140 places in our first-year class. This year the law faculty sought to relieve that pressure slightly by enlarging the first year class to 150, clearly the maximum number our current facilities will support. Yet despite a nationwide decline of over 10 percent in law school applications for the 1977 entering class, our pool increased by over 20 percent to more than 1,600.

We have continued our practice of admitting a select group of minority applicants who have demonstrated their readiness for law school through successful completion of an intensive pre-law-school, Council on Legal Education Opportunity, summer program; these programs are funded by HEW and co-sponsored by several law schools in the region (ASU, Arizona, Utah, New Mexico, and BYU) and the ABA. In addition, a few other minority students are specially admitted after a screening committee determines that they have the ability to succeed in law school. These special admissions are made on a slightly different standard from regular admissions because of the school's determination that it is in the community's interest that a substantial number of minority students be included among our graduates.

One effect of the interregnum caused by the California decision in *Bakke*, coupled with our continued effort to recruit especially qualified minority students, is that the pool of minority candidates applying to this law school has increased sharply during this past year. Whereas in previous years only occasional minority applicants had numerical credentials and other supporting data warranting their regular admission into law school, 21 such candidates were admitted in 1977, of whom 13 matriculated. We hope this means that we can look forward to a substantial number of minority students who



will do very well in law school and that special admissions programs can be reduced in future years. The causes of this shift in the quality of minority applicants are speculative, but several explanations seem plausible. One is the fall-off in minority applications felt throughout California as a direct result of the hostility to minority admissions reflected in *Bakke*; Boalt Hall and Davis law schools have suffered a substantial decrease (up to 40 percent) in minority applications. Another factor is this school's selective recruitment effort, focusing attention and support on the ablest minority applicants. Third is our school's growing reputation and favorable location. And finally, and probably most importantly, have been the efforts of a few articulate and dedicated students and graduates of this law school in informing others of the quality education available here and the importance of seeking sound training in law.

It is also important to note, however, that this school's record on behalf of minority students has been a moderate, controlled effort. Care has been taken to admit qualified students. Where mistakes were made, we have acknowledged them and changed our policies. In the past year, for example, we have tightened our retention policies, and students not making a 65 or better average in the first semester are no longer permitted to continue in school. Similarly, we have kept our commitment of resources to specially-admitted students within reasonable and manageable limits. Minority admissions on a special basis have not exceeded 12 percent of the entering class, and in 1977 such admissions will include only 5 percent of available spaces. Despite having specially admitted some students, the faculty has applied a single (and rigorously anonymous) grading system. This assures that all graduates must meet the same demands.

Tutorial assistance is made available to specially-admitted students in the first year, thus assuring these students are not forgotten once they are admitted.

The effort has been and continues to be a difficult one. Typical of those with legal training, we debate it among ourselves frequently. But the basic consensus is clear: we are as a faculty committed to these programs designed to enroll a substantial number of minority students in law school and, in so doing, to fulfill our commitment to racial equality.

III.

While the focus of this report has been on minority admissions because that issue has come to the fore during the past year, it is only one item of many that has occupied and will continue to occupy the Law School's attention.

A. The Self-Study. As required by the rules of the ABA and the Association of American Law Schools, a student-faculty committee was appointed to study the progress and program of the College of Law since its inspection in 1969. This self-study was prepared in anticipation of the reinspection that was to have been held first in the late fall and then in early spring during the past academic year. Under the leadership of Professor Milton R. Schroeder, the Committee wrote a 132-page report carefully evaluating the Law School's educational program, faculty, administration and governance, library, physical facilities, and external relations. A separate report prepared by student members of the Committee was also included. This report seeks to raise questions about what we have done in the past, to suggest what we need to reconsider, and to outline possible new approaches. It concludes, for example, that the school's original curriculum plan of a two-year required course of study and a third year of electives needs review because numerous modifications have changed the approach, thereby raising questions about the viability of continuing the original concept. There is also, the report says, "a need to reevaluate priorities and resource allocations." This assignment will be undertaken in the next school year.

The reinspection of the College of Law by the ABA and AALS that was to follow preparation of the self-study has been postponed several times at their request. Currently it is scheduled to occur in the fall of 1977. The self-study is also being used as the foundation for the University's decennial review of the program of the College in accordance with procedures outlined by the Board of Regents.

B. The Curriculum. The law school's curriculum was enriched on several fronts. The appellate advocacy seminar, in which both law students and lawyers participated, was offered for a second time on an experimental basis. We are currently evaluating both the experience and cost of the program to determine whether it should (and can) be continued. Our offerings in profes-

sional responsibility were expanded when two Phoenix lawyers, Larry Hammond and Andy Hurwitz, whose backgrounds include clerkships to justices of the Supreme Court of the United States, taught a seminar on the legal profession — including topics such as lawyer advertising and the effective delivery of legal services. Continuing efforts were made to improve the first year research and writing program by assigning two hours of credit and additional class hours, and by providing guidelines for the Fall Semester program to standardize the introductory instruction. Our experience with faculty tutoring assistance to a selected group of students who needed such assistance suggests, at least so far, that remedial instruction can be effective.

Both the Academic Affairs and the Clinical Committees were busy during the past year. The former committee developed several recommendations approved by the faculty, including grading standards, grade distribution guidelines, and a new grading scale; numerical class ranking for students in the top third of the class and decile grade averages for the top half of the class; and a more carefully monitored formula governing student credit for *Law Journal* participation. The Clinical Committee, among other things, reviewed the prosecutorial internship program and established guidelines to assure quality supervision in this program in which students are given experience in both theoretical and practical problems facing prosecuting attorneys.

I am also pleased to report that the clinical program in criminal law has achieved permanent status and financial support. A continuing relationship with the Public Defender's Office has been established, and the legislature's approval of our request for a new position for a supervising attorney frees that program from annual funding crises. This program is an example of how initial funding from an outside agency, in this case the Law Enforcement Assistance Administration, can support





experiments, develop experience, enrich a law school's curriculum, and support educational efforts that eventually will improve the quality of justice in our society.

C. The Student Body. A total of 392 full-time students attended the Law School in 1976-77; in addition, 14 special students took courses in the Law School. Of the regular students, 128 (or 33 percent) were women, an increase of 8% from the previous year. And 33 (or 8 percent) of the student body were members of minority groups.

The quality of the student body, as measured by numerical credentials as well as reflected in previous honors and achievements, continues to improve. The median LSAT for the entering class was 629, and its median undergraduate grade average was 3.52 (on a 4.0 scale). Eighty-five percent of the entering class were residents of Arizona, and two-thirds were 26 years or younger. Political science, history, accounting, or business was the undergraduate field of study for half the class, but others ranged over a wide field including English, mathematics, engineering, nursing, and anthropology. The largest group, again about half, were graduates of either ASU or the University of Arizona, while the others were spread from Antioch and Barnard through Virginia and Yale.

The Placement Office's annual survey of ASU graduate employment showed that 95 percent of the 1976 graduates responding are now employed, a slight increase over the 91 percent employment figure for the class of 1975. In addition 46 (or almost 40 percent) of the 1976 graduating class had accepted job offers in May, before graduation, which is not only better than the national average, but also the best employment record yet achieved by ASU law school graduates. Thus despite occasional fears expressed about the glut of law graduates now inundating the job market and the concerns of

some that law schools should at least warn law students that jobs may not be available upon graduation, the record at ASU supports a continued view of cautious optimism. There is currently a strong job market for qualified graduates from this school. Initial salaries paid to our graduates range widely from \$10,000 to \$22,000, with the median salary being \$14,000.

The student's life at the College of Law was enriched by a variety of programs, conferences, meetings, and opportunities. The Arizona Supreme Court held a session in the Great Hall, hearing arguments in five civil and criminal matters. The Student Bar Association expanded its book exchange, supported student recruitment as well as first-year orientation programs, participated on student-faculty committees that develop policies for governing the Law School, established a book scholarship for law students, and organized numerous social events that made the life of our students more pleasant.

With the infusion of a \$3,500 grant from the Maricopa County Bar Association, which indicated that its contribution will be made annually, the Moot Court program was increasingly active, with students participating in a wide range of intra- and inter-law school competitions at the trial and appellate stages. This cocurricular program supplements our skills training in regular courses, and also frequently involves practicing attorneys with law students; this guidance from the practicing bar has been invaluable. The expanded support and interest in the Moot Court program has also led to the development of a sophisticated training program for a selected number of students in the skills of brief writing and oral argument.

And in the two competitions that occur annually between ASU and the University of Arizona, I am pleased to report that this Law School was the winner in both — Denise Blommel and Robert Koch returned the silver bowl emblematic of the Jenckes Oral Advocacy Competition to the ASU College of Law, and Jane Goldman, a 1977 graduate, submitted the best research paper in the Roger Perry Memorial Writing Contest.

D. The Faculty. The faculty has continued its tradition of dedication and excellence in the classroom and of innovative scholarship. Student evaluations are used to monitor classroom performance, and the associate dean and I also interview numerous students on a random basis for additional in-depth evaluations. Faculty publications and activities (see pages 12-13) reflect the incredible diversity of interest and high degree of achievement of the faculty.

Two new additions to the faculty this year were Associate Professors David Kaye and Gary Lowenthal. Mr. Kaye's background includes graduation from Yale Law School as a Note and Comment Editor of the *Yale Law Journal* in 1972, a clerkship on the Ninth Circuit, a position as an assistant special prosecutor in the Watergate cases, and private practice in Portland, Oregon. His interests include jurisprudence and law and science. Mr.

Lowenthal graduated from the University of Chicago Law School in 1969 after being Comments and Topics editor of the *University of Chicago Law Review* and served as an Associate in Law on the faculty of Boalt Hall. In addition, he practiced law for six years in the Bay Area, first with the Alameda County Public Defender's office and then as a partner in his own firm. His interests are clinical teaching and criminal law and procedure.

The faculty was assisted by several distinguished visitors: Fall Semester — Professors John J. Barcelo of Cornell, David A. Binder of UCLA, and C. Douglas Miller of Florida; Spring Semester — former Harvard Law School Dean Erwin N. Griswold, James W. Mercer, an attorney with the Securities and Exchange Commission, and Professors Walter B. Raushenbush of Wisconsin and David A. Rice of Boston University. In addition, several practitioners and judges were relied upon on an adjunct basis to meet particular curricular needs and to cement the bridge between the law school and the bench and bar.

E. The Law Library. The needs of the Law Library have been supported generously by the University this year, and our capital budget of \$155,000 reflects an increase of more than 25 percent from two years ago. The Law Library now has 140,000 volumes excluding microforms, and expects to enlarge this number substan-



tially when it is designated as a selective federal depository. Our application for depository status is currently being reviewed, and we are hopeful that the school's need for these governmental materials will be recognized.

F. External Relations. Continuing efforts are made to maintain close relations with the legislature, bench, bar, and alumni of the Law School. Each has extended generous support to the school during the past year. We plan to continue and expand these efforts.

The Law Alumni Association has expanded its scope and operations this past year and now includes over 900 graduates. Its President was Timothy H. Barnes, a 1973 graduate. It sponsored legal seminars, which have thus far raised \$1,000 for a law student loan fund, and held several social events seeking to continue ties among alumni and with the Law School.

The Law Society grew in size during the past year and held an annual dinner, co-sponsored for the first time with our burgeoning Alumni Association, attended by over 500 guests including Governor Raul H. Castro, and the speaker was Mr. Justice Byron R. White. The Law Society's Board of Directors met four times, reviewed plans and programs of the law school, and gave generously of its time and experience.

An organized fund drive, also co-sponsored by the Alumni Association and Law Society, was also held for the first time this year. Over three dozen class and committee chairmen and scores of students participated. An Edward W. Cleary Research Fellows Fund was also established, in recognition of his contributions to the law school and to improvements in our system of justice. These various efforts resulted in roughly \$75,000 of private funds being raised for the College of Law during the past year, a substantial increase over amounts raised before in any comparable period. I am happy to acknowledge our deep appreciation to the school's supporters in the community who have been so generous in their giving to the Law School. Private support can make the difference between a good and a great public law school. It can and has made the difference also as to whether those with very limited financial resources can enter law school and eventually become lawyers.

The past year has seen the College of Law make real strides in its effort to achieve excellence in the education provided all students, in its contribution to legal scholarship, and in the service given the bar and community. The students and faculty have honestly sought to understand and respond to the many challenges facing legal education. We are grateful for your continuing support and understanding.

Very respectfully yours,

Ernest Gellhorn
Dean

In Honor of the Retirement of

OLIVIA BIRCHETT

When the history of the Arizona State University College of Law is written it will surely recognize that in the school there has only been one Olivia Birchett.

Early in 1966, before the Law School had even officially begun its organizational life, this tiny feminine dynamo materialized in my new Dean's office in the Matthews Center building and made it clear that her one consuming ambition at this stage in her life was to be "involved with" setting up the new Law School and assisting it on its course. I had no real appreciation then of the many talents that came with this lady of small stature but great charm and purpose.

But I soon learned, when Olivia Birchett became the first staff member of the new Law School here at Arizona State, that she was a person of many talents and broad background. What I did not anticipate was the extent and nature of the devotion she would give to this institution. I ought to have realized that she meant to make the Law School her "family" when she gave to our law library her husband's tax library. I did come in time to understand that we were her family, as did the faculty, the staff, and of course the great procession of students whom she cajoled, threatened, charmed and assisted through law school. It is no exaggeration to say that she has for more than a decade since the beginning of this Law School's life been our "Mrs. Chips." In theory her responsibilities in late years were limited to the business of registration and keeping of records. In fact, she operated under a kind of "roving commission" which meant that whenever she could be helpful to a law student, faculty member or administrator, she plunged in and gave her very best.

In theory Olivia Birchett is now retired, and she has retired from the University. But Olivia retired? Never. She has just shifted gears, once again. How fortunate we were to have had her here at the College of Law.

Willard H. Pedrick



In Honor of the Retirement of

EDWARD W. CLEARY

After I had agreed, with scarcely a struggle, to serve as the Founding Dean of the Arizona State University College of Law, I began to consider how I could go about recruiting a "major league" faculty for the new law school. About this time, in the spring of 1966, as I recall, a mutual friend from the Chicago suburban area reported that he had some basis for believing that Professor Edward W.

Cleary, the leading scholar of the University of Illinois School of Law, might just possibly be interested in becoming a member of the founding faculty at the new Arizona State University College of Law. To this bit of intelligence I expressed skepticism. I think my words were "I don't believe it!" But I pursued the matter. We got together and, in the course of offering as many inducements as I could conjure up, I even suggested that the class schedule could be accommodated so that, if desired, he could have exclusively 8:00 A.M. classes. His response, not uncharacteristic, was "At that hour of the morning, I doubt that any honest folk are about!" But the result of friendly negotiation was his enlistment as the first founding faculty member to be recruited for the new law school. What a happy omen that has proved to be.

On every front Professor Cleary, as a member of the foundation faculty, was a creative leader, offering counsel as well as drafting procedures and in every way carrying a very heavy part of the burden of getting the new enterprise properly launched. In addition, his own extraordinary reputation as a leading scholar in his chosen fields of evidence and procedure meant that his very act in joining the faculty here made a tremendous contribution in the recruitment of other faculty.

He's a delightful colleague. His dry wit has saved many a tense moment in meetings of faculty committees and of the faculty itself. Not much given to stories as such, when he did offer an anecdote it was invariably to the point. One of his favorites was the comment of Willie Sutton, famed bank robber, who when asked why he robbed banks replied simply, "That's where the money is." In committee meetings, faculty meetings and, I am sure, in meetings on the Federal Rules of Evidence, he has always had the impressive ability to get to the heart of the matter—not infrequently with a motion to adjourn.

Over the years, both at the University of Illinois School of Law, where he was so highly regarded as a member of the faculty, and here at Arizona State University College of Law, Professor Cleary has been affectionately known as "Easy Ed." The appellation is just about as appropriate as calling the circus fat man "Skinny." For "Easy Ed" is anything but easy. He is demanding of his students and demanding of his colleagues and of the law school as well. He was committed to, and deserves a great deal of the credit for, insistence on high standards for this law school.

Willard H. Pedrick



Faculty Activities

Professor Michael L. Altman supervised student volunteers of legal assistance to inmates at the women's prison at Florence. He continued on the Board of Directors of the Arizona Civil Liberties Union, served on the Criminal Justice Committee of the State Bar and testified before the Senate Judiciary Committee on the new Arizona Criminal Code.

Professor Michael A. Berch assisted the winning Jenckes team in oral advocacy and other moot court teams. He also taught a law course at Brophy Preparatory High School and published an essay on the federal courts and social rights in the *Arizona State Law Journal*.



Associate Professor Harold H. Bruff wrote on judicial review in local government law in the *Minnesota Law Review* and prepared a *Report to the Administrative Conference of the United States* with Dean Gellhorn.

Professor William C. Canby, Jr. argued the lawyer advertising case of *Bates v. State Bar of Arizona* and discussed that case before numer-

ous conferences and conventions throughout the United States. He was the project director and moderator of a Conference on "Indian Power and Indian Justice: The Tribes and the State" held at the law school and co-sponsored by the Arizona Council on the Humanities and Public Policy, testified before the Senate Health Committee on informed consent, and served on the ad hoc investigating committee of the American Association of University Professors. He continued to serve as a board member of the Maricopa County Legal Aid Society and the Arizona Center for Law in the Public Interest. He was appointed a member of the Legal Services Advisory Board by Governor Raul H. Castro and is a member of the Board of the Arizona Coalition for the Right to Choose. Professor Canby wrote on broadcast programming in the *Texas Law Review*.

Professor Edward W. Cleary spoke on the federal rules of evidence to lawyers and judges in Phoenix, San Antonio, and New Mexico. He also delivered the Class Day Address to the 1977 ASU graduates.

Professor Richard C. Dahl served on an American Bar Association Inspection Team for the reaccreditation of North Carolina Central University and taught a seminar on legal research at the ASU College of Business Administration.

Professor Richard W. Effland was a member of the University's multidisciplinary committee on aging and reviewed questions on wills for the lay public at the Tempe Public Library. He also spoke on probate code changes and issues of estate planning before numerous continuing legal education audiences.



He prepared a new edition of his casebook on Estates and Trusts with John Ritchie and Neal Alford and wrote on the Arizona Probate Code in *Uniform Probate Code Notes*.

Professor Dale B. Furnish was a special lecturer for the United States Information Service and the State Department in Chile, Argentina, and Peru last fall, and was on leave of absence at the University of Iowa Law School in the spring. He directed the Council on Legal Education Opportunity Institute held in the



College of Law during the summer of 1976 and continued to serve on the Board of Directors of the ASU Center for Latin American studies. He reviewed "Curso de Derecho Mercantil, Tomo I," in the *American Journal of Comparative Law*.

Dean Ernest Gellhorn participated in national conferences on law and economics and on public participation in energy regulation and presented a paper to a conference on government regulation of higher education with Barry Boyer. He is chairman of the ABA Industry Regulation Committee of the Antitrust Section and prepared a memorandum on appointments to regulatory commissions for the Section.

Associate Professor David H. Kaye served as a discussion leader on censorship at an Arizona Council on the Humanities and Public Policy conference and published on subpoenaing congressional papers in the *UCLA Law Review*.

Professor Stephen E. Lee organized 72 students in a Volunteer Income Tax Assistance Program in South Phoenix. He served on the Board of Directors of the Arizona Civil Liberties Union and is its treasurer. He was on sabbatical leave during the fall semester, 1976.

Professor Douglas L. Leslie served as a visiting professor at the University of Michigan during the fall semester, 1976. He wrote on labor union fiduciaries in the *Columbia Law Review*.

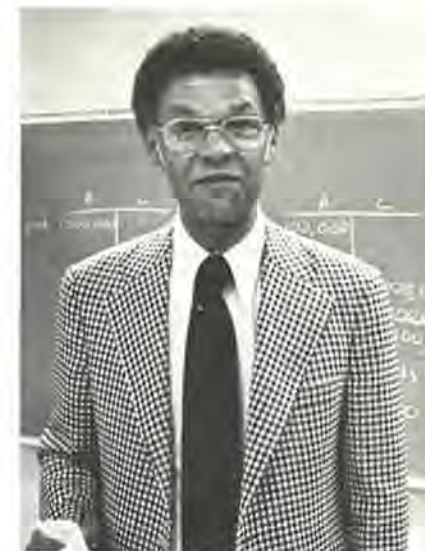
Associate Dean Alan A. Matheson served on the Boards of Directors of the Maricopa County Bar Association and Tri-City Mental Health Citizens Board, and on the Services Committee of the Law School Admissions Council. He was an observer for the AAUP at the Dr. Peacock dismissal hearings at the University of Arizona and spoke at a workshop of the State Department of Education.

Associate Professor Robert L. Misner testified on the proposed revision of the criminal code and participated in a conference on the Code sponsored by the Arizona Justice Planning Agency. He also spoke on the Speedy Trial Act, of which he is the reporter for several courts in the Ninth Circuit, and delivered a paper to the American Society of Criminology. He has been an adviser to the Attorney General and



the Director of the Department of Corrections on Arizona prisons. He is a member of the Governor's Commission on Corrections Planning, the Maricopa County Advisory Commission on Detention, and the University Committee on the Elderly. He wrote on tape recordings and the statute of frauds in the *Iowa Law Review* and prepared a report on the Speedy Trial Act of 1974 for the Ninth Judicial Circuit Conference.

Professor John P. Morris served on the University's Ad Hoc Committee on the Effect of AAUP Censure, as an advisor to the Athletic Department in connection with ASU's move from the Western Athletic Conference to the Pacific Athletic Conference, and as the representative of several non-tenured professors in the School of Social Work. He is a member of the new Antitrust Committee of the State Bar of Arizona and assisted in the completion of the Tanner Manor Home, an integrated



nursing home for the elderly in South Phoenix. He also served as a moot court judge at Brigham Young University Law School.



Professor Beatrice A. Moulton taught at training conferences for legal services lawyers in Los Angeles, Minneapolis, and Phoenix. She also spoke at the annual conference of the Arizona Trial Lawyers' Association in Guadalajara and was a commentator on the Future of Legal Education at a Society of American Law Teachers conference in Tiburon, California. She is a vice president of the Board of Directors of the Arizona Center for Law in the Public Interest and was elected to the Board of Directors of the Tempe-Mesa Chapter of the ACLU. In addition, she served on the Community Advisory Committee to KAET, Channel 8.

Professor Willard H. Pedrick was the Law Day speaker at the University of Cincinnati Law School, produced the "Law School Revue," and lectured at numerous continuing legal education meetings throughout the country. He was appointed Chairman of a Canadian-American Law Teachers' Commission and served on the Legal Affairs Committee of the Law School Admissions Council. He served as President of the Phoenix Executives Club and the Rotary Club of Tempe and is a member of the Board of Directors of the Arizona Center for Law in the Public Interest. He wrote on the crisis in accident reparations systems in the *Wisconsin Bar Bulletin*; "Estate Planning and Future Shock," in *Taxes*; and prepared an annual edition of his estate and gift tax volumes with Vance Kirby.



Professor Jonathan Rose spoke at a continuing legal education forum on antitrust and served on the State Bar's Board of Legal Specialization and as an antitrust consultant to the Arizona Attorney General. He also served on the Board of Directors of the Maricopa County Legal Aid Society.

Professor Milton Schroeder continued as a trustee of the Rocky Mountain Mineral Law Institute. He was an instructor in the Bureau of Land Management Training Program for Paralegals and also prepared special law school proposals



for a foreign law teacher exchange program, a law and technology center, and an Indian Law project. He published on state coastal planning in the *Southern California Law Review* and on the real estate subdividing statutes in the *Arizona State Bar Journal*.

Professor Robert E. Strong, Jr. was on sabbatical leave this past academic year. He addressed a continuing legal education program on estate planning.



Associate Professor Donald N. Zillman lectured on tort law before several groups in the University as well as to audiences in Tempe, Phoenix, and Charlottesville. He was on leave as a visiting professor at the University of Utah during the fall semester, 1976, and was appointed to the Arizona Department of Educa-

tion's Task Force on School Discipline. He published on solar energy development in the *Arizona State Law Journal* with Raymond Deeny and on military law in the *Georgetown Law Journal* with Edwin Imwinkelried.

Clinic Directors Named



William L. Topf III, (L.) a 1974 graduate, has been named director of the Student Defender Project, the law school's criminal internship.

As supervising attorney, Bill "advises, counsels and supervises" third-year students (ten this fall; twelve in the spring) who defend clients charged in Phoenix city courts with criminal misdemeanors and major traffic violations.

Bill became interested in the student defender program in law school, and in 1974 he enrolled in the first criminal internship offered at ASU. Since graduating, Bill has worked with the Public Defender's office and "kept in touch" with the Student Defender Program's development. He finds directing the internship "a rewarding experience so far."

Law School Clinic Director **Gilbert R. Montano (R.)** received B.S.B.A. and J.D. degrees from the University of Denver. After graduation he served as staff attorney, supervising Denver's Defender, Juvenile Justice, and Prosecution Internships. The Civil Internship program at ASU this fall involves eighteen students and a caseload of about 110 civil cases from the Guadalupe, Victory Acres and Vista del Camino areas.

Gilbert is assisted by Administrative Secretary Pacquita Pozajuncal, who was previously secretary to the Dean.



Visiting Faculty

Louis J. Barracato (top, left), visiting from Catholic University Law School in Washington, D.C. (which is also where he received his legal education), teaches contracts, practice court, and evidence. While here he plans to finish two articles, one on contracts and ethics and another on the federal rules of evidence. Professor Barracato, who will be visiting both fall and spring semesters, finds Arizona "both beautiful and fascinating" and the ASU law school "a very warm, friendly, and challenging environment."

Douglas M. Branson (top, right), from the University of Puget Sound in Tacoma, Washington, received his J.D. from Northwestern University and LL.M. from the University of Virginia. His teaching interests are corporations, business planning, corporate finance, and securities regulation. The areas of law in which he is interested are corporate social responsibility, comparative regulation, state corporate law reform, and the securities industry and individual investors. He enjoys running, hiking and camping, wines, and furniture making. He found ASU "a first rate law school with a first rate faculty and students" and especially liked "the law school's size and the size of my classes." Professor Branson visited for the fall semester only.

G. W. Foster, Jr. (center), who visited for the fall semester from the University of Wisconsin Law School in Madison, received his LL.B. from Georgetown University and LL.M. from Yale. His teaching areas include civil procedure, federal jurisdiction, constitutional law, and conflict of laws. He has a special interest in the role of courts in the federal system, and other interests include "bird watching and partisan (Democratic) politics." He observed, "The ASU law faculty is an impressive lot: bright, committed and active. The law student body seems to be about a stand-off as to brightness when compared to law students at Wisconsin. The ASU law students seem better prepared as to case materials but a lot less likely than Wisconsin students to question the social, economic, or moral consequences of legal norms."

Samuel J. Sutton, Jr. (bottom, left), of the law firm Cahill, Sutton & Thomas in Phoenix, received B.A. and B.S.E.E. degrees from the University of Arizona and J.D. from George Washington University. Teaching areas include intellectual property, international business law, commercial torts, and real property. Professor Sutton's special interests in law include technology/law and art/law areas. A patent attorney, he authored the textbook used in the fall semester intellectual property course. Professor Sutton will be visiting at ASU both fall and spring semesters.

Donald T. Weckstein (bottom, right), here for the fall semester, is Dean of the University of San Diego Law School. He received his J.D. from the University of Texas and LL.M. from Yale University. His teaching areas are labor law, arbitration, legal profession, and federal jurisdiction; in addition, he is interested in professional roles and ethics and legal education. Other interests include politics and government, sailing, biking, wining and dining. He comments, "As dean of another law school with little time in which to teach and pursue scholarly interests, I very much enjoy the return to the classroom and the relief from administrative burdens."



Alumni News

CLASS OF 1970

Noel Dessaint is Administrative Director for the Supreme Court of Arizona.



Michael D. Hawkins is the youngest United States Attorney in Arizona history. After graduation, Mike served as a captain in the U.S. Marine Corps JAD and later was Chief Legal Counsel for the Democratic Party of Arizona. He was court-appointed United States Attorney for the District of Arizona on February 20, 1977, nominated by President Carter April 12, and confirmed by the United States Senate May 25, 1977. Mike and his wife Phyllis are expecting their second child.



Gary Pope is the first ASU law graduate to serve as a superior court judge. He was elected to Division 2 of the Mohave County Superior Court in November,

1976, after having previously served as Mohave County Attorney, Mohave County Superintendent of Schools, and Kingman City Attorney.

Stuart Susser is practicing in Miami, Florida, "representing minority groups in civil rights cases, EEO matters, and police brutality as well as medical malpractice. Still single."

Kent C. Ware II was recently appointed Director of Indian Affairs for Gulf Oil Corp. Kent, a member of the Kiowa Tribe, works with Indian representatives carrying out community relations and financial assistance programs in areas where Gulf has business developments on or near Indian land. Prior to joining Gulf, he was executive director of Arizona Indian Centers, Inc. and an instructor at Phoenix College.

CLASS OF 1971

Dennis Dellwo is a member of the Spokane firm of Dyreson, Ledlin & Dellwo. After graduation, he spent two years as tribal attorney on the Colville Reservation in Washington, setting up a legal services program for tribal members, then for two years was associated with Dellwo, Rudolf & Schroeder, Spokane.

John Zastrow was recently appointed a Phoenix City Court Judge. At the time of his appointment, he was serving as Assistant City Attorney for Scottsdale. Previously, he was Assistant Director of the League of Arizona Cities and Towns.

CLASS OF 1972

John Bates (below, left) and **Van O'Steen** (below, right) have gained na-



tional prominence by virtue of their lawyer advertising case, *Bates v. State Bar of Arizona*, which was successfully argued to the United States Supreme Court by ASU Professor William C. Canby, Jr. (see Professor Canby's comments on lawyer advertising, page 18). John and Van report that business is good at their Phoenix legal clinic, and they have also been kept busy with speaking engagements around the country since the Court ruled earlier this year that lawyers have a First Amendment right to advertise.



Ilene J. Lashinsky clerked for Justice Lorna Lockwood of the Arizona Supreme Court for one year after graduation and later was associated with the Phoenix firm of Streich, Lang, Weeks, Cardon & French. Since December 1975 she has been Director of Continuing Legal Education for the State Bar of Arizona. She is a Director of the Law

Society and of the Lawyers' Club and a member of the editorial board of the *Arizona Bar Journal*. She is also a past president of the Law Alumni Association and a Director of the ASU Alumni Association. She is married to Assistant Attorney General Steven J. Silver.

CLASS OF 1973

Luis Aranda is Director of the Small Business Development Center at ASU's College of Business Administration. The Center offers professional services to businesses throughout the state. Luis coordinates a clinical program under which business students provide management consultation and technical advice to Valley small businesses. He was named educator of the year by the Arizona chapter of the National Economic Development Association, U.S. Department of Commerce.

Robert Martinez was recently elected to the Maricopa County Community College Board. He is in private practice in Phoenix and is a Cooperating Attorney for the Mexican American Legal Defense and Education Fund.

William L. McDonald recently assumed the position of Deputy Administrative Director of the Maricopa County Courts. He was previously with the Governor's Executive Budget Office and the Joint Legislative Budget Committee.

Dan O'Hanlon clerked for Judge James A. Walsh of the U.S. District Court in Tucson after graduating. He is presently working at the Department of Justice, Civil Rights Division, in Washington, D.C. He is active in litigation involving racial discrimination in housing and sex discrimination in financing under the new Equal Credit Opportunity Act.

CLASS OF 1974



Janet Effland has served since June 1975 as corporate counsel for Courier Terminal Systems, Inc., which develops, manufactures and markets video display computer terminals as well as a point-of-service system for the McDonald's fast-

food chain. As in-house counsel, Janet is involved in a wide range of duties, from corporate secretary to real estate matters (Courier recently moved into a large new Tempe facility) to international negotiations.

Ed Pastor was recently elected a Supervisor for Maricopa County.

Herbert Yazzie is the first Navajo to join the Utah bar. He is a staff attorney for DNA, the Navajo legal services program, at its Utah office in Mexican Hat. He is presently working on a lawsuit to stop the flooding of Rainbow Bridge and on litigation involving San Juan County schools.

CLASS OF 1975

Mike Espino spent a year and a half after graduation as a staff attorney for the Mexican-American Legal Defense and Education Fund in San Francisco. He is now in private practice in Flagstaff and serves as a MALDEF Cooperating Attorney in Arizona.

Herb Schlanger is associated with the Atlanta, Georgia firm of Hansell, Post, Branden & Dorsey. He formerly practiced with Harrison, Myers & Singer in Phoenix.

Chris Van Dyke is an assistant county attorney in Benton County, Oregon. He lives in Corvallis, the home of Oregon State University. He recently completed two years as a law clerk for Chief Justice Arno H. Denecke of the Oregon Supreme Court.

Dan Ziskin and **David Damron** are both Assistant Public Defenders in the felony division of the Pima County Public Defender's Office.

CLASS OF 1976

David F. Conley is living in Washington, D.C. and works for the Department of Treasury, Office of Chief Counsel (IRS). He writes, "Work great, climate miserable!!! We miss Arizona. . . ."

Ame Gannon lives in San Carlos, California and works for Hughes Air West. She writes, "Everything is going well. The job is great and I am in love with San Francisco!"

Cynthia L. Hathaway writes, "After clerking for one year for Judge Yeagley of the D.C. Court of Appeals, I have joined the Washington, D.C. law firm of Arent, Fox, Kintner, Plotkin & Kahn. Although the firm employs more than 130 attorneys, I work with a small (13) group of attorneys within the firm specializing in communications law."

Ralph Kostant has returned to the United States after a year in Israel and will join the Los Angeles firm of O'Mel-

veny and Myers in January, 1978. Ralph was married in September 1976 to Laura Cannon.

Bill Lawson and **Dick Underwood** are members of the Phoenix firm of Larry J. Richmond, P.C.

Pat Metzger has joined the antitrust division of the Arizona Attorney General's office. She formerly was associated with Brown & Bain, Phoenix.

CLASS OF 1977

Charles E. Fletcher II writes, "I have a blossoming law practice. I am one of three full-time attorneys in Payson. I have about 60 active cases. I enjoy the practice of law in this small town. I've done little criminal, only two felonies, and have written more wills than I care to."

Greg Groh is participating in a program leading to an LL.M. degree in taxation at the University of Florida at Gainesville.

ASU Alumni Elected To Head Tri-City Bar

Richard G. Johnson, Jr. '70 was elected President of the Tri-City Bar Association for 1977-78. Other alumni elected to office in the Association include **T. Delbert Nelson** '71, Vice President; and directors **Herbert S. Fibel** '70, **Donald O. Fuller** '72, **John D. Helm** '70, and **Wayne C. Arnett** '74.

Knoller Heads Alumni Association for 1977-78

Guy David Knoller '71 was elected to serve as President of the ASU Law School Alumni Association during 1977. Other officers are: **Ellie Finn** '72, Vice President; **Judy Bailey** '75, Secretary; and **Jerome Shultz** '73, Treasurer.

Norval Morris To Speak At Annual Law Dinner

Norval Morris, Dean of the University of Chicago Law School since 1975, will be the featured speaker at the 12th Annual Law Alumni-Law Society Dinner, scheduled for Monday, February 13, 1978, at Mountain Shadows.

Dean Morris, who holds degrees from the University of Melbourne, Australia, and London University, is an internationally recognized criminal law scholar and recently co-authored *The Honest Politician's Guide to Crime Control*. He has advised that his topic for the dinner will be "And I Sentence You."

On the Virtues of Not Thinking Like a Lawyer

(with unveiled references to the subject of lawyer advertising)

PROFESSOR WILLIAM C. CANBY, JR.

In law school we quite consciously subject students to a peculiar three-year process aimed at making them think like lawyers. On the whole this process is successful — more successful than most students or former students are likely to realize, because the change occurs gradually. The function of thinking like a lawyer is almost beyond description, but my favorite illustration of it occurred when I went to visit a member of the Yale Law School faculty. His office was on the second floor, and when I entered the ground floor of Yale's impressive law building, I saw nothing but a hall full of closed doors with no obvious way to get upstairs. So I stopped a law student in the middle of the hall and asked him where the stairway was. Without blinking, he replied "for what purpose?" I told him for the purpose of ascending to the second floor. He said that the stairway was at the end of the hall to the right. I walked off commenting to myself that Yale must indeed be a fine law school; it was accomplishing its mission so well, at least with one student.

These inquiring habits of thought are assimilated by law students in their three-year passage, and they may not even be aware of the fact. But those who are close to them know it. At commencement time we always congratulate the new graduate's husband or wife, but that is due to a certain delicacy of taste combined with the realization that it is too late to offer condolences. The success

of legal education is attested to by the fact that no one can stand to be around its products for extended periods of time.

Despite these drawbacks, I do believe that the habits that we describe as "thinking like a lawyer" are useful. There is merit in the tendency to narrow a question that is posed, in the desire to abstract principle from episode, and in the ability to adjust that principle so that it makes sense in its next application. Above all, there is great value in the disposition to approach a problem in a spirit of argumentative neutrality. These ways of thinking like a lawyer are well worth keeping.

There is, however, another way of thinking like a lawyer: it is collective, institutional thinking, based on experiences peculiar to the world of the lawyer. Its origins perhaps lie in the kind of atmosphere that law school itself provides. For three years students are thrust together and, like it or not, subjected to the same ordeal. From it arises a common set of shared experiences and to a considerable degree a set of shared values, despite individual differences in philosophy and attitude. That sense of community follows the students into practice, where the community is reshaped somewhat, with a modified membership, but with a persisting set of shared values nonetheless. The legal profession itself becomes a way of looking at life as well as a way of earning a living. The common assumptions of a large proportion of its members constitute another way of thinking like a lawyer.

This second kind of thinking like a lawyer probably has its benefits, and it most certainly has its comforts. But it is very confining and, in some instances, positively distorting. Those distortions can arise when the profession addresses itself to the problem of providing services to the unserved public. In solving that problem, the most valuable thing all of us lawyers could do collectively would be one simple and most difficult thing: we must learn to think like lay persons.

Let's begin with a few facts. An American Bar Association-American Bar Foundation survey has reported that one third of all Americans never consult a lawyer in their lives, and another third do so only once.¹ The legal profession, then, has been dealing with a small part of the

populace, and the populace knows this. But the Bar's conclusions about the nature of service being rendered by the profession is drawn not from experience with the unserved two-thirds, but with the much smaller group with which the practicing profession comes in regular contact. There is a natural tendency for lawyers to generalize from this, their own experience, and to be shaped by it. Like others, we lawyers become what we do.

Furthermore, lawyers are such a self-defined and self-conscious group that their own institutional needs loom large in any decision. Professor Tom Morgan of Illinois has written an interesting article² in which he discusses the decision-making involved in the evolution of the Code of Professional Responsibility. He identifies four interests that might be served by a professional code:

1. the public interest in seeing that justice is done;
 2. the public interest in resolving disputes expeditiously at low cost;
 3. the client's interest in being served;
 4. the interest of lawyers individually and collectively.
- In many cases these interests coincide, and at those points in the Code the public's interest is well served. But sometimes these interests conflict, as in a case where the public wants justice done but the individual client, a criminal defendant, wants nothing so fervently as a gross miscarriage of justice.

Morgan suggests that when the public interest, which ought to come first, conflicts with the lawyers' interests, the public loses out. He has several illustrations, but I will mention only two.

The first is in the area of unauthorized practice of law. Punishment of unauthorized practice is, of course, the weapon the profession uses to enforce its monopoly. An example is the controversy in some states over the sale of do-it-yourself divorce kits. Even lawyers can get in trouble for producing them, because they are offering advice not sought directly. More commonly, non-lawyers get in trouble on the grounds that they are practicing law — that is, they are intruding on the lawyers' monopoly.

The justification for keeping all of this in the hands of lawyers, of course, is that lawyers know how to do it better. After all, what have three years of law school been for? But lawyers also cost more, and what the profession is telling the layman is that if he is to get any help at all, it has to be first-class expensive help. And the result is that in many places over half of the divorces are obtained willy-nilly by people acting on their own, without the help of a lawyer or even of a decent (or mildly indecent) divorce kit.

Now if you think like a lawyer, you will look at one of the kits and will say that is oversimplifies, that a lawyer would do it better, and that just the other day you had in your office a matter that looked like a simple divorce, but individualized attention proved that more serious potential problems lurked beneath the surface; you attended to them and protected against future problems. You na-

turally had to charge a reasonable fee for your time.

If you think like a layman, you are probably one of those who never sees a lawyer, who will get your divorce yourself because you can't afford a lawyer or simply don't want to pay for one, and you see the legal profession as keeping you from getting some more modest help.

Milton Friedman, in reference to a parallel problem, made the point that we Americans could pass a law saying that no one was permitted to purchase any kind of automobile except a Cadillac.³ (The example obviously predated the oil crisis.) We could then wander the face of the globe stating that we had the finest automobile transportation in the world. But we would also have to admit that we had the most pedestrians. And those who sold Cadillacs would sincerely oppose legalizing the Ford on the grounds that it did not serve as well as a Cadillac.

The point is simply that the public is not necessarily served by a hand-tailored industry within the reach of only a portion of the public, an industry which keeps out by law all cheaper competition. The solution, which will come as a result of outside pressures if the Bar itself does not move that way, is to remove many of the strictures against unauthorized practice. The trend is in that direction, with real estate conveyancing, tax counseling, and many other services, and it seems bound to continue.

One other area of professional responsibility where the Bar may be thought to have put its own interests first involves lawyer advertising, a subject which I enter with all due warning about biases on my part.

For the last 70 years or so, the legal profession as an institution has been dead set against general public advertising by lawyers. It has remained so in the face of the fact, brought out by the ABA survey previously mentioned,⁴ that tens of millions of Americans do not know a lawyer, do not know how to find one, and are afraid that one will cost too much. Part of my previous point, of course, is that they may be right in fearing that a lawyer will cost too much, but the survey also indicates that in many instances lay persons believe the costs to be much higher than they actually are. Finally, economic theory and economic studies in the few comparable areas where

"There is . . . another way of thinking like a lawyer: it is collective, institutional thinking, based on experiences peculiar to the world of the lawyer."



This article is adapted from a commencement address delivered by Professor Canby at the College of Law of the University of Arizona in May, 1977.

Professor Canby was attorney for the appellants in *Bates v. State Bar of Arizona* (U.S. 1977), which recognized a First Amendment right of lawyers to advertise.

studies are possible indicate that price advertising tends to drive prices down, and that suppression of price advertising has the opposite effect. In other words, open price competition in the form of advertising is good for the consumer; it is not necessarily economically good for the supplier. So advertising has been banned.

Now it is important not to interpret what I am saying as the devil theory of the Bar; conscious evil-doing plays very little part in this whole affair. The leaders of the Bar do not sit down and decide to feather the nests of lawyers as a group. But they do think like lawyers, and it appears in their collective attitude toward advertising.

So what? Hasn't *Bates v. State Bar of Arizona* simply laid the matter to rest and established First Amendment protection for lawyer advertising? Well, that decision has confirmed the right to advertise fees for routine services, but considerable room for argument remains over the right to advertise quality, the right to advertise on radio and television, and the right to solicit in person. If *Bates* is read broadly, as I think it should be, virtually all advertising that is not false and deceptive will be protected. If it is read narrowly and restricted to its facts, it will have considerably less effect. In the first instance, it is the organized Bar and its committees that will make the choice. And while *Bates* prevents the Bar from continuing its ban unbroken, it does not require any particular limits on advertising. The attitude of the Bar, and whether its thinking is oriented toward lawyers or consumers, is therefore still of crucial importance. Unfortunately, the arguments that the Bar mobilized against advertising in the *Bates* case reflect the problems of thinking like a lawyer.

One argument used against advertising is that it is offensive to professional dignity, and that public respect for the law will decline when lawyers advertise. I must admit that at first blush this argument has considerable appeal; if you have any soul at all advertising in general just has to offend you. This reaction can only be overcome by recognizing the informational value of advertising. But the point is that the argument regarding dignity is



perhaps the best illustration of institutional thinking like a lawyer, because I have never found the lay person to have an overwhelming sense of the dignity of lawyers. It is a lawyers' argument, and it is not heard elsewhere. Whatever respect for law remains in the populace must have its roots elsewhere.

A second argument is that advertisement entices people to use legal services — that it stirs up strife and constitutes barratry. But of course the Code already permitted a lawyer to stir up strife on behalf of his existing clients, or members of his family, or even former clients. In other words, when a lawyer has a high duty to someone, it is all right for him to advise that someone that he or she may have a legal claim, but it is not all right so to advise the public. Ignorance then becomes the filter for the use of legal services, and it is an unfair filter.

Even arguments over deceptive advertising benefit from the lay person's view. It is almost impossible to write an advertisement that might not mislead someone because it did not say more. For instance, lawyers' advertisements might mislead because they fail to make clear that the potential client is legally entitled to and in some cases fully capable of conducting his own case. (Service station advertisements for tune-ups make the same deceptive omission.) The lawyer, thinking of the client who might be misled, concludes that the advertisement is impermissible. The lay person, thinking that if the advertisement is not permitted thousands of persons may not know of the availability of services, concludes that the advertisement will cause far more good than harm.

Ultimately, the arguments against advertising failed in *Bates* because, as the Court stated, they depended upon protecting people by keeping them in ignorance. The same faulty argument is certain to be raised against TV advertising: the viewers will select the lawyer with the attractive TV image rather than the one with the most legal knowledge or competence. The cynical lay person might well answer that "image" is a combination of elements that are very important to the prospective client who is about to enter a very special kind of relationship with a lawyer, and that such "image" (called "bedside manner" in physicians) has always entered into selection of professionals whether done at the country club, the political campaign, or the board meeting. That same cynic might also point out that there has never been any way for him to ascertain the competence of any given lawyer. If people are permitted to bring their own cases and to make the choice to do so, and to choose their lawyers on the basis of no information at all, there is no sound reason to deprive them of the opportunity to choose lawyers based on some information, including the information whether they can stand the sight and sound of the lawyer. But even a more modest view supports television advertising: it is the only way to reach a huge segment of the unserved public. Attempts to close off that informational route might simply lead the public to conclude that lawyers are protecting themselves from

... advertising almost inevitably will tend toward a volume industry, and the law still enjoys the luxury, at the expense of the consumer, of being a cottage industry."

competition — a conclusion that tends to push the public and their legislatures toward establishing non-lawyer regulation of lawyers, or toward deregulating the practice of law altogether.

A word then about the effect that advertising may have on the organization of the profession. First, despite my talk of community, it must be recognized that there are strata within the profession. At the economic top are the large firms serving corporate clients at high prices. They are in a restricted market of their own; their clients will not be attracted by advertising, and those firms almost certainly will not advertise. Incidentally, they are also not particularly threatened by advertising, and the fragment of the leadership of the Bar that is favorable to advertising comes from this group.

A second group which is larger in numbers consists of the smaller firms doing more of an individual business. If their practices are established, advertising poses a threat to them, and some of the most vigorous opponents of advertising are found in this group. The reason is that advertising almost inevitably will tend toward a volume industry, and the law still enjoys the luxury, at the expense of the consumer, of being a cottage industry. There is no reason to believe that the comparison of the mom-and-pop grocery store and the supermarket is invalid for the legal profession. The supermarket is the creature of advertising, and when it advertises, it draws people away from the higher priced, more individualized provider. And a volume business, while cheaper for the consumer, requires a lot of capital; it is unlikely to be done by a few practitioners in a small office.

The pattern one might forecast, then, is that advertising will lead to the growth of a wholly new type of large law firm aimed at serving the middle and lower-middle classes — that is to say, most of the people. These firms will feature relatively standardized services at low prices. If the present smaller practitioners do not consolidate into such firms, they are likely to be driven out of business unless they are able to specialize very narrowly and achieve the equivalent of a volume enterprise that way,

perhaps as a subcontractor for one of the new large firms. Incidentally, there is no reason why these firms should not be regional or national in scope.

Now this may be a rather unappealing picture for one of our students who is just receiving a law degree and our plaudits for mastering a complex discipline. What reward to be dispensing standardized services? The answer, I hope, is that the highly skilled lawyer will not be greatly involved in the standardized operations except to design them and see that they operate properly. And part of operating properly is to discover those cases that really need personalized service, to provide that service, and to find ways to pay for it. This may sound as if there will be much less work for lawyers. It is perfectly true that at present much routine work is done by lawyers only because they have a monopoly on the work and the pricing system leaves too little incentive for efficiency and delegation. In that sense, the lawyer's role will be smaller, because those tasks ought not to be performed by lawyers. But lest those entering the Bar conclude that they are all destined for a lifetime of unemployment, it must be remembered that in supplying legal services the surface has barely been scratched — the legal needs of most of the population are not being met. If systems are designed to meet them, the special cases will provide more than enough work for the lawyers. This is not to say that legal needs are always to be met in the traditional manner; some of the most creative work will lie in devising methods of serving what are now seen as legal needs by means not traditionally thought of as law-related. But much will remain for the lawyers.

The most important point is that the new systems serve the public. From the standpoint of the lawyers as a group, this may not be happy news. For I suppose that the most joyous news I could give a new lawyer is a welcome into a comfortable monopoly; the ideal economic situation is to work in a self-regulated monopoly when much of the rest of the economy from which you consume is engaged in competition. But that is not the future I can forecast.

Instead, the challenge will be in overhauling the profession and in fashioning viable practices as these changes come. The primary satisfaction will be in serving the public as a whole, and it can be done in reasonable comfort to the lawyers. The prospect for a satisfying life for many in the practice of law will depend on the lawyer's ability to deal with his individual client's problems by thinking like a lawyer, and to deal with the profession's problems and the public's problems by thinking like a lay person.

NOTES

1. B. Curran and F. Spalding, *The Legal Needs of the Public* 85-86 (Prelim. Rept. 1974).
2. Morgan, "The Evolving Concept of Professional Responsibility," 90 *Harv. L. Rev.* 702 (1977).
3. M. Friedman, *Capitalism and Freedom* 153 (1962).

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