1977

Colonial Lawyer, Vol. 7, No. 1 (Spring 1977)

Editors of Colonial Lawyer

Repository Citation
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COMMENT FROM THE EDITOR

THE COLONIAL LAWYER

A brief glance at the current issue of The Colonial Lawyer will show that the Lawyer's format, content, and focus has taken on a new direction aimed at serving the students, faculty, and alumni.

It has been painfully apparent in the last few years that a change was long overdue. Some changes in the right direction were made in the Spring 1976 issue, but my staff and I felt that more were needed. After some consultation and deliberation, we determined that a student publication aimed at providing a liaison between students, alumni, and faculty would provide the essential "raison d'être".

But more than just a dedicated editorial staff is needed in order to achieve the desired goal. To be a lasting success, The Colonial Lawyer needs full cooperation, support, and contributions from all of you, our readers: students, alumni, and faculty.

So you immediately say, "What does The Colonial Lawyer offer me?" And I say, "A lot!" For example, it provides a forum of general circulation for your ideas, as well as a means of receiving informed feedback. But that's not all. In particular, the students, alumni, and faculty have a chance to publish many different types of material in the Lawyer: short articles on legal issues or topics, short stories, poems, cartoons, and other items of general appeal. Moreover, the alumni get to communicate to other members of the Marshall-Wythe community their recent achievements, honors, distinctions, and newsworthy events. And the faculty has an outlet for their views on current law school programs, teaching methods or materials, and innovations in legal education; as well as their views on various controversial legal issues.

Of course, I have not outlined all of the services that The Colonial Lawyer can provide its readers. The ones noted above are only a few. But it must be remembered that the editorial staff cannot do the job alone. So PLEASE CONTRIBUTE, so that all of us can receive the most that The Colonial Lawyer can give.

Rhette M. Daniel
Editor-in-chief
THE LEGAL PROFESSION AND PUBLIC PERCEPTION
William B. Spong, Jr.

THE 1968 CONFIRMATION HEARINGS OF JUSTICE ABE FORTAS
Richard Dubin

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Cover: Bob Harris

Colonial Lawyers: Jim Eldridge
Jim Pettengill
RHETTA M. DANIEL, the current Editor-in-chief of The Colonial Lawyer, received a B.A. degree in English from the College of William and Mary in 1973. During her senior year, she was a member of Kappa Delta Pi Honor Society.

Following her graduation, Ms. Daniel taught English, speech and drama at King William High School, and in 1974 she returned to the College to work on her law degree.

Ms. Daniel is presently a Juris Doctor candidate at Marshall-Wythe School of Law and expects to graduate May 15, 1977. While at Marshall-Wythe, she has been a member of the Student Bar Association, American Bar Association, Mary and William Law Society, and the staff of The Colonial Lawyer. She is also a member of the Publications Council of the College of William and Mary and of the Society for Collegiate Journalists.

In addition to her law school activities, Ms. Daniel has been employed as a law clerk and as the Legal Assistant to the Vice President for Business Affairs at the College of William and Mary. She lives in West Point, Virginia, has two teenage children, and plans to practice in the Richmond metropolitan area following her graduation from Marshall-Wythe.
NEW FEATURES have been included in this issue: prose, poetry, humor, and alumni news. Many thanks go out to those who submitted material for these features.

CONTRIBUTIONS FROM THE ALUMNI are particularly desired for the next issue of The Colonial Lawyer. Please send your news, articles suitable for publication, and monetary contributions so The Colonial Lawyer can continue to function as a liaison between the alumni and the law school. Plans for next year include an additional feature spotlighting distinguished alumni with significant achievements in legal, political, and other fields of endeavor.

THE COLONIAL LAWYER has its own office, mailing address, and telephone number. The office is located next door to the law school in 104 Rogers Hall. Our mailing address is The Colonial Lawyer, Marshall-Wythe School of Law, College of William and Mary, Williamsburg, Va. 23185, and our telephone number is 1-804-253-4686.

Please send all correspondence to the above address and make out any checks of contribution to The Colonial Lawyer.

SPECIAL THANKS go out to the Law School Association for their gift of $200.00 to The Colonial Lawyer and to the individual members of the alumni who sent in their monetary contributions. Without this type of support from the alumni, The Colonial Lawyer cannot serve this segment of the Marshall-Wythe community as only student issues may be funded with the money allotted by The Publications Council.

CLINICAL EDUCATION is a new program added to the curriculum at Marshall-Wythe this year. John Levy is the Director of Clinical Education and the author of the article on the program included in this issue of The Colonial Lawyer.

Contrary to the national trend, 2369 APPLICATIONS FOR ADMISSION have been received to date for 150 places in the Fall 1977 first-year class.

COMMENCEMENT EXERCISES for the Marshall-Wythe School of Law, The College of William and Mary, are scheduled for 2 p.m. on Sunday, May 15, 1977 in the Phi Beta Kappa Hall auditorium. There are 148 candidates for graduation.

THE FOLLOWING VISITING PROFESSORS will be at Marshall-Wythe School of Law next year:

1. Professor Delmar Karlen of New York University, Tazewell Taylor professor, will teach Civil Procedure. Professor Karlen is a former director of the Institute of Judicial Administration.

2. Judge Walter Hoffman, Tazewell Taylor Professor of Law, will teach a course in Federal Courts. Judge Hoffman is presently director of the Federal Judicial Center in Washington, D.C. He is a former member of the Marshall-Wythe faculty.

3. Justice Paul Reardon, recently retired from the Supreme Judicial Court of Massachusetts, will teach in the spring semester. Justice Reardon, immediate past president of the Institute of Judicial Administration, will teach Judicial Administration and will lecture on Fair Trial-Free Press.

4. Professor J. Rodney Johnson of the University of Richmond is a graduate of Marshall-Wythe and a former member of its faculty. He will teach Trusts and Estates during the fall and spring semesters.

5. Professor John Bridge of Exeter University, who has taught at our Exeter Summer program for several years, will exchange for the 1977-78 academic year with Professor Walter Williams. He will teach International Law and a course in the European Common Market.

CYNDIE BASKETT, a rising second-year student from Virginia Beach, has been appointed to the position of EDITOR-IN-CHIEF of The Colonial Lawyer for the year 1977-78. Her father, William C. Baskett, is an alumnum of Marshall-Wythe and a director of the William and Mary Law School Association.
Construction of **THE NATIONAL CENTER FOR STATE COURTS** is progressing rapidly. The new center is located adjacent to the site under preparation for the new Marshall-Wythe School of Law building. The locating of the National Center for State Courts next to the Marshall-Wythe law school site in Williamsburg promises mutual benefits to both National Center and Marshall-Wythe School of Law community.

**SITE PREPARATION FOR THE NEW MARSHALL WYTHE SCHOOL OF LAW** is under way. Groundbreaking ceremonies were held on September 11, 1976, and there will be no delay once the actual construction on the building is authorized to begin.

**THE NEW LAW SCHOOL BOND ISSUE** is going to the Virginia voters in November, 1977. All Virginia alums, especially, take notice and VOTE IN FAVOR OF IT. Your support of Marshall-Wythe at this critical time may make a significant difference in the future success of the law school.
OYEZ, OYEZ

JUDGE SHIRLEY M. HUFSTEDLER, circuit judge of the Ninth Circuit United States Court of Appeals, will receive the MARSHALL-WYTHER MEDALLION from Dean William B. Spong, Jr. at a law school ceremony in Phi Beta Kappa Hall following the completion of the Marshall-Wythe graduation exercises.

The medallion is awarded periodically by the faculty of the Marshall-Wythe School of Law to persons who have distinguished themselves in the legal profession.

Judge Hufstedler, after having served in various judgeships in California, assumed her present position in 1968. She is a graduate of the University of Mexico and Stanford University's Law School. In addition, she has received honorary degrees from a number of universities, including Georgetown, Tufts, Pennsylvania, New Mexico, Southern California, and Wyoming.

The Los Angeles Times has named Judge Hufstedler "Woman of the Year," and Ladies Home Journal has recognized her as "Woman of the Year in Government and Diplomacy". She is the author of several judicial papers and a member of the International Association of Women Lawyers. Recently Judge Hufstedler was also chosen to serve on the board of trustees for the Colonial Williamsburg Foundation.

Last year the MARSHALL-WYTHER MEDALLIONS were awarded to former Special Watergate prosecutor LEON JAWORSKI and professor NORMAN ANDERSON of the University of London.

HOMECOMING COCKTAIL PARTY - LIBEL NIGHT-BARRISTER'S BALL. Students, alumni, and faculty mark your calendars and attend all three of these outstanding Law School events. The Homecoming Cocktail Party, complete with an open bar and scrumptious food, will be held after the William and Mary Homecoming football game with Rutgers University on October 29, 1977 from 4 'til 8 pm. Game time is set for 2 pm.

The Barrister's Ball and Libel Night are planned for mid and late March respectively. Please contact the Student Bar Association, The Marshall-Wythe School of Law, College of William and Mary, Williamsburg, Va. 23185 at the beginning of February 1978 for additional information and tickets.

A SPECIAL INVITATION is extended to all alumni who have not attended these events since their law school days. You won't be disappointed!
Law students who will soon be practicing law will be interested in how the public perceives the legal profession. The Virginia Bar Association, concerned about mounting criticism of lawyers, some of it flowing from the Watergate revelations, last year commissioned Peter D. Hart Research Associates of Washington to conduct a scientific survey of the attitudes of Virginians toward the legal profession. Approximately 600 Virginians, selected as a scientific sample of the population in this State, were interviewed personally in sessions lasting an average of 45 minutes. The results of these interviews were computerized, analyzed and set forth in a 70 page report. The report was released to the press and discussed at the annual meeting of the association earlier this year here in Williamsburg by a panel headed by Dean Roy Steinheimer of Washington and Lee.

The survey reflected that Virginians, by a wide margin (84 to 10 percent) agreed that lawyers perform a unique and valuable function. 59% of those interviewed said they would feel comfortable and relaxed in a lawyer’s office and 21% said they would feel ill at ease, inferior and in fear of being taken advantage of. Virginians disagreed with the statement, “Most lawyers work only with businessmen and rich people and don’t seem to have time for people like me,” by a margin of only 53 to 43 percent. Yet they also indicated by a substantial margin, 74 to 22 percent that “Once a lawyer took my case, I think I would feel confident that he would give me a good service as his bigger clients.” And, also, by a margin of 67 to 16 percent said they would encourage rather than discourage their child to become a lawyer.

One of the significant factors weighed in political polls for incumbents is the level of confidence. The level of confidence shown in various professions and occupations in Virginia is indicated below.

<table>
<thead>
<tr>
<th>Profession</th>
<th>Great Confidence</th>
<th>Some Confidence</th>
<th>Little Confidence</th>
<th>No Confidence</th>
<th>Not Sure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Doctors</td>
<td>58</td>
<td>33</td>
<td>6</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Dentists</td>
<td>51</td>
<td>39</td>
<td>6</td>
<td>2</td>
<td>2</td>
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<tr>
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<td>34</td>
<td>37</td>
<td>6</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Plumbers</td>
<td>25</td>
<td>49</td>
<td>15</td>
<td>4</td>
<td>7</td>
</tr>
<tr>
<td>Architects</td>
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<td>38</td>
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<tr>
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<td>19</td>
<td>49</td>
<td>21</td>
<td>5</td>
<td>6</td>
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<tr>
<td>TV newscasters</td>
<td>16</td>
<td>49</td>
<td>24</td>
<td>7</td>
<td>4</td>
</tr>
<tr>
<td>Members of local city councils or Boards of Supervisors</td>
<td>12</td>
<td>42</td>
<td>25</td>
<td>11</td>
<td>10</td>
</tr>
</tbody>
</table>

When asked to suggest changes in the legal profession, the most commonly volunteered suggestions were lower fees, improved quality of legal service, higher standards of ethics and keeping clients better informed. When asked to comment on the disciplining of lawyers in Virginia, 6% of the respondents said it was excellent; 29% said it was good; 24% said it was fair and 14% said it was poor. As to whether participation by lay members on disciplinary bodies would help, 38% said it would be an improvement; 15% said it would be worse and 31% said it would be about the same. An interesting statistic on a controversial subject within the legal profession showed that 46% of the Virginians interviewed said that advertising by lawyers would be a good idea and 41% believed it would be a bad idea.

These figures represent only a smattering of the statistical information provided by the poll and much of that information is ambivalent. It would be fair, however, to observe that the present public perception of lawyers is such that legislative efforts to change the nature of the legal profession might receive public support or judicial decisions affecting the licensed privileges of the profession might be applauded.

The Virginia Bar Association circularized the survey to its membership, its committees, and to other legal organizations in the State. It was determined that in addition to the statistical information reflected by the report it would be advisable to invite lay leaders to discuss the more controversial questions raised by the survey. Accordingly, in June the Virginia Bar Association convened approximately 75 lay leaders of
William B. Spong, Jr., former United States Senator, was appointed Dean of the Marshall-Wythe School of Law, July 1, 1976.

Dean Spong is no stranger to Marshall-Wythe. On two prior occasions, he was a member of the law school faculty: first, as Lecturer in Law, 1948-49; and second, as Cutler Lecturer, 1975-76.

Dean Spong, a native Virginian, received his education at Hampden-Sydney College, University of Virginia, LL.B., and University of Edinburgh, Scotland. His past achievements also include serving in both houses of the Virginia General Assembly: House of Delegates, 1954-55, and Senate, 1956-66.
On June 26, 1968, President Johnson accepted Chief Justice Warren’s decision to retire: “With your agreement, I will accept your decision to retire effective at such time as a successor is qualified.” The same day, the President also submitted to the Senate the nominations of Mr. Justice Abe Fortas to be Chief Justice replacing Chief Justice Warren, and Judge Homer Throneberry, of the United States Court of Appeals for the Fifth Circuit to be Associate Justice replacing Justice Fortas. Arising near the end of an increasingly unpopular presidency and set off against a background of political and social conflicts which then divided our national culture, the nominations precipitated Senate Judiciary Committee Hearings of great historical significance.

Throughout the summer, the Judiciary Committee held Justice Fortas’ personal history, legal record, and constitutional philosophy before the most powerful magnifying glass ever used in such a hearing. For four days, Justice Fortas sat beneath the frequently warm reflection of the magnifying glass and testified himself. Essentially a conflict between well spoken, carefully organized advocates of judicial restraint and conservatism on one side, and poorly organized forces favoring liberal or moderate ideals and a greater degree of activism on the other side, the Hearings culminated in a failure of Congress to report favorably on the nomination. Thus, while it was reported favorably to the Senate floor by an eleven-to-six vote, the conservatives sitting on the Judiciary Committee had gathered sufficient momentum during the Hearings that talk of a filibuster to block confirmation communicated the desired impact, and in September, Justice Fortas requested that the President withdraw his nomination.

Situated in the final year of Earl Warren’s tenure, the Hearings illuminate not only Abe Fortas’ personal qualifications and legal jurisprudence, but function as a cogent manifestation of the ideological conflicts which marked the Warren era as a whole. Considered in relation to many of the conservative dissents delivered during the turbulent development of the court’s activist role, the Hearings provide a concise and distilled representation of the struggle which permeated this court’s effort to define itself. A statement contained in Senator Eastland’s individual views, filed as a part of Senate Judiciary Report, furnishes an appropriate introduction to the bitterness of this crucial struggle:

Unfortunately, it is apparent from the nominee’s performance as Associate Justice that he has joined ranks with those judicial activists who have become so overzealous in their obsession with the rights of the lawless that they completely disregard the rights of society; judges who have turned the temple of justice into a criminal sanctuary; judges more concerned with theories of sociology than sound principles of law.

The argument about the proper role of the judiciary, as such erudite historians as Senator Ervin would tendentiously proclaim, is as old as the nation, going back to Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), and extending through two centuries of judicial debate. But as Senator Eastland candidly stated, “This nomination cannot be considered in a void. It must be considered in light of the turbulent times in which we live.” Given our historical perspective, it is still a serious mistake to evaluate Justice Fortas’ Confirmation Hearings exclusively either in terms of his immediate personal qualifications or in a vacuum of conflicting legal principles. Rather, the Hearings should be analyzed against the background of a nation trying to cope with the new realities engendered by the creation of a “Great Society.” The Hearings should be understood in “light of the turbulent times in which we live; a time which witnessed the unleashing of great racial and individual tensions, spawned at least in part by earlier Warren Court expansions of civil rights. As Senator Eastland urged, the Hearings should be seen in the context of a widespread national concern that such developments as a rising tide of crime and proliferation of pornography signaled a disintegration of public and private morals. More importantly the Hearings
should be interpreted in light of the political climate these social developments helped create. Against this background, the Abe Fortas Hearings attain a symbolic importance. For in many ways, they embody the exact critical response to the Warren Court's active role and its social progeny which had threatened this court from its beginning.

The deepest source of legislative concern throughout the Hearings centered on the historical debate between judicial activism and judicial restraint. Naturally, Senators Eastland, McClellan, Ervin, and Thurmond who formed the nucleus of the conservative opposition went to great pains, as well as length, to reassert the necessity of a judiciary which would remain subordinate to the letter of the Constitution. Yet, the factor which most fully expresses the political climate of the Hearings is that no one denied the validity of this theory. Perhaps because other issues put Fortas on the defensive from the beginning, he and his supporters did not attempt to justify the legal theory involved in an activist court. Thus when Chairman Eastland asked, "To what extent and under what circumstances do you believe that the court should attempt to bring about social, economic, or political changes?", Fortas responded, "Zero, absolutely zero." The southern senators of course were unable to accept the proposition that a justice who generally sided with one of the most unrestrained majorities in the history of the Supreme Court could truly hold such a belief. Yet, consideration of the two memoranda adopted by the Committee majority strongly suggests that, at least in the case of Fortas, an apparent contradiction between theory and practice was susceptible to reconciliation.

Exhibit 45, "Judicial Restraint in the opinions of Mr. Justice Fortas," and Exhibit 47, "Memorandum Re Judicial Performance of Mr. Justice Fortas," were both presented by Senator Hart, leader of those forces who supported the nomination. The first document seeks to prove that Fortas' jurisprudence displays a respect for judicial restraint, while the second paper attempts to show that his decisions conform to such legal theory. Exhibit 45 is subdivided into three equal parts. Each part is preceded by a title which accurately summarizes its respective content:

A. The opinions of Mr. Justice Fortas reflect a meticulous concern that the Court confine itself to cases in which the issues for decision are properly presented.

B. The opinions of Mr. Justice Fortas reveal passionate belief that the Federal Judiciary has no monopoly on wisdom and virtue, and that the judiciary must show a proper deference to the roles of Congress, the Executive, independent administrative agencies, and the states.

C. Opinions of Mr. Justice Fortas reflect a craftsman's aversion for absolute rules, and a profound awareness of the need to accommodate legal rules to the complexities of actual life.

Wainwright v. New Orleans, 392 U.S. 598 (1968), and Rosenblatt v. Baer, 383 U.S. 75 (1966), are cited in section A as examples of situations where Fortas found the record inadequate for the purposes of reaching a difficult constitutional question. In Wainwright, Fortas who wrote the majority opinion, Chief Justice Warren, and Justice Douglas expressed their view that the merits should not have been reached. In Rosenblatt, Fortas alone found the record inadequate for the purpose of a proper decision stating:

"Particularly in this type of case it is important to observe the practice of relating our decisions to factual records that serve to guide our judgement and to help us measure theory against the sharp outlines of reality."7

Section A closes with the observation that Fortas' meticulous view of which cases are judicially ripe provides the Court with "one of the most rigorous and consistent voices for self-restraint in this important area since the retirement of the late Justice Felix Frankfurter."8

In Section B of the memorandum, another series of decisions is introduced to demonstrate Fortas' conviction that "the courts must not impose their solutions to questions of policy either where the question was suitable for legislative remedy or where

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Congress had manifested its will.”9 In Steelworkers v. Bouligney, 382 U.S. 145 (1965), Fortas’ first opinion for the Court presented a situation wherein the Justice expressed sympathy for the purpose of the appellant’s suit but “declined to accomplish that result by judicial fiat.”10 Here, the question of whether unincorporated labor unions should be permitted to assume the status of corporations for diversity cases was characterized as “a decision suited to the legislative and not the judicial branch, regardless of our views as to the intrinsic merits of the petitioner’s argument.”11 In this section, just as in the preceding one, the greater impact is generated by a decision in which Fortas’ assiduous restraint is set off against the more relaxed standards of his brothers on the Bench. In Federal Trade Commission v. Dean Foods Company, 384 U.S. 597 (1966), a liberal majority of the Court headed by Chief Justice Warren accepted the F.T.C.’s view that “it should be empowered to petition a federal court of appeals to preliminarily enjoin consummation of a merger under investigation by the Commission.”12 Writing for himself, Justice Harlan, Stewart, and White, Fortas argued that the Court should not make a grant Congress had frequently withheld: “The Commission should not be given such jurisdiction by fiat of this Court. It should do what Congress intended it to do... The Act is abused where, as here, it is contorted to confer jurisdiction where Congress has plainly withheld it.”13

Further evidence of Fortas’ belief in the efficacy of a restrained judiciary is offered in the memorandum’s assessment of his deference to the role of the States. Here too, an instance of Fortas writing for a divided Court is followed with another example of the nominee’s writing articulating stricter standards in a dissent from the more active majority. In United States v. Yazell, 382 U.S. 331 (1966), Fortas, writing for the majority, declared that the Small Business Administration’s interest in enforcing its own rules did not override a Texas rule of law which rendered that enforcement more difficult. Despite his personal distaste for the coverture clauses attacked in the case, his strict view of the U.S. Court’s role led him to write:

Clearly, in the case of these SBA loans there is no “federal interest” which justifies invading the peculiar local jurisdiction of these States, in disregard of their laws, and of subtleties reflected by the differences in the laws of the various States which generally reflect important and carefully evolved state arrangements designed to serve multiple purposes.14

The memorandum describes Duncan v. Louisiana, 391 U.S. 145 (1968), as an even more persuasive manifestation of Fortas’ solicitude for the rights of the states. In this case, Fortas concurred in the Court’s judgement that the due process clause of the Fourteenth Amendment obligates the state to accord the right to jury trial in prosecutions for serious offenses. But he did not agree with the Court’s implication that by holding that due process requires the state to accord jury trial for all but petty offenses, “we automatically import all of the ancillary rules which have been or may hereafter be developed incidental to the right to jury trial in the federal courts.”15 Concern for the states’ right to experiment is clearly revealed. In Fortas’ interpretation of the Constitution, a “federal union not a monolith” is set up, and insofar as the loftiest standards of due process will allow, the judiciary should allow “maximum opportunity for diversity” and attach “minimal imposition of uniformity of method and detail upon the states.”16

Duncan v. Louisiana, 391 U.S. 145 (1968), is crucial because, like several cases discussed above, it consists of four separate opinions which give tangible form to the spectrum of constitutional philosophies which characterized the Warren Court. At one extreme, Justices Black and Douglas offer their familiar argument that the Fourteenth Amendment was intended to make the Bill of Rights applicable to the states. Justice White, writing for his Brothers Warren, Brennan, and Marshall, employs a more restrained selective incorporation procedure. Justice White finds that because trial by jury is fundamental to the American scheme of justice, the Due Process Clause incorporates that part of the Sixth Amendment which requires trial by jury in federal criminal cases. At the other extreme, Justice Harlan, joined by Justice Stewart, rejects the internal logic of incorporation. He delineates a more discriminating method of due process adjudication which entails a gradual process of judicial infusion and exclusion. This approach seeks with “due recognition of constitutional tolerance for state experimentation and disparity, to ascertain those immutable principles... of free government which no member of the Union may disregard.”17 Justice Harlan

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REFRESHING
RECOLLECTION

Class of '29

Judge Walter E. Hoffman, senior judge for the Eastern District of Virginia and Director of the Federal Judicial Center, will be teaching at Marshall-Wythe in 1977-78 as a visiting Tazewell-Taylor Professor of Law.

Class of '48

For the past 15 years, Ira Bernard Dworkin has been honored by being listed in “Who’s Who in the East.” He has served as Vice President of his local bar association, trial counsel for the state child-welfare agency and Acting Magistrate of Hunterdon County. Presently, he is a referee on the New Jersey Worker’s Compensation Bench and conducts a private practice limited to probate and real estate in Flemington, N.J. He also teaches an evening adult education course entitled “Sherlock Holmes Cross-Examined.”

Class of '49

Walter Oden served as an intelligence officer for the C.I.A. from 1952-72 in various Far East countries. He is presently the Assistant Commonwealth’s Attorney for Norfolk, Va. and recently completed a two year investigation which culminated in 101 indictments and the longest criminal trial in Norfolk’s history. Walter resides in Virginia Beach and is the proud father of a four year-old, red-headed daughter named Georgette.

Class of '50

The first editor of the William & Mary Law Review, R. Harvey Chappell, JR., is now in the firm of Christian, Barton, Epps, Brent, and Chappell in Richmond, Virginia. He was one of the organizers, as well as the first president, of the William & Mary Law School Association. His outstanding accomplishments in the legal field have included serving as the President of the Richmond Bar Association; President of the William & Mary General Society of Alumni, 8 years on the Board of Visitors, 4 years as Rector; and Chairman of the A.B.A. Standing Committee on the Federal Judiciary which nominates federal judges. This summer he will begin his term as the President of the Virginia State Bar. In addition, he is on the Board of Directors and General Counsel of Thalhimers Brothers, on the Executive Committee of the Crippled Children’s Hospital, and an active member of his church.
fame fortune & success

19 days before

Class of '51

Bruce Lester was appointed judge of Division No. 1 of the 6th Appellate District of Kentucky on August 17, 1976 and elected to fill the balance of the eight year term in last November's elections. He notes that Virginia is not without representation in the Kentucky Court of Appeals composed of fourteen judges, three of whom graduated from Virginia law schools.

Class of '52

Robert E. Mellon has been practicing all phases of law in Waterbury, Conn. since 1953. He is associated with another alumnus, "Tocco" Sullivan. Their office handles criminal matters, as well as domestic matters, property closings, etc. He is married to the former Judith Baker and they reside in Waterbury.

Class of '55

Nathaniel Beaman III lives in Norfolk and finds it easy to keep up on the news at Marshall-Wythe since his son, Chip, is a member of the first year class.

Class of '59

Theodore Bliss, M.D. and Fellow of the College of Legal Medicine, is practicing in Norfolk. His main interest is in the field of medico-legal law.

Class of '61

Allan C. Brownfeld resides with his wife and daughter in Alexandria, Va. He writes a column appearing three times a week in numerous papers across the nation and participates in several other journalistic endeavors. He also is a consultant to several members of Congress and lectures throughout the country for Freedoms Foundation of Valley Forge, Pa.

Class of '62

Peter Haynes White is still on all four corners of White’s Corners, Hopewell Jct., N.Y. 12533 or White’s Corners, Wappingers Falls, N.Y. 12590. He is a merchant, and his corporation owns one store, a small mail order business, and the family farm. White is the chairman of the Beacon Merchant Association, the director of the Howland Library Restoration Association, a Town and County Committeeman for the Republican Party, and the Treasurer of the Town party. He is currently the "designee" for County Legislator.

Class of '65

John Meagher is Minority Counsel of the Committee on Ways and Means, U.S. House of Representatives. He and his staff of sixteen provide legal counsel, policy and technical assistance to the twelve Republican Congressmen on the committee. Another Marshall-Wythe graduate, Paul Auster, joined the staff last year as a specialist in foreign tax law.

William Joseph "Tocco" Sullivan became associated with Attorney Robert Mellon upon his discharge from the U.S. Army. He served as Director of Connecticut’s Vietnam Bonus Office for two years and is presently Corporation Counsel for the City of Waterbury in addition to his private practice. He is married to the former Mary Lou Christiano and resides in Waterbury with their three sons.

Class of '67

Jerry Jebo is a partner in the firm of Dalton and Jebo in the general practice of law in Radford, Va. He is the chairman of the Planning Commission of the City of Radford and a member of the Board of Directors of the Radford College Foundation and the New River Legal Aid Society.
Class of '68

Worth D. Banner is an associate with the firm of White, Reynolds, Smith, Winters and Lucas in Norfolk, Va. He recently wrote the appellee’s brief and presented his first argument before the Supreme Court of Virginia. The trial court’s demurrer was sustained.

Richard H. Harding was recently made a partner in the 40-attorney San Francisco, Ca. law firm of Littler, Mendelson, Fastiff & Tichy. The firm specializes in the practice of labor law representing management clients. Richard, his wife Sue, and two sons live in Walnut Creek and enjoy the northern California lifestyle.

Class of '70

Michael M. Collins is a partner in the firm of Collins, Wilson, Collins & Singleton in Covington, Va.

Stephen R. Crampton is a partner in the second largest Vermont firm, Gravel, Shea, and Wright, located in Burlington. He has served as Director of Burlington Junior Achievement and Director and Vice President of the Vermont Epilepsy Assn. His family includes wife Susan, a practicing C.P.A., and two children. He would be glad to talk to any graduates about law practice north of the Mason-Dixon line.

Charles F. Midkiff was recently elected Secretary of the Virginia Bar Association, Young Lawyers Section. During the prior year, Chuck served as Treasurer of the organization. In addition, he has been reappointed to the position of Editor of the Young Lawyers Section, Virginia Bar Association Journal. For the last five years, Chuck has been associated with the law firm of Christian, Barton, Epps, Brent & Chappell in Richmond, Va.

George Wright has been a teacher at Monmouth College since 1970 and is in private practice in New Jersey since 1973. His is married and has two daughters.

Class of '71

After serving as a law clerk for the U.S. Court of Claims in Washington, D.C. for one year immediately following law school graduation, Nicholas J. “Nick” DeRoma joined the legal department of the IBM Corporation. He is currently a staff attorney, Office of Counsel, General Systems Division, IBM Corporation, Atlanta, Ga.

Bradley K. Jones served four years in the U.S. Army following law school graduation. He voluntarily resigned from active duty in August, 1975, was admitted to the North Carolina Bar by comity, and has been a sole practitioner in Fayetteville, N.C. ever since.

Fred Morrison left the Army after twelve years service in the summer of 1975. He had served in the Army JAG and spent one year teaching Criminal and Constitutional Law at West Point. He is now an Assistant Professor at the McGeorge School of Law, University of the Pacific, Sacramento, Ca. He is teaching mostly criminal law related courses and will be promoted to Associate Professor this fall. He has four sons; the eldest, Bill, is a freshman in college at University of Pacific.

Class of '73

Ed Miller works for the Vermont state legislature preparing and amending legislation. He participated in the first impeachment trial in over 200 years in Vermont. He and his wife, Sarah, live in Montpelier.

Class of '74

David G. Altizer became a partner with Gillespie, Chambers and Combs of Tazewell, Va. on January 1st of this year. He is the proud father of a daughter, Carolyn Anne Riley, born on July 4, 1976.

Kent R. Nilsson completed his Ph.D. in Economics and Finance and established a consulting firm for attorneys which prepares and presents financial and economic evidence. He is living in Charlotte, N.C.
Class of '75

Louis K. Campbell served briefly in the Army and then as Asst. Commonwealth's Atty. of Botetourt County, Va. Presently, he is in private practice in association with E. C. Westerman, Jr. in his hometown of Fincastle, Va.

Stanley C. “Clint” Spooner is currently practicing patent law with the law firm of Holman & Stern in Washington, D.C. He and wife, Sandra, reside in Alexandria, Va.

Class of '76

John L. Carver is engaged in the general practice of law with a three man law firm in Belfast, Maine. He deals largely in criminal and trial practice with real estate predominant in the non-winter months. Anyone desiring information on the New England area should contact John, Blake and Hazard, Belfast, Maine.

Richard M. Foard is engaged in the general practice of law, as well as the practice of patent law, in Hayes (Gloucester County), Virginia.

Robert B. Goldman is a registered securities salesman with Shields Model Roland, Inc. in New York City. He is handling retail customers, including estate and trust business, as well as pension funds.

Unable to find a job with a firm or government agency, Sharon A. Henderson opened up practice in Fairfax County using her home as her office. Business is improving every day and she's learning more and more about the practice of law that they didn't teach in law school. She's writing a section on “Marriage and Its Consequences” for a booklet on Women and the Law in Virginia that is to be published by the Virginia Women's Bar Association.

After graduation from Marshall-Wythe and passing the Bar in February of 1976, Everett P. Shockley was employed by the law firm of Frith & Pierce in Blacksburg, Va. In September 1976, he opened his own general practice in Dublin, Va., where he is now a sole practitioner.

Sandra R. Spooner is currently clerking for the U.S. Court of Claims in Washington, D.C. She will begin work as an attorney at the Department of Justice in the Attorney General's Federal Clerk's Honor Program in the fall.

In searching for graduation dates for this column, we discovered several discrepancies between the information supplied and our computer printout. Please excuse any resulting error and assist us in the next issue by including your year of graduation with your information. It will be appreciated.
They thought it was murder......

CERTIORARI

by Andy Thurman,

NOTE: A tag line is necessary with this tale, as with all others of its genre. The characters may bear some resemblance to real people; however, this similarity is merely coincidental. Moreover, the events are the "stuff that dreams are made on".

Lieut. Evers, Robbery-Homicide, sat across the stained wooden table from the young man and stared patiently at him. Around them vending machines hummed; the several other tables in the small room were newspaper-littered but empty. Yet there were many other men about; men in the hallway outside the room, men in the four adjacent rooms, and men on the wide stairway that ended directly in front of the one occupied table. Most of these men were in uniform. The two, sitting men were outwardly calm, but the tension produced by unusual events occurring in the very early hours of the morning filled them even though both were used to it. Lieut. Evers fetched a small, weary sigh, shifted in his seat, and spoke, "So tell me about it."

"Everything?" asked his companion, whose name was John Quintus Smith IV.

"Everything," Lieut. Evers tiredly replied.

It was late at night, almost morning, and the campus was lonely and deserted. The small law school building was dark; only the library lights on the first floor and the dim shuttered lights of the third floor were on. The stairway inside the building was lit only by the ethereal red glow of the exit signs shining over the landing doors.

On the third floor the landing had been widened and converted into a lounge with several tables and vending machines. This room was brilliantly lit but unpopulated except for a single man sitting at a table facing the stairs with a pile of books in front of him. He was reading intently from a particularly mammoth volume with the legend 'Constitutional Law' etched on its spine. Although his clothes were expensive and clean, his appearance was disheveled; there was a light stubble on his chin and cheeks, his short hair was in disarray, and he often took off his horn-rimmed glasses and bit the ear-pieces in frustration. He was an amateur criminologist and first-year law student, one John Smith by name, and on the morrow he faced that most harrowing of all experiences, the Constitutional Law exam. He was, insofar as a naturally plegmatic nature can be, frantic. He had chosen the lounge to study because it was empty and quiet, yet, somehow comforting. The stack of recent newspapers reminded him of a saner, if equally depressing, world, and the constant hums and clicks of the coffee, soda, and candy machines kept him company. Only occasionally would another sufferer ascend from the library and chat briefly.

Although the floor was quiet, three of the other rooms were occupied. To the left of the landing-lounge, Jack Riley, the third-year law review editor worked in the journal's office. To the left of that room was the cubbyhole of the Women-in-Law Organization; second-year student Mary Lee studied for her Trusts and Estates exam there. Across from that was the office of Constitutional expert, Thomas Jeff, who was up late diligently grading an exam. The last room on the floor, the office of the law school's one genuinely eccentric professor, Emerson Holmes Filler, was empty.

John Smith's agonizings over Griswold v. Connecticut were interrupted by a step on the stair, and he glanced up. The strain of exams had taken its toll on his usually unimpeachable self-control; for he allowed the smallest quirk of distaste to twitch his lips. Coming up the stairs towards him was Emerson Holmes Filler.
Emerson Holmes Filler was a legend at the law school. His father had been mildly insane, his grandfather a raving lunatic, and many of his colleagues and students felt that he followed in their footsteps. He was a tall, lean man with beautiful androgynous features and thick blond hair that peaked several inches above his skull and fell in monumental and skillfully arranged curls to his shoulders. He invariably dressed in exquisite three-piece suits, silk shirts and ties, and cowboy boots. He was one of the country's leading experts on Constitutional Law and was resented by his colleagues and universally despised by his first year students, including John Smith, whom he cruelly tortured in Con Law between sips of Hawaiian Punch, reputedly the only liquid he allowed to pass his lips. He had had three heart attacks, although he was only thirty. He was vain, pompous, sarcastic, witty, and a bit of a boor. As he came up the stairs John murmured politely.

"Good evening."

Filler did not respond, but his glance fell on John's open text and he gave a slight smirk. He walked on past John, bought a cup of coffee, and went on into his office. John paused for a moment, irritated by the professor's manner, but then continued with his studying. He had read but little, however, when Filler reappeared and said preemptorily,

"I've spilled some of my coffee and need something to wipe it up."

John was annoyed, but he looked about him helpfully. "This newspaper might serve," he suggested, handing some to Filler.

The professor took it and started to go back to his office, but then he paused. "Studying for my exam?" he inquired.

John nodded. Fuller hesitated, then turned to go back to his office. "I shouldn't worry about it too much if I were you" he said almost kindly over his shoulder as he went.

HE WAS A TALL, LEAN MAN WITH BEAUTIFUL ANDROGYNOUS FEATURES AND THICK BLOND HAIR...

The suggestion did little to allay John's anxiety. He studied for a bit longer before he decided that Griswold was completely incomprehensible to him. He determined to ask Riley, the law review editor, for some assistance. Ponderously he got up; he was a big man and had been sitting for a long time. Leaving his book, he walked to the door of the law review office and hesitated; he recalled that the one blight on Riley's record was a failure in Constitutional Law. As he paused, his gaze strayed idly down the hall. Filler's
office door was open and the room brightly lit. John's attention was caught by the odd position of the man himself; he was sitting with his head on the desk at an odd angle. Curious, John walked softly down the hall and stopped in the open door.

Professor Filler was seated in his desk chair with his head and shoulders aspawl the desk top. His left arm hung down by the chair; his right forearm rested on the desk with his hand lying on the bottom of the page of an open textbook. John mechanically noted, exams on his mind, that the book was the Con Law textbook open to Buck v Bell. Over on a side table in front of the couch was an empty coffee cup.

"Professor Filler?" he called softly. He went quiet for a moment, listening. There was no sound of the heavy breathing of sleep. Stepping gently, he walked over to the desk.

Very gently John reached across to Filler's throat and laid his fingers lightly on it. There was no pulse. John stood very still for a moment, looking slowly around the room; then he turned and walked quickly to the pay phone in the lounge. He called an ambulance and the police. These officials arrived quickly and soon announced their verdict. Professor Filler was dead, killed by a massive overdose of hyoscine, a heart depressant and eye medicine, administered in his coffee.

"Well," said Lieut. Evers, "that was very vivid, and helpful, I think you have a talent for third-person description."

"Thank you," John modestly replied.

"You also have a talent for stumbling across murders. Are you going to solve this one for me or do I have to do it myself?"

"I would be delighted to assist you, as usual," John smugly countered. "Is there any way I can be of service?"

Lieut. Evers chuckled. "Why don't you tell me your theory of the crime?"

"Certainly," John began, a trifle pompously. "There are five possible suspects."

"Five?"

"Of course. Riley, Lee, Jeff, myself, and Filler. No one else came by me on the stairs, assuming my testimony is reliable."

"True," said Lieut. Evers, "but suicide is unlikely."

"Why?" John asked, mildly surprised at his companion's sure tone.

"Poison is not the usual choice of male suicides, and almost every suicide leaves a note. 98%. The odds are strongly against it."

"Very well," John resumed, "to continue. Motives for the four potential murderers: Riley, law review editor, failed first year Con Law and had to repeat, he hated Filler. Lee, second year female, had been seen, once or twice, in perfectly innocent circumstances, with Filler, and the gutter mind of the amateur criminologist like myself leaps immediately to illicit liaisons and smouldering passions. Jeff, resentful colleague, upstaged in his field by a younger man. And finally Smith, first year student familiar with murder and police procedure who despised Filler and was in mortal terror of his Con Law exam. Opportunity: apparently the only chance a potential murderer had to do the deed was the brief period when Filler left his office to get something to clean up the spilt coffee. If Smith's testimony is reliable, which, of course, it is, then Smith is out, as is Riley, who would have been seen by both Smith and Filler going to Filler's office. The other two are possibles. There you have it."

Evers smiled. "Thanks, Sherlock. I must admit that I think I know you well enough to know that you wouldn't kill over a law exam."

"Well," John considered the proposition, "I might, and I've never been a suspect before; but on the whole I'm relieved you think so."

"Do you know who did it?"

"I think so." John said, more seriously. "Well?"

"It was suicide, of course," John smiled at Evers' outraged incredulity, "for both of the reasons you mentioned; the poison and the note."

"Elaborate, please." Evers growled.

"Well, poison is exactly what a man like Filler would use. I told you he was vain; he wouldn't want to mess himself up. But more to the point, there is the Hawaiian Punch fixation."

Evers groaned, "Of course!"

"Exactly. If a murderer knew that Filler had a bad heart, which was common knowledge around here, so hyoscine would kill him, he wouldn't put it in a cup of coffee, which Filler reputedly didn't drink, especially if it wasn't on his desk. But what clinches it is the note."

"He didn't leave one." Evers was confused.

"Yes, he did." John flipped quickly through his Con Law book and stopped at a case heading. "Buck v Bell, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927)."

He passed it to Evers. "An interesting case. Oliver Wendell Holmes, Filler's namesake, you know, in the opinion that was such a blight on his humanitarian reputation." Evers looked mystified. "Filler had his hand near the bottom of the page. There's a line there I've marked."

Evers traced down the page with his finger and stopped at an underlined passage. He read it aloud, sudden comprehension in his voice.

"Three generations of imbeciles are enough."

"Yes, indeed, or so Filler thought: grandfather, father, and now him." John smiled in spite of himself. "You know, I'm inclined to agree with him."

notes that such a strict approach was followed through the nineteenth and most of the present century.

A review of the historic struggle to find the appropriate standards for defining due process and fundamental fairness is beyond the scope of this article, but it is sufficient for present purposes to say that the opinions of Black and Harlan depict the outer parameters of the debate. It is interesting to note, therefore, that Justice Fortas' opinion does not gravitate to either extreme, but rather stakes out a moderate middle ground. While the majority selectively incorporates and Black urges absolute incorporation, Fortas resists the trend of rigidly imposing the exact pattern of federal proceedings upon the 50 states. He concludes that such federal requirements as unanimous verdicts or a jury of twelve "are by no means fundamental--that they are not essential to due process of the law--and that they are not obligatory on the States."

Section C of the memorandum completes the review of Fortas' judicial restraint with an examination of his aversion for absolute rules. Fortas has given no comfort, the report states, "to those who hoped he would subscribe to the broad absolutes which have characterized many areas of the Court's work." Rather, he has revealed "a subtlety and lawyer-like preference for moderate positions which have been wholesome additions to the Court."

In support of this proposition, Avery v. Midland County, 390 U.S. 474 (1968), involving extension of the one man, one vote rule to local government, is cited. Here, Fortas argued that the Court should abstain from deciding the issue until the Texas courts had presented their "final product" for approval. His underlying purpose is again the rejection of a "rigid, theoretical, and authoritarian" approach to local government problems:

In this complex and involved area, we should be careful and conservative in our application of constitutional imperatives, for they are powerful . . . . It is our duty to insist upon due regard for the value of the individual vote but not to ignore realities or to by-pass the alternatives that legislative alteration might provide.

This aversion to overly simplistic rules, fashioned by majorities he sometimes found too unrestrained, is also reflected in the areas of criminal procedure, antitrust, subversive activities and libel of public officials. Berger v. New York, 388 U.S. 41 (1967); Katz v. United States, 389 U.S. 347 (1968); Terry v. Ohio, 392 U.S. 1 (1968); and United States v. O'Brien, 376 F.2d 538 (1st Cir. 1967), are all presented as examples of Fortas' preference for moderate positions in the field of criminal procedure. Each case in the series involved framing approval of governmental procedure with carefully prescribed conditions. Dennis v. United States, 341 U.S. 494 (1951), is set forth as proof that in the area of subversive activities, Fortas entertained precepts "some might consider 'old fashioned'." Here, he declined to reach the constitutional issue raised by Black and Douglas, adhering instead to the majority view that Communists prosecuted for filing perjured affidavits "could not defend their false statements on the ground that the statute requiring such affidavits was unconstitutional."

Thus far, discussion has centered around cases noted by Judiciary Committee supporters of Fortas, but generally ignored by his protagonists. There is, however, another body of decisions seized by the nomination opponents to demonstrate that Fortas is one of those judicial activists who, in Senator Ervin's words, "toy with the Constitution as if it were their personal plaything instead of the precious inheritance of all Americans." This group of cases includes four categories which attracted special concern: criminal procedure, subversive activities, pornography, and the State-Federal relationship.

As might be expected, Fortas' role in the Warren Court's pioneering criminal justice developments provoked the most vituperative attacks. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967); and most importantly Miranda v. Arizona, 384 U.S. 436 (1966), were typically credited with creating artificial rules of evidence outside the scope of the intentions contemplated by the original framers of the Constitution. In discussing these four decisions, Senator Ervin summarized the constitutional and social policy arguments leveled against Fortas' work in this area of criminal justice:

These newly created rules are repugnant to the words and history of the fifth and sixth amendments upon which they are allegedly based, and permit multitudes of murderers, rapists, burglars, robbers and thieves to go unwhipped of justice. In the final analysis, these decisions rest on the strange assumption that society needs little protection against criminals, but criminals need much protection against law enforcement officers.

Ervin's language has its roots in the belief that the maintenance of public order and the protection of person and property that it entails is a fundamental priority of government. At the time of the Hearings, the incidence of civil disorder approached previously unknown levels of intensity. The Watts holocaust, the widespread riots of the summer of 1967, the massive unrest which followed Martin Luther King's assassination, and the violence surrounding the contemporary Democratic Convention all were etched clearly in the minds of Ervin and his committee allies. Moreover, the rising crime rates which every large city in the nation experienced reinforced the argument that the restoration of law and order was a paramount concern of the general public. Thus, the basic complaint thrust against Fortas was that some of the decisions he had
ABE FORTAS (cont. from p. 21)

helped formulate retarded this restoration. Following this critical approach, Senator Thurmond attacked *Miranda v. Arizona*, 384 U.S. 436 (1966), because it freed a twenty-three year old man who had confessed to the kidnapping and rape of an eighteen year old girl. As Thurmond interpreted the five-four decision, it "completed the destruction" of voluntary confessions in criminal cases. Justice White's strongly worded dissent was carefully noted: "In some unknown number of cases the Court's rule will return a killer, a rapist, or other criminal to the streets and to the environment which produced him, to repeat his crime."25

Fortas emerges as an unfortunate pawn caught between conflicting ideologies . . .

At this point, reference should be made to the second exhibit introduced into the Record by Senator Hart, a document entitled "Memorandum Re Judicial Performance of Mr. Justice Fortas." Here, the advocates of Justice Fortas directly confronted the criticism aimed at specific decisions. Since Fortas acted in accordance with a tradition established by Frankfurter and would not express his views about these particular cases, the memorandum furnishes what may be classified as a hypothetical justification of Fortas' participation in them. The memorandum particularizes "four relevant considerations" about the *Miranda* decision which the Fortas defenders felt were not adequately recognized by Thurmond, Ervin, or their allies.

First, it is aimed that the extent to which the *Miranda* decision was a departure from existing law was greatly exaggerated. Chief Justice Warren's opinion for the Court is quoted to demonstrate that "the Federal Bureau of Investigation has compiled an exemplary record of law enforcement"26 while using essentially the same warnings required by the majority in *Miranda*. Additionally some state supreme courts had already come to the same conclusions about what Due Process required before the *Miranda* decision was handed down. In any event the memorandum continues, "When Justice Fortas came to the Court, Mallory, Escobido, and other cases had already been decided, foreclosing some of the possibilities that might otherwise have been open to him."

Ervin and Thurmond also denounced the tendency of cases like *Miranda* to let murderers and rapists "go unwhipped of justice," to put them back on the street without rehabilitation. The memorandum sharply disputes this assessment:27

The *Miranda* case itself and its three companion cases, *Westover, Vignera*, and *Stewart*, dramatically illustrate the over-statement of the "need" for confessions in law enforcement. All four of these defendants have been or will be retried even though the confessions they made to the police are no longer admissible in evidence. Two of four defendants, Miranda and Westover, have already been retried and convicted of the same offense for which they were originally charged, and have received the same sentences originally imposed. 28

Finally, the memorandum notes that, while the five man majority reached a decision on the issues here, the Court remembered its own role in our Federal system, and "specifically invited the Congress to enact appropriate legislation dealing with confessions and police interrogation." 29

The reason that Fortas' record on the Bench was treated superficially and occasionally arbitrarily is enshrouded in the political mist which hung thickly over the Hearings. Out of this haze of conflicting political pressures, certain assumptions may be drawn.

First, it seems clear that the Fortas critics were obliged to give expression to their constituents' dissatisfaction with the effect of the Warren Court's impact on American life. A primary concern of these critics was to act as alter ego for the public they represented and to articulate the fear and distrust of this Court's pioneering developments in criminal rights, obscenity adjudication, and other controversial areas. Consideration of the scope of this criticism inexorably leads to the conclusion that this distrust and dissatisfaction was directed primarily at the Warren Court as a whole.

Fortas' record did not lend itself entirely to inclusion in this broad object of attack, but the opposition was composed of men extraordinarily adept at manipulating political advantages. These men innately sensed a vulnerability in the Fortas nomination. From the beginning they seemed to realize that the rising tide of sentiment against the progressive changes wrought by the Warren Court would coalesce with the doubts surrounding the nominee's close relationship to President Johnson and afford them an opening. In this scenario, Fortas emerges as an unfortunate pawn caught between conflicting ideologies. He was not the judicial extremist characterized by the opposition, but since he was not the conservative, tradition oriented man they yearned for, he was castigated for his views. Fortas' judicial record may have warranted his nomination for Chief Justice, but other issues, primarily his personal history, provided the opposition with the seeds of resistance.

Cont. on page 24
MERE RATIONALITY WITH BITE

A law professor's warranty,
whether express or implied,
Extends to the student
who has reasonably relied.
To study legal writing,
Torts, or Contracts,
A student must do more
than mere finding of facts.
Who is this enigma,
this reasonable man,
Whose conduct we must emulate
or act better than?
Formalities of law school,
"yes, sir" and "no, ma'am,"
Are not the best equipment
to pass the bar exam.
The library regulations,
no smoking, eating, or drinking,
Are effective preventions
of concentrated thinking.
In the dead of winter,
amid sniffles and sneezes,
All of us have learned
about the loathsome diseases.
Between textbooks and hornbooks
supplied by Mr. West,
With our Gilberts and Marty-Z's,
most will pass the tests.
Law school, however,
is not as bad as it seems,
For being attorneys
is in all of our dreams.

Cyndie Baskett
LEGAL PROFESSION (cont. from p. 9)

How did the lay leaders of Virginia feel about advertising by lawyers? The report on the conference stated: "While there was a general reaction against aggressive advertising by lawyers to promote the use of their services... there was general agreement that much more communication and information was needed to match the client with the proper attorney to handle his particular problem and make the public aware that legal services are needed in certain areas. Present conditions leave the public in a state of ignorance...." There was no strong desire to see fees advertised, but the conferees did believe that there should be law lists available to the public that give the lawyer's name, background, experience, specialty and representative clients.

Hugh Patterson, the Norfolk lawyer who along with John Ryan, an adjunct on this faculty, directed the taking of the Hart Survey and organized the Woodberry Forest Conference, has concluded that "a shroud of skepticism covers the profession." It is that skepticism that law students as well as practicing attorneys should understand. Has the nature of the legal profession and of legal education resulted in an abundance of practitioners who are insensitive or unaware of public concerns, or unaware of the professional restraints placed upon them in consideration of the licensed privilege of monopoly?

There is evidently a wide gap of understanding between what the average lawyer sees as his or her role and duty, and the public perception of whether that role and duty are being fulfilled. As much as we in the profession may relish the mysticism of our language and the elitism of our calling, there is an evident need to provide the public with information about what we do and why, where and how to select a competent attorney and to assure that the products of our law schools and those in the practice are both ethical and competent.

The implicit warnings of the Hart Survey and the Woodberry Forest Conference are not new. In 1965, Justice Lewis Powell, then President of the American Bar Association, speaking on The State of the Legal Profession said: "The bar enjoys the privilege of self-discipline but along with this privilege there is a commensurate responsibility to protect the public from attorneys who are unworthy to practice."

William B. Spong, Jr.

ABE FORTAS (cont. from p. 21)

These other factors were skillfully developed and eventually enabled the opposition to gather a momentum which made the inadequacies of their criticism of Fortas' jurisprudence less noticeable. In the fall of 1968, the opposition reaped the harvest they had worked for over the long summer — Fortas, the moderate activist, was forced to withdraw.

FOOTNOTES
4. Id.
5. Id. at 8.
6. Hearings at 1110, 1111.
7. Id. at 1110.
8. Id. at 1111.
9. Id.
10. Id.
11. Id. at 1115.
12. Id.
13. Id.
14. Id. at 1112.
15. Id.
16. Id.
18. Id. at 175.
19. Hearings at 1112.
20. Id.
21. Id.
22. Id. at 1113.

Richard Dubin

The following sentence was lifted verbatim from a recent recruitment letter:

Again, I am looking for currently available applicants, law students, and people who will be graduating in May or June.

"Yes, Virginia, there is a difference."
THE MARY AND WILLIAM LAW SOCIETY

The Mary and William Law Society, an organization at the Marshall-Wythe School of Law, was recently formed for the purpose of focusing upon legal issues and areas of interest which are of particular concern to the women at the Law School.

Last spring, the Society co-sponsored the First Annual Virginia Law Women's Symposium ("Women Talking About Law: Getting In, Getting Out, and Getting On") with the women's groups at the University of Richmond and the University of Virginia. This year's Symposium, entitled "Sexual Assault: Psychological, Judicial, and Legislative Perspectives," is being sponsored by the Society and will be held at the Law School on Saturday, April 16, 1977.

Although the Mary and William Law Society is open to all law students and faculty, the present membership is entirely female. The Society sponsors monthly speakers' programs and occasional social events to which all members of the law school community are invited.

SALLY ANN O'NEILL, this year's president, is a Juris Doctor candidate for May, 1977. She graduated cum laude from Elon College (North Carolina) in 1970, receiving a Bachelor of Arts degree in Social Science, and from Memphis State University in 1972 where she received a Master of Arts in Political Science.

Sally has been working as a law clerk in the Office of the Chief Counsel, National Aeronautics and Space Administration, Langley Research Center in Hampton, Virginia, and upon graduation, plans to practice law in Dallas, Texas.

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Amicus Subscriptions
(LAW SCHOOL NEWSPAPER)

The Amicus Curiae is now soliciting subscriptions for the 1977-78 academic year. Subscription cost for graduating students is $7.50 per year. The price of a subscription will otherwise be $8.00. To subscribe, complete this form and send the detached version to the Amicus Curiae, Marshall-Wythe School of Law, Williamsburg, Va. 23185. Graduating students should drop off the form in the Amicus Curiae box in the Law School office.

Name __________________________________________
Address _________________________________________
Amount Enclosed __________ Please Bill Me._________
The Marshall-Wythe Chapter of the Black American Law Students Association (BALSA) is now in its fourth year. BALSA is a small but diverse group of minority students dedicated to the development of professional competence in the field of law and united by two broad goals: the minimization of extraneous obstacles to individual achievement in the law program and the maximization of minority input into the American system of jurisprudence. Membership in BALSA is by voluntary association and in compliance with guidelines established from time to time. Officers of BALSA are elected for a one year term. This year’s officers are Wilford Taylor, Chairman; Bryan Milbourne, Secretary; and Carol Grant, Finance Officer.

BALSA has been privileged to work with other law school and college groups this year. In an era of painfully limited resources, BALSA has stressed the necessity of inter-group cooperation and reinforcement. We anticipate that this cooperation will continue.

Realizing that the law school administration cannot be responsive without input, BALSA continually strives to identify and elucidate the particular concerns of black students at the school. Financial woes still threaten completion of a three year term for many of the group’s students. Minority recruitment has not yet pushed black enrollment beyond the 4% level, and the absence of a black professor from the Marshall-Wythe faculty does not carry positive connotations. These lingering, prickly problems will be tackled afresh each year until they are resolved.

BALSA measures its vitality by the participation of its members. Consequently, the organization has sponsored or endorsed a broad spectrum of activities throughout the academic year. These activities have been characterized as “total law exposure on a shoestring.”

The year began with a picnic style orientation program for first year students. SBA and BALSA members fielded the neophyte’s questions with the authority and finesse that are common among upperclassmen. BALSA’s next event was a reception for William and Mary’s black undergraduates. The reception provided an opportunity to make acquaintances and to identify prospective Marshall-Wythe students. In November, BALSA sponsored a topical symposium on the delivery of justice. Panel members included a judge, prosecutor, public defender, and academician. In March, BALSA sponsored a day-long juvenile law symposium. The two panels of the symposium were comprised of recognized specialists in the field of juvenile law. The year’s activities culminated with a farewell reception in April for BALSA’s graduating students.

Mr. Taylor received a master’s degree in Finance and Economics from the University of Richmond in 1975. He enrolled in Marshall-Wythe where he expects to complete requirements for the Juris Doctor degree in 1978. Mr. Taylor has served as a student representative interviewing prospective faculty members. He has participated in the post-conviction project and will work as an intern with the Hampton Commonwealth Attorney’s office during the summer of 1977. He plans to settle in the lower peninsula area of Virginia.
INTERNATIONAL LAW SOCIETY

This year the Marshall-Wythe International Law Society experienced its greatest increase in membership since its inception four years ago. This increase is not surprising since the ILS has been extremely active this year. Ten lectures and cocktail parties have been sponsored or co-sponsored by the ILS, have increased the exposure of Marshall-Wythe students to practitioners and scholars of international law, and have permitted firms, governmental agencies, and international organizations to meet prospective future associates.

This year's regular series has included discussions led by various distinguished speakers, a panel discussion at Virginia Institute of Marine Science, and lectures. The various speakers came from the Hebrew University in Jerusalem, U.S. State Department, United Nations, private industry, CBS News, and Washington, D.C. law firms.

Four officers have guided the ILS this year in its efforts to meet the interests of the William and Mary law students. They are Patrick McDermott, President; Wally Kleindienst, Vice-president; Tim McDormott, Secretary; Sarah Slesinger, Treasurer.

PATRICK McDERMOTT, this year's president, did his undergraduate studies at Montclair State College, The Sorbonne, and the Royal Conservatory of Music and received a Bachelor of Arts in French.

Mr. McDermott is a candidate for a Juris Doctor degree at the Marshall-Wythe School of Law in May 1977. He will practice law with a firm in Hampton following his graduation from Marshall-Wythe.

ENVIRONMENTAL LAW GROUP FOCUSES ON PUBLICATION, AND SPEAKERS

The growing awareness of the necessity of balancing the technological needs of modern industrial society with the natural and human environment has resulted in an ever-increasing number of federal, state, and local regulatory programs and statutes, ranging in scope from the management of the coastal zone to the protection of endangered species. These regulatory programs and statutes, coupled with the litigation which has resulted from them, have made environmental law one of the fastest growing areas of the legal profession.

The Environmental Law Group is composed of students interested in new developments in environmental law. The activities of the Environmental Law Group center on two major areas of concern. The first of these is the publication of the Environmental Practice News, a review of recent developments in environmental law written especially for the practicing attorney. The articles comprising the Environmental Practice News are written by members of the Environmental Law Group and strive to present a balanced view of new legal developments in the field.

The second major activity of the Environmental Law Group is the sponsorship of a speaker's program to promote the discussion of important issues in environmental law. Past speakers have included representatives from law firms, government, and industry, and often their lectures have sparked lively exchanges between speaker and audience.

STEVE ORMOND, President of the Environmental Law Group, graduated with honors in 1974 from Michigan State University where he received a B.A. degree in International Relations.

Mr. Ormond entered Marshall-Wythe in 1974 and expects to receive a Juris Doctor degree on May 15, 1977. His law school activities have included membership in the Law School Christian Fellowship, Environmental Law Group, and on the staff of The Colonial Lawyer editorial board. Also, Mr. Ormond has worked as a Law Library Assistant.
CLINICAL
LEGAL
EDUCATION

Practical Experience
Before Graduation

The student comes into my office. "Do you have a minute? I want to do third-year practice." For the next fifteen minutes we talk about the course requirements in Virginia for third year practice; what courses are offered in which there's a chance that one might actually practice in court; and what other ways there are to get practical experience before graduation. This scenario was repeated numerous times. It raised for me two questions. First, what law students and others think is needed from legal education which is not now being provided. Second, within the realities of law school and law practice, what can be expected.

The underlying issue has been there since the birth of law schools as we know them today and has been most often articulated as to whether law school is a trade school or a graduate school. This internal tension has its genesis in the history of law schools and their struggle for both hegemony over access into the profession and a secure and respected place within the academic community. The campaign to acquire both the monopoly and respectability was long and hard fought and appears to have left legal education with an innate hostility and disdain for those aspects of law which deal with practice. Legal education's position has been that most of those "practical" aspects must be left to the bar since law schools do not hold themselves out to be "lawyer schools".

It is my position that if law schools "do not hold themselves out as lawyer schools" then there is very little reason why their diploma and the final law school exam, i.e., the bar exam, should be the prerequisites for becoming a lawyer. If the law schools can or will not shoulder a substantial part of the burden of assuring that lawyers have at least a bare minimum level of competence to practice law, then there is little justification to bestow upon them the entire benefit of having a monopoly on the access to that practice. If law schools are truly graduate schools, then let them compete in the intellectual arena with other graduate schools (e.g., political science, history or sociology) without the overwhelming advantage of holding the keys to the Kingdom of Practice.

The debate would take on quite a different cast if the burden of proof was shifted from those attacking the citadel, to the law schools themselves to justify why the traditional entry requirements, teaching methods, courses and length of legal education should be the prerequisites for admission to the bar. The illogic of the burden in the present debate (which is often the case in movements against the status quo) is that for what appear to be unjustifiable historical reasons law schools now sit virtually alone in the middle of the road to the practice of law and insist on framing the debate in terms of convincing them to get out of the way or at least move over. This is, of course, a very natural conservative reaction, but "stonewalling" is not an appropriate response.

The traditional law school position set out above does not accurately represent most law schools' recent stance. They have in the last ten or so years focused on clinical education as at least a partial response to these challenges. In addition to the debates outlined above and the millions of dollars the Ford Foundation has funneled into clinical programs through the Council on Legal Education for Professional Responsibility, Inc. (CLEPR), there are at least four other factors which I believe have given impetus to clinical education. First, the usual (and I think often inapposite) model of the medical profession is readily available. One would not want to be operated on by a surgeon who had never in the course of his medical education been in an operating room, or seen an operation, much less, actually performed one, but had learned how to operate by classroom instruction and then, after graduation, by the experiential method of performing operations and then (hopefully) first recognizing and then learning from his mistakes. Medical education has a large clinical component to deal with the needs of the practice of medicine and, therefore, so should legal education.

By John Levy
Second, the accutely felt need of law students to acquire some of the mundane skills and knowledge to ease their transition into the profession has combined with the malaise of the second or third year to create great pressure for clinical courses. The consensus as to the value of the case method after the first year fell apart long ago. In the mid-30s a survey of Harvard Law School students found that they thought the case method should be dropped after the first year! Jerome Frank posited that the case method's goal of teaching one to "think like a lawyer" could and should be accomplished within six months.

Third, the social activism of the last 10 or 15 years, laced with a dose of anti-intellectualism, has forced much of academe including law schools to deal with practical problems (or, if you will, reality). The legal manifestations of this activism such as the right to counsel cases and the poverty law-legal services movement, has opened up areas of practice which lend themselves to field work by law students in clinical courses.

Finally, the theoreticians of the clinical movement have persuasively argued that primarily (or perhaps, only) through a clinical or practical setting can a student acquire a deeper theoretical understanding and examine "some of the most basic questions about the relation to the legal order of language, symbol, myth and social consciousness." Theories such as these gave the Ford Foundation and CLEPR the rationale for providing the seed money for the clinical movement.

My short tenure as a law teacher and my experience in legal services programs working with recent law school graduates and their inadequacies, both real and imagined, has confirmed for me the need for and worth of clinical education.

After graduation our students will be plunged into a welter of impressions, processes, roles and obligations. The most important questions they will face will not be concerned with the coherence of doctrine or the skill of case analysis, but with making sense of this experience, of coping with it, understanding it and growing within it, in the context of the particular professional role they have chosen to perform. The breadth, depth, and applicability of this understanding will be a function, in large part, of whether and how they have learned to learn.

Clearly, there seem to be a great need by and for law students to "conceptualize the way in which they (as an individual) shall become working lawyer-professionals." The clinical methodology, i.e. the students' assumption and performance of various roles within the legal system and the use by the teacher of this experience as the subject and focal point of intellectual analysis, provides the student a structured context within which he or she receives feed-back and constructive critical evaluation of his or her functioning as a lawyer. This will most likely be the only time in their professional lives when this is available to them. This process is both intellectually and emotionally challenging.

The traditional subject matter of clinical legal education - interviewing, counseling, negotiating, advocacy, etc. - provides not only knowledge about, and practice using, much needed and desired skills, but the context within which very basic concerns can be raised. The learning which takes place in the clinical context appears to be on a different level than cognitive (theoretical) transmission of knowledge and ways of analysis. The clinical experience is integrative, in that substantive legal knowledge, analysis and
interpersonal skills all must be coordinated within the ubiquitous constraints of time. The ethical dilemmas which pervade the lawyers relationships with clients, peers, courts and society in general are experienced. The Code of Professional Responsibility’s broad and sometimes inconsistent mandates are confronted. Choices are made and the student must live with the consequences.

The advantages of clinical legal education are at this time mostly just possibilities. Law schools, even the richest, have a finite amount of money to spend. The student-faculty ratio which is a prerequisite for the learning experience described above, is not within the ability of law schools as presently structured. There is great pressure to expend resources and time on the study of the ever expanding body of the law and its concomitant complexity. The other side of the equation also presents problems. The present day practice of law in many areas does not lend itself to either student participation or controllable and meaningful educational experience.

It seems clear to me that there needs to be some significant changes in both legal education and the practice of law. Law schools have started to respond by experimenting with new methods. The process has begun to try to find a creative way to realistically use the tensions between the academic and the practical, and the case and lecture method and the clinical. This process opens up exciting possibilities for ideas and input from all.

It is perhaps obvious that the students who came into my office inquiring about third-year practice, left with some feeling of bewilderment. The exact responses to their concerns are far from clear.

John Levy

FOOTNOTES

1. See generally, 3 Learning And The Law No. 2 (Summer 1976).
3. There are a few states which still allow reading law as an alternative to law school as a prerequisite to taking the bar exam. Virginia does, at present, provide for this route. Section 54-62(2), Code of Virginia; Rule 8.C. Rule of the Virginia Board of Bar Examiners. However, the Virginia General Assembly appears to be on the verge of removing this option.
6. Auerbach, Unequal Justice (1976). Auerbach presents a convincing case that a major factor in the growth of university based law schools was racism (or in Auerbach’s terms “ethnicity.”)
7. Stevens, supra note 4, at 51.
8. “Intelligent men (sic) can learn that dialectical technique in about six months.” J. Frank, Courts on Trial 237 (1949).
15. Bellow, supra note 11, at 379.

John Levy, during the past year, has been Director of Clinical Education and Visiting Associate Professor of Law at Marshall-Wythe School of Law, The College of William and Mary, Williamsburg, Virginia. Prior to this year, he was the Director of the Neighborhood Legal Aid Society, Inc. in Richmond, Virginia.

After receiving his B.A. degree from New York University, Mr. Levy joined the Peace Corps and served in Nigeria where he taught English and African History in a secondary school. Following his tour in Nigeria, Mr. Levy returned to Syracuse University to work on his Juris Doctor degree which he received in 1968.
The Colonial Lawyer is published at the Marshall-Wythe School of Law of the College of William and Mary. The opinions expressed are those of the writers and do not necessarily reflect the position of the school.