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The Virginia Supreme Court, which first convened in Williamsburg in 1779, is 208 years old this year. For 206 of those years, it was the only appellate court in Virginia. Since 1928, the Court has been composed of seven justices, and until 1985, the seven justices constituted the sole appellate capacity in Virginia, a state which, by 1985, had 5.7 million citizens and 14,000 practicing lawyers.

For a number of years, The Virginia Bar Association advocated the establishment of an intermediate appellate court, and in 1985, this advocacy bore fruit. The Virginia Court of Appeals was created, but its jurisdiction was constricted by political compromise. The Court of Appeals has jurisdiction to hear appeals of right in domestic relations cases, industrial commission cases, and administrative agency cases, and jurisdiction to grant petitions for appeal in criminal cases other than death cases. Curiously, the civil litigant, dissatisfied, say, with the amount of his alimony, is given an appeal of right, while the criminal defendant, dissatisfied, say, with his life sentence to Spring Street, must petition for an appeal.

The coming of the Court of Appeals was heralded with great expectations by impatient civil litigants, who had often waited up to three and one half years for a Supreme Court decision, and by their counsel, who had often labored late in the law libraries of the state, only to find no Virginia cases on point. Notwithstanding its peculiar jurisdiction, the Court of Appeals was expected to relieve the Supreme Court of the huge volume of criminal petitions that it had to deal with. In 1984, for example, the Supreme Court disposed of 815 petitions for appeal in criminal cases, granting 44 appeals and refusing 771. Relieving the Supreme Court of the criminal load was expected to have at least two salutary effects. First, the Supreme Court would be able to grant more petitions in civil cases, thus giving effective appellate review to more civil litigants and explicating the civil law of Virginia in areas where it remains undeveloped. Second, the time required to process a civil appeal from trial court decision to Supreme Court decision would be reduced.

What has in fact happened? The answer may be that it is too soon to tell. But statistics available after two years of operation of the Court of Appeals give no cause for optimism. The 1986 Virginia State of the Judiciary Report reveals:

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<tr>
<td>Granted</td>
<td>186</td>
<td>167</td>
<td>210</td>
<td>191</td>
<td>209</td>
<td>181</td>
<td>138</td>
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<tr>
<td>Refused</td>
<td>457</td>
<td>398</td>
<td>514</td>
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<td>832</td>
<td>1,048</td>
<td>884</td>
<td>771</td>
<td>352</td>
<td>216</td>
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* The statistics are from Figure 10, Supreme Court of Virginia: Petitions Filed, Granted and Refused, Virginia State of the Judiciary Report 1986, p. 32. Figure 10 in its entirety is reprinted below in the Appendix.

These figures show, surprisingly, a decline in the number of civil petitions granted in 1985 (from 209 to 181) and an even more precipitous decline in 1986 (from 181 to 138). Moreover, the percentage of civil petitions granted has not increased—from 1980 to 1985 it hovered around 30%, dropping to 28% in 1986. As might be expected, the number of criminal appeals disposed of has declined sharply—from 815 in 1984 to 221 in 1986. Why, then, has the number of civil petitions granted also declined?

Cynics might suggest that now that the Court of Appeals is in place, the seven justices are working less. No evidence, however, supports this hypothesis. Although the number of Supreme Court cases decided by written opinion declined in 1986 from 174 to 152, the total number of cases disposed of (by opinion and by order) increased from 212 to 240. In any event, the industry of the justices is not necessarily measured by the raw number of cases decided in a given year.
One might also hypothesize that the Court of Appeals has not absorbed the workload it was expected to, but no evidence supports this hypothesis either. The Court of Appeals has certainly been busy. In 1985, 1,648 cases, including 1,092 criminal petitions, were filed there. In 1986, 1,536 cases were filed, of which 1,087 were criminal petitions. These figures suggest that, for the time being at least, a substantial criminal docket has been transferred from the Supreme Court to the Court of Appeals.

Will the Court of Appeals continue to shield the Supreme Court from the deluge of criminal petitions? The State of the Judiciary Report shows the following trend in criminal petitions filed with the Supreme Court:

<table>
<thead>
<tr>
<th>Year</th>
<th>1984</th>
<th>1985</th>
<th>1986</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases</td>
<td>851</td>
<td>121</td>
<td>287</td>
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</table>

The sharp decline in 1985 (from 851 to 121) is explained by the advent of the Court of Appeals. But why the sharp increase (from 121 to 287) in 1986? By 1986 the Supreme Court was beginning to receive a substantial volume of criminal petitions from decisions of the Court of Appeals itself. The April 1987 decision of the Court in *Dodson v. Director of Department of Corrections*, 233 Va. 98, 355 S.E.2d 573 (1987), holding that a criminal defendant is entitled to counsel at all stages of the appellate process, is hardly likely to reduce the number of criminal petitions filed with the Supreme Court. In several years, the number of criminal petitions may build back up to the level that existed before the Court of Appeals was created. It seems naive to expect that the Supreme Court will have more time to deal with civil cases next year than last year.

On the brighter side, the State of the Judiciary Report does show a decline in the Court's backlog, that is, the number of granted cases awaiting oral argument. At December 31, 1986, there were 232 such cases, the lowest level since 1979. The workload absorbed by the Court of Appeals may account for this decline in backlog. Of course, if the Supreme Court grants fewer petitions, as occurred in 1985 and 1986, one would expect the backlog to go down.

And what effect has the Court of Appeals had on the time it takes to process an appeal through the Supreme Court? Here surely it is too soon to tell, since the Supreme Court is still deciding cases that were in the pipeline before the Court of Appeals was created. Recent Supreme Court advance sheets show that many civil cases decided by the Supreme Court in the first half of 1987 were decided at the trial level in the last half of 1983—about three and one half years ago. Absent some improvement, a litigant who loses in the trial court today—if he can persuade the Supreme Court to take his appeal at all—may not get a decision until 1991. To date the Court of Appeals has had no discernible effect on this delay.

Why does it take three and one half years to process a civil appeal in Virginia? In the United States Court of Appeals for the Fourth Circuit the elapsed time from District Court decision to Fourth Circuit decision is usually less than one year. The National Appellate Judge Conference has proposed that 300 days should be the standard from the filing of an appeal until the decision is issued. All agree that three and one half years is far too long, but what can be done about it?

The Virginia Bar Association will try to answer these and other questions about appellate capacity in Virginia. Through our Judiciary Committee, chaired by Edward R. Slaughter, Jr., the Association is studying the appellate process in Virginia to determine what reforms are needed. Legislative and rule changes may well be called for, and if so, specific proposals will be formulated and presented to the General Assembly or the Court.

Chief Justice Carrico recently announced that he is appointing a Commission on the Future of Virginia's Judicial System. This Commission is charged with "the task of defining the demands likely to face the Virginia judicial system in the twenty-first century and of recommending courses of action to address these requirements." We hope that the work of the Bar Association will compliment and dovetail with the
work of the Commission. Lack of adequate appellate capacity in Virginia is a serious problem now. By the year 2000, Virginia's population will grow to 6.6 million persons. Unless changes are made, the problem will only get worse. Within the next year, The Virginia Bar Association hopes to propose constructive solutions.

September 21, 1987

**APPENDIX**

**Supreme Court of Virginia: Petitions Filed, Granted and Refused***

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<td>250</td>
<td>269</td>
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<tr>
<td>Criminal Refused</td>
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<td>73</td>
<td>33</td>
<td>37</td>
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<tr>
<td>Total</td>
<td>1,297</td>
<td>1,268</td>
<td>1,635</td>
<td>1,409</td>
<td>1,263</td>
<td>777</td>
<td>603</td>
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<td>Total Appeals Granted and Refused</td>
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<td>1,502</td>
<td>1,895</td>
<td>1,659</td>
<td>1,522</td>
<td>995</td>
<td>759</td>
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<td>326</td>
<td>280</td>
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<td>41</td>
<td>22</td>
<td>49</td>
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<td>2</td>
<td>2</td>
<td></td>
<td>1</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Total Awarded</td>
<td>37</td>
<td>37</td>
<td>42</td>
<td>23</td>
<td>49</td>
<td>42</td>
<td>45</td>
</tr>
</tbody>
</table>

| Refused                     |      |      |      |      |      |      |      |
| Writ of Habeas Corpus       | 214  | 236  | 277  | 172  | 261  | 239  | 228  |
| Writ of Mandamus            | 75   | 41   | 90   | 64   | 79   | 39   | 57   |
| Writ of Prohibition         | 3    | 7    | 14   | 4    | 8    | 6    | 6    |
| Total Refused               | 292  | 284  | 381  | 240  | 348  | 284  | 291  |
| Total Original Jurisdiction cases Disposed of | 330 | 321 | 423 | 263 | 397 | 326 | 336 |
| Grand Total of Cases Acted On | 1,860 | 1,823 | 2,318 | 1,922 | 1,919 | 1,321 | 1,095 |
| Total Petitions Filed       | 2,091| 2,257| 2,290| 2,073| 1,915| 1,043| 1,232|

* Reprinted from Virginia State of the Judiciary Report 1986, Figure 10, p. 32.

** Writs of Habeas Corpus awarded and made returnable to trial courts.
Participatory democracy, particularly when practiced on the local level, depends on the existence of a populace willing to be both informed and engaged. The private citizen who is sufficiently interested in or concerned about the activities of government to attend and to speak at meetings of governmental bodies plays a number of important roles—watchdog, critic, surrogate for segments of the population not in attendance, sounding board for the public officials who convene the meeting, even potential candidate for public office. Because of the significance of the participation of a private citizen in governmental affairs, legal rules and principles that could act as a disincentive to such participation ought to be scrutinized closely, and such rules should be forced to bear a substantial justificatory burden. Among the attitudes with which one should approach such rules is a receptiveness to reform proposals that alleviate the deterrence to participation without creating significant substantive or administrative problems of their own.

It is the dual thesis of this article that the potential for defamation litigation against a private citizen who speaks out about government could act as such a disincentive, and that a fairly simple tort reform measure can go a long way toward removing or reducing that deterrent effect. A brief statement of the mesh of constitutional and common law rules of defamation will provide a basis for both an understanding of the nature of the problem and an appreciation of the merits of the proposal offered here for alleviating the problem.

The Problem: Insufficient Protection for the Critic of Government

The United States Supreme Court's decision twenty-three years ago in New York Times Co. v. Sullivan transformed the law of defamation from a common law strict liability tort to an action in which constitutional principles now often require a showing of a particular kind of fault-as-to-falsity, the misnamed "actual malice" of the Sullivan decision. Under the regime of constitutional rules derived from Sullivan and its progeny, a defamation plaintiff who can be characterized as a public official or a public figure must prove by clear and convincing evidence that the defamatory communication was made under circumstances that show that the defendant either knew the material was false or published the material with reckless disregard of whether it was true or false. Absent such a showing by the plaintiff, a defendant who has published defamatory material about a public plaintiff is deemed to be entitled to a constitutional protection from liability.

One might object to the shape of the current law of defamation, and from different perspectives might contend that its line of development would have been better if the Supreme Court had been either more restrictive or more expansive in its recognition of the First Amendment privilege beginning in the Sullivan case. An important range of issues surrounds the question of how far beyond the core of the Sullivan fact pattern the specific type of constitutional protection recognized in that case ought to be extended. Those issues, significant though they are, lie outside the scope of this article, for the problem presented by the potential liability of the citizen-critic of government is squarely within that Sullivan core. An examination of this problem reveals that, however well-intentioned the thrust of the Sullivan opinion, the solution adopted by the Supreme Court in that case fails to provide adequate protection for the critic of government.

The central concern of the Sullivan decision was the manner in which a civil action for defamation could be analogized to the criminal prosecution for seditious libel. In the hands of a public official, the defamation lawsuit could be an effective means of stifling criticism of official conduct. Instead of deciding that criticism of public officials was absolutely privileged, the Court created a qualified or conditional constitutional privilege that could be defeated only by clear and convincing evidence of "actual malice." The goal of the Sullivan court—to create a "breathing space" within which vigorous and robust debate about matters of public concern could take place—was not accomplished.
placel0—is served only indirectly by the rules adopted
in that decision, through what might be seen as a
false target approach. Rejecting the argument in
favor of recognizing a constitutional immunity for
speech about official conduct, the Court was neverthe-
less unwilling to allow the difference between truth
and falsity to serve as the determinant of liability vel
non.11 The critical issue of “actual malice”—whether
there was known or reckless falsity in what was pub-
lished about the plaintiff—was developed as a “safer”
basis for determining liability, an issue that could be
left to judicial factfinders with a greater assurance of
reliable and accurate conclusions than would be the
case if the decision were to be solely on the truth or
falsity of the material.12 The expectation of the Sulli-
van majority apparently was that anyone wishing to
say something about the official conduct of a public
official would be undeterred by a libel standard that
made liability turn on the one thing that the publisher
could control, that is, the publisher’s own state of
mind regarding the truth or falsity of the communi-
cation.

There is a degree of naivete in the Sullivan opinion
that makes the decision less compelling as the source
of a rule of law than it may be as an expression of
political aspirations.13 While it is true that the aver-
dance of liability for defamation of public officials
would no longer be permitted to turn solely on the
ability of a publisher to persuade a jury of the truth of
the published matter, the post-Sullivan critic of offi-
cial conduct would still be subject to litigation on the
issue of whether that critic published known or reck-
lessly false statements about the plaintiff. To suppose
that the constitutional protections afforded to the
defamation defendant by the Sullivan opinion would
remove the deterrent effect of the law of defamation is
to fail to perceive the extent to which the fact or even
the threat of litigation can be as powerful a weapon
against a critic as would be the ultimate imposition of
liability itself.14

One might contend that the defamation defendants
best served by the Sullivan rules are those media enti-
ties that have the resources and the professional
interest in resisting defamation claims to the fullest.
With effective legal counsel either in-house or on call,
and with a fairly high stake in establishing and
maintaining the credibility of its publishing enter-
prise, such a defendant may very well receive from
the Sullivan opinion just the assurance that the Court
wanted to create. Sullivan ignores, and the Sullivan
progeny have not adequately protected, those poten-
tial critics of government officials who have neither
the resources nor the institutional stake in the out-
come that would make worthwhile the costly and

often emotionally draining litigation of a defamation
claim. Understanding that the prospects of actually
being liable to the person whose conduct one wants to
criticize are fairly low may be less than totally reas-
suring to someone who also understands that the sub-
ject of the criticism has it within his or her power to
drag the critic into the expensive and risky arena of a
defamation lawsuit.

If the deterrent effect of defamation litigation actu-
ally does pose a problem for critics of government, one
could further suppose that the problem is greatest at
the lower levels of government. The severity of the
adverse effects is enhanced for at least two reasons:
first, critics at the lower levels of government are less
likely to have the resources or the inclination to fight
defamation claims, and second, the necessity for
ordinary citizens’ vigilance and outspoken discussion
of government conduct at this level is arguably even

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Torts and Jurisprudence. He is a member of
the Florida and the Virginia Bars. He received his
undergraduate education at George Washington
University and his legal education at the Uni-
versity of Florida. He has taught at William and
Mary for five years, and before that taught for
four years at the University of Alabama. Pro-
fessor LeBel has published a number of articles
dealing with the law of defamation.
greater than it is at higher levels. When the President of the United States engages in wrongdoing, we can take some comfort from the fact that institutions such as the Washington Post will serve as a watchdog. When a city council or a county board of supervisors is about to act, the most effective check on those local officials may be the private citizen with sufficient knowledge and concern to speak out. At this level, even the media entity which has the resources to defend a defamation claim may have to rely primarily on information from individuals who would themselves be subject to the deterrent effect hypothesized here.

The Solution: A Symmetry of Privilege

If the state of affairs just outlined is a matter of legitimate concern, as I believe it is, what can be done about it? One solution—leave it to the United States Supreme Court as a matter of interpretation of the federal constitution—seems to be both short-sighted and unproductive. While recent defamation decisions of the Court do not call for the cries of anguish issued from some quarters of the media, their lawyers, and other critics of the Court, neither is it realistic to expect the Court to be inclined to extend significantly beyond their current borders the constitutional protections already recognized. If reform is to be effective, it must occur at the state level. I will outline in the remainder of this article the basic contours of a solution to the problem I have described, and then point out the multiple options that exist for the implementation of this solution. In this way, the right to criticize government can be given greater protection than it currently enjoys by virtue of the federal constitutional guarantees of free speech and press.

The fundamental reform that needs to be put into place can be described as a principle of symmetry of privilege. Understanding the nature and the operation of this principle requires an appreciation of a set of privileges that do not depend on the Sullivan line of cases for their provenance. Although the privileges created as part of the constitutional law of defamation may receive the most attention today, a separate set of common law privileges has existed in one form or another since well before the United States Supreme Court’s initial efforts toward the constitutionalization of this tort action in 1964. These common law privileges can be identified and distinguished in two ways: first, on the basis of their origin, and second, on the basis of their strength. Privileges may arise as a result of what is being said—content privileges—as well as who is saying it—status privileges. The strength of the privilege may be either absolute or qualified. The combination of a privilege of a particular origin with a particular strength determines the scope of the common law protection from liability for defamatory falsehoods.

The privileges that are relevant to the problem addressed here are those that attach to a person by virtue of the public office he or she holds. For a variety of legitimate reasons, many public officials are granted an absolute immunity from defamation claims based on statements that are made in the course of their duties. A matter of constitutional import for federal and state legislators under the constitutional “speech and debate” clauses, these privileges have been extended by common law to officials in the judicial and executive branches of government. The absolute immunity enjoyed by a public official means that once the occasion for the privilege is established, a defamation claim based on that statement must be dismissed, without any further inquiry into the motives, the good faith, or the fault-as-to-falsity of the person making the statement.

A recent decision of the Circuit Court for the Seventh Judicial Circuit, in Newport News, illustrates the operation of the relevant privilege, and serves as a nice model for explaining the symmetrical privilege advocated here. An attorney whose clients challenged a proposed city ordinance banning topless dancing appeared before the Newport News City Council and stated that he had affidavits placing two members of the council at parties where such entertainment had occurred. One of the council members so accused responded with the statement that the attorney was a liar. Two days later, the attorney sued the council member for defamation. Circuit Judge Douglas M. Smith recently dismissed the action, ruling that members of the city council were protected by an absolute privilege. Judge Smith’s decision with regard to the privilege of the council member is eminently defensible both as a matter of law and as a matter of sound public policy.

The problem being considered by this article would be encountered in what might be described as the “flip side” of the lawsuit that was actually filed as a result of this incident. Suppose that, instead of the attorney suing the city council member, the councilman had sued the attorney for the statements made about the councilman. In that situation, the attorney would have had the protection of the constitutional privileges flowing from the Sullivan decision, but as mentioned earlier, that protection consists only of a qualified or a conditional privilege. If the councilman could prove that the attorney knew that the allegations were false or that the attorney was reckless with regard to the truth or falsity of the allegations, the constitutional privilege recognized in Sullivan would
be defeated. Even if the councilman were unable to make the showing of knowing or reckless falsity, defending the lawsuit could pose a substantial financial and emotional burden to the person who spoke out at the council meeting, particularly in a situation in which the speaker is not an attorney, and thus is likely to view the prospect of litigation with greater trepidation.

The consideration of this relatively uncomplicated fact situation reveals the asymmetrical nature of the privileges that operate in this setting. The councilman as a defamation defendant enjoys an absolute privilege, while the person who addresses the council has, as a defamation defendant, only a qualified privilege. Although the ultimate result may turn out to be the same in both cases, and neither defamation lawsuit may succeed, it is at least plausible to assume that the prospect of having to defend such a lawsuit with only the protection of a qualified privilege may act as deterrent to someone who has either information to present or an opinion to express at a meeting of a local governmental body.

That deterrent effect can be removed by the recognition of a symmetrical privilege in this situation. Under a rule of law establishing this privilege, at any time that a statement about a government official is made on an occasion on which the official would enjoy an absolute privilege, the person making the statement would also enjoy an absolute privilege. Just as the public official’s motives, good faith, or “actual malice” would not be open to judicial questioning, so too would the critic of government under these circumstances be protected from such judicial scrutiny. The privilege proposed here is in that way different from, and because it is more protective of speech arguably superior to, any common law privilege of “fair comment,” which is only a qualified or conditional privilege and thus might be defeated by the appropriate showing.21

Implementing the Solution

The absolute privilege of government officials is either already part of Virginia law or readily inferable from existing cases and constitutional provisions. The reform of defamation law advocated in this article would simply extend to the critic of government the same absolute privilege that would be enjoyed by a government official who had made the same or similar remarks about the critic on a privileged occasion. The remaining question that needs to be addressed is the method of implementation of this symmetry of defamation privileges.

One way of developing a solution to the problem would be to propose legislative action creating the kind of privilege for government critics proposed here. For a variety of reasons, this solution might prove to be less desirable than would be a judicial recognition of the privilege. As each session of the legislature confirms, reform proposals that address specific and discrete problems can be caught up in a process in which such efforts become entangled in the maneuvers of those who have other agendas to serve.22 Furthermore, despite the presence of so many lawyers in the legislature, the careful legislative drafting that is designed to deal with a particular problem in a precise manner is too often wanting.23 Finally, human nature suggests that the least likely of all the proposals to move to the top of the legislative agenda is one that might be seen as directly contrary to the self-interest of government officials.

If legislative action is arguably not the best way of implementing the reform proposal offered here, the question then becomes whether the reform can be put into place through judicial action. In this case, it would seem fairly clear that an affirmative answer might be given to that question on at least one of two grounds. First, the most plausible method of implementation of the new symmetrical privilege would be the adoption of a common law rule to that effect. Such a step would be in keeping with the centuries old common law development of the tort of defamation. Tort law in general, and the law of defamation in particular, is a loss-distribution/risk-allocation mechanism which can accommodate the needs and respond to the problems of a particular time and place. Should the courts decide that the potential deterrent effect on critics of government should be eliminated, a common law tort rule putting into place the privilege outlined here would remove that deterrence.

A court might decide for some reason that the adoption of a common law rule recognizing the privilege would not be an appropriate addition to the body of defamation law that has already become so heavily weighted with constitutional considerations. It might also be the case that a court could decide that such a privilege is so necessary a part of the law of defamation that it ought to be beyond the reach of modification or elimination by the legislature in the normal course of its activities. In either of those two events, the free speech guarantee of the state constitution24 would serve as a hook on which the judicial announcement of the privilege could be hung. Just because the United States Supreme Court has apparently run the scope of protection under the federal constitution out to its limits, there is no reason why the courts of Virginia should be content with a state constitutional guarantee of free speech that is too weak to serve the important goal of protecting a citizen’s right to speak.
out in the most important way imaginable in our system of government—acting as a critic of the performance of government officials—an activity which was characterized by the Supreme Court in the Sullivan case as rising to the level of a duty of citizenship.25

Conclusion

Participation in open debate about public affairs is too important a matter to be subjected to deterrent effects from rules of law that can be fairly easily modified to remove such effects. While this article admittedly provides no more than a sketch of a particular problem and a proposed method of solving that problem, consideration of the issues raised in this article may serve to alert members of the profession to a need to expand the scope of current thinking and debate about the blend of federal constitutional and state tort law that determines the contours of the contemporary law of defamation. Although the last quarter-century has seen important and impressive efforts to use the federal constitution to promote vigorous discussion of public issues, it may well be the case that the momentum is shifting to the arena of state tort law rules. Should such a shift occur, it needs to be recognized that the purposes underlying the constitutional developments are not necessarily put in jeopardy, and that in fact those purposes may be better served by tort rules tailored to particular interests and problems.

Footnotes

2. The Sullivan decision requires that defamation plaintiffs who are public officials claiming damages for defamatory statements relating to their official conduct must prove that the defamatory material was published with what the Court called “actual malice,” which the Court defined as knowledge of falsity or reckless disregard of truth or falsity. See id. at 279-80. This “actual malice” is “actually” a form of knowledge or awareness that would be more properly referred to as scienter, or fault-as-to-falsity.
4. See generally LeBel, supra note 3, at 254-64.
8. This was the position advocated by Justice Hugo Black in his concurring opinion in the Sullivan case, id. at 293.
9. See supra note 3.
12. That this approach was overly optimistic is demonstrated by the enormous disparity between jury verdicts for plaintiffs on the constitutional issue of “actual malice” and appellate court reversals of judgments entered on such verdicts. The constitutionally required fault-as-to-falsity of the Sullivan case may thus be seen not only as a false target but as an ineffective one as well.
18. Id. (June 22, 1987) (letter from Judge Smith to counsel).
19. The judge sustained the defendant's demurrer on the ground of the absolute privilege to the defamation claim, and sustained the defendant's demurrer to an intentional infliction of emotional distress claim on the grounds of the absolute privilege and a conclusion that the allegations did not satisfy the elements of that tort claim. Concluding that the privilege could not be avoided by amendment of the pleadings, the judge ordered the action dismissed from the docket. See id., letter to counsel, at 4-5.
20. See generally L. Eldredge, The Law of Defamation 388-92 (1978). See also R. Smolla, Law of Defamation 8-15 (1986) (suggesting that the decisions in other states are about evenly divided between those that recognize an absolute privilege and those that recognize only a qualified privilege for members of legislative bodies at levels below that of the state legislature).
21. In The Gazette, Inc. v. Harris, supra note 3, the Supreme Court of Virginia stated that common law qualified privileges would be defeated by a showing of “common-law malice, that is, behavior actuated by motives of personal spite, or ill-will, independent of the occasion on which the communication was made.” 229 Va. at 18, 325 S.E.2d at 727.
22. The linkage of tort reform and insurance regulation in the last session of the legislature provides an illustration of the proposition that such an entanglement results in less than sterling performances on either of the components of the legislative package.
23. One example of this phenomenon from the last session of the legislature is Va. Code sec. 8.01-226 (1987 Supp.), designed to reform the “fireman's rule” of tort law, apparently in response to the decision of the Supreme Court of Virginia in Pearson v. Canada Contracting Co., 232 Va. 177, 349 S.E.2d 106 (1986).
25. 376 U.S. at 282.
The premise of this article is that the recent, massive growth of the Bar and, to a lesser extent, the evolution of the Code of Professional Responsibility, in many respects, from a guidebook for professionalism to a handbook on the law of self-regulation have contributed to cause the current decline of professionalism.

The American Legal Profession in the 80's

In January, 1984, there were approximately 650,000 lawyers in the fifty states and the District of Columbia. That number represented nearly threefold growth in the years since 1951 and eighty percent growth since 1971. In 1938, the first year of the existence of the Virginia State Bar, its total active membership was approximately 2,800. In October 1985, that number was 13,180 members active and in good standing. After the induction ceremonies in October 1987, that number will approximate 15,000. In the early 80's, the 172 accredited law schools in this country graduated an average of approximately 35,000 lawyers annually. While the total number of students in law schools and annual graduates has declined moderately, the massive annual infusion continues.

In 1970, the median age of lawyers in the USA was 45-46 years. By 1980, the median was 40 and thirty-six percent were 35 years of age or younger. The median in 1985 was 38 years. At least fifty percent of the membership of the Virginia State Bar in 1985 was less than 36 years of age.

The ratio of nonlawyers to lawyers in the USA fell from 696 in 1951 to 363 in 1984 and the ratio has continued in that pattern.

Forty-nine percent of the private practitioners (who constitute approximately seventy-five percent of all American lawyers) are sole practitioners and approximately eighty percent of all private practitioners are in firms of 10 lawyers or fewer.

Competition is fierce and the public reluctance to utilize the services of a lawyer continues. Economic pressure to survive, much less prosper, is intense.

Accordingly, the American legal profession in the 80's suffers from an overabundance of younger, less experienced lawyers with less business and more economic pressure, perhaps higher expectations, and relatively fewer opportunities to gain an understanding of the intangible rules of the game by contact, formal or informal, with an older, more experienced lawyer, schooled in the "art" (as distinguished from the "rules") of the game who, because of the pressures of increased competition and higher costs, has less time available for the training of younger lawyers.

The English Tradition

By the time of the English settlement at Jamestown, the legal profession in England had developed a formalized structure and institutions which nurtured professionalism through continuation of the earliest traditions dating back to the late Middle Ages of an organization that was, in effect, a family with common interests and pursuits. That tradition continued to the time when the common law courts functioned at Westminster Hall when lawyers were bound together professionally and personally in the Inns of Court, by means of common tables, education and experience and were controlled, by consensus, in regard to admission, discipline and the maintenance of those intangible qualities or characteristics we now refer to as "professionalism". Professionalism, com-
munity of interests and institutionalized standards of conduct were perpetuated and transmitted between generations of lawyers through those personal, mentorial relationships.

The American Colonial Tradition and Post-Colonial Decline of Professionalism

The American legal profession, in the years before the Revolution, participated in the continuation of the “Inns” tradition by training of colonial lawyers there in London, and, in turn, by the training and mentoring of those juniors who were raised as lawyers in the Colonies in the English tradition. As in the English tradition, the American colonial lawyers exercised sound surveillance over the professional conduct of the Bar in the Colonies.

After the Revolution, in the years preceding the Civil War, the rejection of all things English as well as the ideals of a Jeffersonian democracy, Jacksonian anti-elitism and the populism of the expanding frontier, caused the American legal profession to experience almost total absence of organization and regulation and, in terms of professionalism, chaos.

The Development of the Organized Bar

Beginning in the late 19th and early 20th centuries, following the Civil War, the spirit of professionalism was rekindled and nurtured by the formation of organized statewide Bar organizations, including the Virginia State Bar Association in 1887 and the nationwide organization, the American Bar Association, in 1888. By 1923, all states had statewide voluntary or mandatory Bar organizations and 32 states now have unified or “so-called” mandatory Bar organizations. In 1938, the Virginia State Bar was organized by the Virginia General Assembly for the purpose, among others, of adopting and enforcing rules of professional conduct.

Accordingly, in the formative years of the American legal profession, the English tradition of self-regulation and mentorial oversight of professionalism sufficed; but that chaos in the profession spawned by the egalitarianism of the Post-Revolution period prevailed until the late nineteenth century following the Civil War when the ideals of professionalism re-emerged in a more orderly profession, organized and self-regulated as commercial business enterprise. It is submitted that the current loss of professionalism is attributable, in substantial part, to those changes in American society and population demographics which, like those changes in American society between the Revolution and Civil War, have produced lawyers for whom the traditions and institutions of the Bar simply are not adequate to deliver that careful surveillance which tradition proves is a necessity. The current decline may be considered as an historic recurrence and an appreciation of that historical cycle can be the basis for confidence that the current stirrings of renewed commitment to professionalism will succeed.

The History and Evolution of the Code of Professional Responsibility

The Code of Professional Responsibility first developed in the American legal profession beginning in the post-Civil War period during that time of renewal of the ideas of professionalism which had persisted in the English tradition during the years preceding the Revolution but had fallen into disuse and disrepair prior to the Civil War. Not until 1908, twenty years after its founding in 1888, did the American Bar Association publish its first guide for professionalism—the “Canons of Professional Ethics”. That first model initially included 32 Canons but, after 20 years
without substantial change, was expanded to 47 Canons in the nine years between 1928 and 1937. That time—1937—might be characterized, particularly by reference to the substance of the added Canons, as the highpoint of professionalism in the twentieth century. That 1908 version, as amended, was the ABA model until 1969. The 1908 model was subscribed to voluntarily by the Virginia State Bar Association. The Virginia State Bar adopted the 1908 model, as amended, in 1938 following its establishment as an agency of the judicial branch of Virginia’s government.

The 1908 model was characterized by aspirational and regulatory concepts now outmoded in the sense that they would probably not be enforceable today because of that now familiar litany of federal court decisions which rendered the First Amendment concept of “commercial free speech” and the antitrust laws applicable to our self-regulation. Other decisions in the the two decades preceding this paper have rendered “fitness to practice law” rather than such less relevant standards as “moral character” the measure by which qualification to take the Bar exam and lawyer conduct is to be judged and, in addition, that there are limits on the scope of the mandatory Bar organization’s activities. Greater sensitivity to the constitutionality and enforceability of mandatory standards by which self-regulation is accomplished has resulted in a Virginia Code of Professional Responsibility more specific, enforceable, legalistic and, necessarily, less preoccupied with “professionalism.”

Consider the following excerpts from the 1908 model guidebook for professionalism—now gone from or, at best, restated in the Ethical Considerations and, therefore, no longer mandatory or enforceable by the organized Bar:

Canon 3—“Marked attention and unusual hospitality on the part of a lawyer to a judge . . . should be avoided . . . .”

Canon 17—“Clients, not lawyers, are the litigants . . . It is indecent to allude to the . . . peculiarities and idiosyncrasies of counsel on the other side.”

Canon 23—“All attempts to curry favor with juries by fawning, flattery or pretended solicitude for their personal comfort are unprofessional.”

Canon 24—No client has the right to insist that “a lawyer be illiberal in such things as forcing trial on a particular day to the injury of the opposite lawyer.”

Canon 28—“It is disreputable to hunt up defects in titles . . . or to breed litigation by seeking out those claims for personal injuries or those having any other grounds of action in order to secure them as a client.”

Accordingly, while the Virginia Code of Professional Responsibility is an updated, streamlined version of the 1969 ABA model with roots in both the 1908 ABA model and the earlier traditions, it has, by necessity, evolved from a handbook for professionalism to a legalistic statement of minimum standards which, in many respects, is a guideline for self-regulation by the organized Bar. The Virginia Code of Professional Responsibility simply will not henceforth serve whatever its former role was in the maintenance of professionalism.

The Institutions of the Bar and the Proponents of Professionalism Must Meet the Challenge

In conclusion, then, too many law school graduates, an overall lower average experience level, relatively fewer opportunities to gain the precepts of professionalism from an experienced lawyer, fierce competition and economic pressure in a commercialized profession, and a Code of Professional Responsibility which has become more of a statement of the law of self-regulation than a primer for new professionals, have overwhelmed the capacity of the historically developed institutions and traditions of the Bar for the maintenance of those standards of professionalism which we value. Mandatory continuing legal education, a revamped disciplinary system with substantially greater resources and responsibility, and automation and improvement of the equipment and facilities of the Virginia State Bar headquarters offices are indicative of the current response of the Virginia State Bar to the institutional aspect of the problem. In the historical context, we can sense that we are experiencing a resurgence of professionalism which may well be a cyclical phenomenon in the American legal profession. Although different in degree, there is an analogy between the current state of the profession and that out of which a resurgence of professionalism arose following that period in the history of our profession concluded with the Civil War. While the Virginia State Bar must and will attend to the institutional aspects of the resurgence, The Virginia Bar Association must undertake to nurture a renaissance of the spirit of professionalism from within its membership which represents those lawyers who, by and large, were raised or trained in the traditions of professionalism and are motivated and economically able to undertake the task.
Military Lawyers:
The Overlooked Law Firm Asset

Recent studies reveal that some civilian lawyers have virtually no contact with the military and lack knowledge about the practice of law in the uniformed services. From an economic point of view, it is important for civilian lawyers to understand the practice of law in the military. This understanding would help eliminate some of the prevailing myths. One such myth is that military attorneys practice only “military law” in something called a court-martial which is akin to a “kangaroo” court. Such misinformation results in a failure by some law firms to consider former military lawyers as potential associates or partners. These firms are essentially denying themselves the benefits of the expertise and competence gained by lawyers from their military experience.

History of the JAG Corps

Some 23 days after assuming command of the Continental Army in 1775, George Washington petitioned Congress to appoint William Tudor as the first Judge Advocate of the Army. Congress acceded to this, granting Mr. Tudor the princely stipend of $20 per month, and thus began an illustrious history. Over the decades, the JAG Corps played a vital role in the conviction of such diverse and celebrated defendants as Benedict Arnold, the Lincoln assassination conspirators, and the Nazi war criminals at Nuremberg. The military legal system that has developed over the years is a part of the total national legal system in the United States. It flows from the constitutional powers of Congress to “provide for the common defense,” to raise and support armies,” and “to make Rules for the Government and Regulations of the land and naval forces.” Its origins, however, antedate the Constitution by more than a decade. The first military code was enacted in June 1775. Thus, when William Tudor was made the first Judge Advocate of the Army in July, he was the first legal officer appointed under authority of the nascent United States. This occurred some 14 years before there was an Attorney General’s School, one of the 15 judge advocates during the Revolutionary War was Captain John Marshall who eventually became the Chief Justice of the United States (1801-1835). Captain Boudreau mentioned some other notables who were former Army lawyers: Felix Frankfurter and William Joseph Brennan, Jr. of the U.S. Supreme Court; great law teachers such as John Chipman Gray, Edmund Morgan, and such prominent public servants as Henry L. Stimson, Enoch Crowder, Patrick J. Hurley, J. Clay Smith, and Leon Jaworski.

Today, with over two million military personnel on active duty, there are over 4700 judge advocates in the Army, Navy, Air Force, and Marine Corps, and law specialists in the Coast Guard carrying on the traditions of the Corps. The Army has the largest of the departments with over 1800 judge advocates. The next largest is the Air Force with 1400, followed by the Navy with 1050, the Marine Corps with 420 and the Coast Guard with 100.

Who is Eligible

To be eligible to become a military lawyer, according to Captain Rogena Clary, chief recruiting officer for the Army JAG Corps, the applicant must be a graduate of an ABA-accredited law school. The applicant must also be admitted to practice law before a federal court or the highest court of a state.

The Military Experience

One prominent figure who has experience as a military lawyer is Mr. Derek Curtis Bok, President of Harvard University. When asked what motivated him to join the Army’s Judge Advocate General’s (JAG) Corps in 1955, Mr. Bok’s response was typical of current and former judge advocates (JAGs). He said he felt the work in the JAGC would be “interesting.” And, interesting it was. Reminiscing about his trial experiences, Mr. Bok compared the military and civilian justice processes. “My impression,” he said, “was that the military justice system, as practiced in the Military District of Washington, was infinitely better than what I knew of criminal justice elsewhere.” Would he recommend the military legal expe-
ience to others? "Yes" was the answer. Mr. Bok elaborated by saying, "I found my military legal experience offered an excellent opportunity to learn many practical skills and experience many of the human relations problems that were not taught in law school."

Not surprising, the military lawyer's business today, over thirty years later, remains people-oriented. Although criminal justice work has decreased to less than half of the JAGC's functions, the military lawyer retains close contact with service members. Uniformed lawyers provide personal legal assistance to service people, adjudicating their claims against the government, and participating in human development programs. As Mr. Bok observed, these community service activities are satisfying to many officers, both from a professional and human point of view.

A Diversified Practice

"Just as satisfying," noted Brigadier General Richard J. Bednar, "is the diversity of the practice of law in the military." General Bednar is a retired Army JAG who is now the Director of the Government Contracts Program at the George Washington University National Law Center.

"One of the primary clients at any military installation," he said, "is the commander whose job is similar to that of a city manager and, as a result, the variety of legal problems is limitless." General Bednar stated that in addition to criminal law and legal assistance, military lawyers litigate cases and provide advice and counsel in the areas of tort liability; legislation; government contracts; medical malpractice; general taxation; and labor, environmental, admiralty, international, real property, aviation, and administrative law, as well as civil litigation.

"In all civil litigation cases affecting the services," General Bednar added, "judge advocates investigate and prepare the cases for trial. Specifically," he said, "they prepare pleadings, motions, and briefs to be used by the trial or appellate attorney. Representation," he continued, "is the responsibility of the Department of Justice, but JAG officers frequently try and argue cases before U.S. district courts and federal circuit courts of appeals."

The Litigator

Involvement with federal litigation enhances the uniformed lawyer's practice, as is evidenced by the experiences of a current Army judge advocate, Captain John R. Morris. Captain Morris, who was one of the 1985-86 White House Fellows regional finalists, works with the General Counsel in the Secretary of Defense's office. He assists in the preparation of Defense Department cases being litigated by the Department of Justice, including the Korean Air Lines (Flight #007) disaster of September 1, 1983. In that same year, Captain Morris was appointed counsel for Mr. George Spanton, the nationally publicized, Florida-based Defense Contract Audit Agency auditor, whose "whistleblowing" on suspected fraud, abuse, and waste in the government allegedly resulted in retaliatory actions against him in violation of federal personnel practices.

Before his Pentagon assignment, Captain Morris served in the Hanau, Germany, Legal Center, one of the busiest trial centers in the Army. Within four months after coming on active duty, Captain Morris was independently handling a full case load. He was actively trying felony cases involving crimes such as aggravated assault, burglary, larceny, and the sale of large quantities of controlled substances. Within eight months, Captain Morris was assigned to two murder cases.

"Throughout my entire assignment in Germany," Captain Morris said, "I was given the opportunity, first as a defense counsel, then as a trial counsel (prosecutor), to try almost 100 cases. Over 90% of the cases were the very felony cases my law school colleagues would wait several years to try." He continued by saying, "The experience I gained and the challenges I faced were available, at this point in my career, only through the JAG Corps."

The Military Law Firms

The Judge Advocates General's organizations of each of the services and their Coast Guard counterpart have been compared to five tremendous, law firms whose practices reach around the globe. Federal statutes require that the service Judge Advocates General and the Chief Counsel of the Coast Guard perform duties relating to legal matters within their respective departments. When one thinks about those legal matters, the term "military law" comes to mind. To speak of "military law," according to Captain Boudreau, is to use a phrase which is not sufficiently descriptive. Uniformed lawyers practice under two distinct legal orders. There is an external order consisting of those parts of international and domestic law which affect the organization, mission, and operation of the services. Additionally, there is an internal order which flows from the military's authority and need to regulate itself.

The Military Justice System

"Under the military justice system," explained Major General Hugh R. Overholt, The Judge Advocate General of the Army, "military lawyers partici-
participate in trials by courts-martial as judges, trial counsel and defense counsel.” General Overholt further explained that uniformed attorneys also perform varied functions in the courts-martial review process, serving as appellate government and appellate defense counsel before the individual services’ Courts of Military Review and the United States Court of Military Appeals.

“Courts-martial,” General Overholt elaborated, “are procedurally similar to federal district court trials, and a judge presides over each session of the trial.” The judge, he said, is the sole and binding authority for rulings on the admissibility of evidence and must instruct the jury on the law they are to apply in the case. According to General Overholt, evidentiary questions are decided under the Military Rules of Evidence. Those rules were amended on September 1, 1980 to reflect in substantial identical form, Articles I, II, IV and VI through XI of the Federal Rules of Evidence.

General Overholt also pointed out that the military criminal code, Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C. §§801-940, grants more rights to the accused—particularly in the pre-trial and sentencing stages—than most civilian codes. Because of this, he said, the code has drawn praise from such prominent attorneys as F. Lee Bailey. It is interesting to note that soldiers had a right to free legal counsel and to be advised about the right to remain silent many years before the Miranda decision.

General Overholt also pointed out other significant changes that have taken place in the military justice system. One such change has been the creation of a separate military defense counsel organization. The organization is distinct from and outside of the normal command structure of which the typical Army legal office, or staff judge advocate office, is an integral part.

An even more far reaching change occurred as a result of the Military Justice Act of 1983. That act, General Overholt said, established Supreme Court jurisdiction to review, on writ of certiorari, certain decisions of the Court of Military Appeals. The United States Court of Military Appeals was established under Article 67 of the U.C.M.J. and is the highest court in the military justice system. The court, according to General Overholt, has only three members, all civilians, appointed by the President for 15-year terms, and is headed by Chief Judge Robinson O. Everett who was appointed in 1980.

**Viewpoint of Civilian Lawyers**

Opinions about military lawyers were expressed by the Washington, D.C. law firm of Lewis, Mitchell & Moore, which in recent years has hired over a half dozen former military attorneys. The firm consists of nearly forty attorneys and is one of the recognized law firms in the United States with a practice concentrating on Government contract law. In commenting upon the firm’s hiring practices, Mr. Roy S. Mitchell said, “If I had a choice between hiring a 24-year old recent law school graduate and a 30-year old former military lawyer with equal academic credentials, I would choose the military attorney because of maturity and training.”

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A retired Lieutenant Colonel from the U.S. Army Judge Advocate General’s Corps, she is presently serving as Regional Legal Counsel for the components of the McDonnell Douglas Astronautics Company in the greater Washington, D.C. area. She has more than 22 years of legal, management, and defense policy, analytical experience gained while serving as an Army officer, attorney, and a defense policy analyst at the Washington Studies and Analysis Group, the think tank for the McDonnell Douglas Astronautics Company. She is also a member of the ABA standing Committee on Lawyers in the Armed Forces.
The law firm of Gaffney, Anspoch, Schember, Klimaski and Marks, a seven-member District of Columbia firm which concentrates in military law, has frequent contact with military attorneys. Mr. Klimaski stated that as a result of that contact, he has gained an appreciation for the variety and complexity of the work performed by uniformed lawyers, especially legal assistance officers. They can be compared to attorneys working in civilian legal services or legal aid offices. Mr. Klimaski continued his observations by saying that he is aware that legal assistance officers deal with a broad range of problems and, in essence, have a national practice.

Mr. Willie L. Leftwich, a member of the Washington, D.C. seventeen-lawyer firm of Hudson, Leftwich and Davenport, also expressed his views about service lawyers. He stated that the uniformed lawyers with whom he has dealt demonstrated that despite their heavy workloads, they are well-informed and well-prepared. Mr. Leftwich’s firm is engaged in the general practice of law, with emphasis on a number of areas, including civil litigation and corporate and business law. One of the firm’s attorneys is a former trial counsel with the United States Navy who handled major construction claims aggregating over $100 million. According to Mr. Leftwich, members of his firm worked with active duty lawyers when the firm represented the Army in a major case. The case involved the sale of Chrysler Defense Industries stock to General Dynamics. Contacts with military lawyers in cases such as this, Mr. Leftwich said, have given his firm an appreciation for the type of work performed by uniformed lawyers and their high level of competence.

In Brief

Those who have come in contact with military lawyers recognize that uniformed attorneys, in concert with other military officers, have engaged in the performance of the defense mission since our nation began. Service lawyers have also contributed to the military’s growing role in community services. Notably, over the years, the composition of military lawyers has changed as more women and minority officers have become military attorneys. All have answered the “call to colors” and have shared the same sense of professionalism which is the modern Judge Advocate’s heritage. This heritage of professionalism, coupled with the military lawyer’s depth of experience, can be bonuses to the civilian law firms which hire former military attorneys.
The Greenbrier, White Sulphur Springs, West Virginia, once again provided beautiful surroundings for the Summer Meeting of The Virginia Bar Association. Almost 700 lawyers, friends and guests enjoyed the luxurious facilities and participated in scheduled programs and recreational events.

Two CLE programs provided attendees with excellent information as well as 2.5 credits each. "Attendance at our CLE programs was better than expected and supports our commitment to provide 'for credit' programs at both the summer and winter meetings," said VBA president R. Gordon Smith. "Our members who attend both meetings can earn all the CLE credits they need for the year at no additional cost."

The Friday morning program, The Medical and Legal Implication of AIDS, emphasized again the seriousness of the disease and the fear and confusion existing with the public. David Craig Landin, panel moderator and Chairman of VBA's Special Issues Committee, noted that "Virginia is still very much in the infancy stage (legislatively) regarding this issue" and urged lawyers in attendance to use this opportunity to gain much needed information from the distinguished panelists.

The panelists for Friday were: Charles J. Cooper, Esquire, Assistant Attorney General U.S. Department of Justice; Richard P. Keeling, M.D., Associate Professor of Internal Medicine, University of Virginia; Saul S. Milles, M.D., Associate Company Medical Director, General Electric Company, and Walter J. Wadlington, Esquire, James Madison Professor of Law, University of Virginia.

Dr. Keeling said that by 1991, AIDS annually will kill more people than car crashes. He also said we must keep in mind that the victim "is not the enemy ... the enemy, remember, is the virus."

Mr. Cooper passed out a survey identifying some of the legal issues presently being litigated, confirming the effect AIDS is having in the area of tort law, employment law, constitutional law, and even criminal law. He said court decisions have already imposed a duty on medical providers to notify spouses or partners of AIDS patients, but most hospitals and health agencies do not have a policy to do so. He advocated requiring testing for marriage licenses and certain hospital admissions. He agreed with Dr. Keeling that the virus was the enemy but also said, "that does not change the fact that there are people who have that virus who, indeed, may be enemies of public safety."

Dr. Milles talked about industry's concern with nondiscriminatory employment policies for victims of AIDS, and noted that American businesses provide 85% of all medical insurance coverage for our population. Dr. Milles stated that "American business has been presented with a severe challenge but also a unique opportunity. The manner in which we deal with the problems of AIDS will set examples of decency, fairness and compassion that will have a profound effect on the rest of society."

Professor Wadlington told the lawyers and guests present that "AIDS no doubt will be the disease of the century for law as well as for medicine." Legal principles developed over centuries are being challenged.

The Saturday CLE program, The Rehnquist Court: The First Year, was moderated by Professor Melvin I. Urofsky, Virginia Commonwealth University, Department of History. Panelists were: A.E. Dick Howard, Esquire, Professor of Law and Public Affairs, University of Virginia; Edwin M. Yoder, Jr., Syndicated Columnist, Washington, D.C.; and William J. Stuntz, Esquire, Assistant Professor, University of Virginia School of Law.

Professor Urofsky noted that when Chief Justice Rehnquist was appointed, "those opposed to judicial activism, those who consider the high Court's decisions on abortion, affirmative action, women's rights and rights of the accused to be all wrong, sensed a change in the air ... Rehnquist in his fourteen years on the bench had been pretty much of a judicial lawyer. He quickly won the respect of legal scholars for his incisive intellect."

In view of the recently announced retirement of Justice Lewis F. Powell, Jr., the panelists discussed his replacement. President Reagan had already announced his support of Judge Robert H. Bork, and speculation was that he would be confirmed. As to what effect this could have on the Court, opinions were guarded and varied.

Professor Howard felt Judge Bork was the type of judicial conservative who might go back to the original principle that "It's more important to be right than to be consistent." Professor Stuntz took a different view, saying "It takes five to override, not just one ... If any one of the five feels it's more important to be consistent than to be right, then the precedent stands." Mr. Yoder made no predictions, stating that "journalists have enough trouble finding out what has already happened."

Along with the CLE programs, committee meetings and our general business sessions, we enjoyed various
social functions, our banquet and recreational activities

During our business session, we passed two amendments to our Constitution. The first simplified our membership application and admission procedures and the second allowed for third year law students who are enrolled in Virginia law schools to become members.

We also had a new program during this meeting which we hope to continue at all summer meetings. We had several Continuing Legal Entertainment courses each day. Warner Stoessel, Director of Dining Services at The Greenbrier and two of his Sous Chefs conducted cooking classes for registered members and guests.

Friday evening’s banquet speaker this year was U.S. Senator Paul S. Trible, Jr. We felt very fortunate to have Senator Trible with us and appreciated how busy he was, particularly as he was heavily involved in the Iran-Contra committee interview of Col. Oliver L. North. Senator Trible was next in line to question North and the members were particularly interested in his remarks. He was very cognizant of the sympathy which North has gathered during the hearings. "He has captured the minds and hearts of the American people as he’s told his story," Trible said. "I suspect questioning Oliver North will be a whole lot tougher and a whole lot more risky than climbing that mountain (Mount Kilimanjaro)." He stressed that the main issue during the hearings was whether the law had been broken. "The Marxist tyranny (in Nicaragua) is no good for the United States or for democracy," Trible said, "(but) we can never advance freedom in this world by ignoring the rule of law at home."

We would be remiss if we did not once again acknowledge the support of our sponsors and exhibitors. Thursday evening’s President’s reception was sponsored by Lawyers Title Insurance Corporation. Friday’s reception before the banquet was sponsored by CSX Corporation; Richmond, Fredericksburg & Potomac Railroad Company; and Norfolk Southern Corporation, with Norfolk Southern Corporation being this year’s host. Saturday’s reception honoring Justice Cochran was sponsored by The Michie Company.

Arthur Young sponsored our YLS dance; Harris 3/M provided music for our banquet; LOPC sponsored tournaments and trophies, and Johnson & Higgins provided a YLS reception.

Exhibitors this year were: Virginia Lawyers Weekly; New England Financial Group, Inc.; Harris 3/M; Arthur Young, and Julia M. Walsh & Sons.

As you will note from the pictures, we had a great time. 1988 is our 100th anniversary. We hope you’ll continue your support of The Virginia Bar Association—it’s your association! We look forward to seeing you in Williamsburg, January 15-17 and at The Homestead, July 21-24, 1988.

—Sue Gift Sanders

WINNERS OF VBA TOURNAMENTS
Summer Meeting July 9-12, 1987, The Greenbrier

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Class A Winner: Vernon M. Geddy, III

Class A Runner-Up: A. Sanders

BRIDGE

Men
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Runner-Up: Mrs. Robert L. Burrus, Jr. (Anne)

Ladies
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TRAP

Men
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Class A Winner: George G. Grattan, IV

Class A Runner-Up: T. Howard Spainhour

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1st Place: Theodore L. Chandler, Jr.
2nd Place: John L. Gregory, III

18-Hole Low Gross: John S. Barr
18-Hole Low Net: Harry C. Wolf

36-Hole Low Net:
1st Place: Mrs. Thomas G. Hardy, III (Margo)
2nd Place: T. Savage

Closest to the Hole: Mrs. Robert H. Mann (Jeanie)

GOLF

Men
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Sr. Men’s 18-Hole Low Net: T. Howard Spainhour

Class A Runner-Up: Mrs. Al Organ (Margo)

Ladies
Championship Flight Winner: Mrs. Henry N. Ware, Jr. (Marillynn)

(continued on page 32)
Dispute Resolution Programs Underway

The VBA/VSB Joint Committee on Dispute Resolution has announced the commencement of two separate programs, one in Richmond and the other in Charlottesville, Virginia. Funding provided by the Virginia Law Foundation has enabled the Joint Committee to realize its efforts to promote and encourage alternative means of resolving disputes throughout Virginia.

The Richmond Alternatives to Dispute Resolution Center is a joint project of the bar committee and the Better Business Bureau of Central Virginia, Inc. Serving residents and businesses in the greater Richmond area, the ADR Center will provide mediation and arbitration services utilizing the efforts of volunteer attorneys, business people and others. During the initial stages of the Center's development, it is expected that disputes involving landlord-tenant, business-consumer and business-business relations will make up the core of the Center's caseload. Training in dispute resolution techniques will be provided to the volunteers by a training team from the American Bar Association, most likely in September. The training will be quite thorough and participants will spend about 20 hours during a series of evenings and one weekend to master the skills that will allow them to provide high quality services.

Karen L. Donegan, an attorney with Hunton & Williams, started her service as the Director of the Richmond Alternative Dispute Resolution Center during July, and brought a variety of experiences to her new position. A graduate of Washington & Lee University School of Law, Ms. Donegan studied dispute resolution theory, received training in mediation techniques, and has substantial experience in social work.

The Charlottesville project, known as the Virginia Dispute Resolution Center, is located in the University of Virginia School of Law. Governed solely by the bar associations, and funded by the Virginia Law Foundation, the Virginia Dispute Resolution Center will support and help to coordinate the development of alternative dispute resolution efforts throughout Virginia. The Center will serve as a clearinghouse for information to be provided to local bar groups or citizen groups interested in beginning dispute resolution efforts in their own communities. The Center is currently surveying individuals, public agencies and commercial organizations such as EnDispute and Judicate, in an effort to compile a directory of dispute resolution efforts in Virginia. A bi-monthly newsletter will be available in September providing information about legal developments in dispute resolution, ethical issues and opinions, training programs, bar activities, and newly created community dispute resolution programs. A half-day program dealing with Alternative Dispute Resolution will be offered to Virginia attorneys during October through the Committee on Continuing Legal Education of the Virginia Law Foundation and the Virginia Dispute Resolution Center.

Another goal of the Virginia Dispute Resolution Center is to help to coordinate dispute resolution services to individuals in Virginia who reside in areas not served by any organized program. The Center will recruit volunteer attorneys, retired judges and others to serve as mediators or arbitrators throughout the Commonwealth. Training for the volunteers will be arranged by the Center, and the volunteers will be able to call upon the Center for assistance in their cases. When fully operational, the Center will be able to receive calls from residents throughout Virginia, and match the caller with volunteers in the same area of the state. Attorneys offering mediation services who wish to be included in the directory, as well as attorneys wishing to volunteer a small amount of time each year as mediators and arbitrators may contact the Virginia Dispute Resolution Center at (804) 924-7893. The Charlottesville project is directed by Professor Richard Balnave, who brings three years of law school teaching and nine years of civil litigation experience to the position.

The members of the VBA/VSB Joint Committee on Dispute Resolution, who have worked for several years to encourage alternative dispute resolution efforts throughout Virginia are R. Edwin Burnette, Jr., Chairman (Lynchburg); Kent Sinclair (Charlottesville); David Shuford (Richmond); Wiley R. Wright, Jr. (Alexandria); and Wilbur C. Allen (Richmond).
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Newly Admitted Members
May 15, 1987-July 30, 1987

Francis Achampong ............. Chesapeake
Carmen S. Adams ............. Washington, D.C.
*Leslie W. Adams ............. Springfield
Michael Edward Anderson .... Springfield
James P. Andrews, III ....... Alexandria
*Michael D. Atkins ............. Charlottesville
*Rosemarie Annunziata ........ Vienna
*Helen Louise Bailey ............ Richmond
*Richard Dennis Balnave .......... Charlottesville
*William Kyle Barlow .......... Smithfield
*Jayne W. Barnard .......... Williamsburg
William Jefferson Barnes .... Richmond
Colombia De Los Angeles Barrosse . Washington, D.C.
*Gary Albert Baskin .......... Virginia Beach
*Kevin B. Belford .......... Arlington
William C. Bell ............. Newport News
Steven D. Benjamin .......... Richmond
David B. Bice ............. Lynchburg
*Robert Alexander Blackwood, III .... Richmond
Denise Waters Bland .......... Cape Charles
*Richard W. Boone .......... Arlington
Martha B. Brissette .......... Alexandria
Alicia Marie Brown .......... Richmond
J. Mitchell Brown .......... Springfield
Margaret A. Brown .......... Fairfax
*Hazel E. Buckingham .......... Richmond
Mary Kathryn Burkey .......... Chesterfield
I. Ray Byrd, Jr ........ Roanoke
Ruth Sharpe Cannard .......... Richmond
*Norma B. Carl .............. Richmond
Dennis A. Carlton .......... Burke
*Thelma Ellen Young Carroll .......... Norfolk
*Elford L. Carwile .......... Manassas
Kelly L. Chick .......... Virginia Beach
Thomas H. Clarke, IV .......... Bedford
Gary Mitchell Coates .......... Richmond
Irwin Mark Cohen .......... Virginia Beach
*Kathleen J. Collins .......... Springfield
*Charles J. Cooper .......... Richmond
David P. Corrigan .......... Richmond
James C. Cosby .......... Richmond
Karen Anne Crist .......... Arlington
*Joseph T. Cutler .......... Virginia Beach
*Wayne F. Cyron .......... Arlington
Brian Andrew Dettelbach .......... Falls Church
Terri Faye Dial .......... Roanoke
*Julianne B. Dias .......... Gloucester
Scott H. Donovan .......... Springfield
*Claire O. Ducker, Sr .......... Locust Grove
Lenden A. Eakin .......... Roanoke
*Roland D. Easley .......... Richmond
Peggy P. Evans .......... Montross
Peter S. Everett .......... Fairfax
*William E. Fears .......... Accomack
Anita D. Filson .......... Lexington
*Jud A. Fischel .......... Warrenton
James C. Fontana .......... Alexandria
Melissa W. Friedman .......... Roanoke
Lisa C. Germano .......... Midlothian
*John D. Grad .......... Alexandria
Thomas N. Griffin, III .......... Arlington
Stephanie Lynn Hamlett .......... Richmond
Amy Edwards Harte .......... Surry
*Thomas G. Haskins .......... Richmond
Sandra L. Havrilak .......... Vienna
Dana L. Hecht .......... Arlington
Herbert W. Hecht, II .......... Arlington
William Henck .......... Arlington
Donna Haynes Henry .......... McLean
Susan K. Hepner .......... Alexandria
J. Gary Hickman .......... Great Falls
*Mary Ann Hinshelwood .......... Christiansburg
William B. Hopkins, Jr .......... Roanoke
Cathie Watts Howard .......... Richmond
*Ann B. Humphreys .......... Norfolk
Joanne Marie Ivancic .......... Washington, D.C.
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*Denotes Regular Section Member
THOMAS F. FARRELL, II

THE Young Lawyers Section has been quite active over the last few months in completing its Summer activities as well as in preparing for numerous Fall events. I want to take this opportunity to report on just a few of these programs here.

Summer Meeting

The Meetings Committee, headed by Lex Eley of Richmond, is to be congratulated on presenting what must have been far and away the most well attended programs in the history of the Association. The “sellout” crowds can be attributed both to the topics discussed, and because for the first time attendees received CLE credit. The Friday morning program, entitled “The Medical and Legal Implications of AIDS”, was moderated by Dave Landin. The panelists included Charles Cooper, the Assistant Attorney General in charge of the Office of Legal Counsel and the author of the controversial AIDS opinion issued by the Department of Justice; Dr. Richard Keeling, Director of the Department of Student Health at the University of Virginia and Associate Professor of Internal Medicine; Dr. Saul Milles, a Professor of Medicine at Yale Medical School as well as the Associate Company Medical Director of General Electric Company; and Walter Wadlington, Professor of Law at the University of Virginia who specializes in Law and Medicine, as well as domestic law issues. The wide range of experience and talents of these panelists provided an extremely interesting and entertaining presentation on a very serious legal and medical issue.

At the Friday evening banquet, the Association was both entertained and informed by Virginia’s junior United States Senator, Paul Trible, who spoke about his activities as a member of the Senate Select Committee of the Iran/Contra affair. Senator Trible is the youngest member of that group of legislators.

The Saturday morning program provided an excellent forum on the first year of the Rehnquist Court. The program was moderated by Professor Melvin Urofsky, a professor of History at Virginia Common-

wealth University. The panelists included Professor A. E. Dick Howard of the University of Virginia Law School, a well recognized expert on the Supreme Court, as well as Edwin Yoder, a syndicated columnist for the Washington Post Writer’s Group and U.S. News & World Report, and William Stuntz, also a Professor of Law at the University of Virginia and a former law clerk to Justice Powell. These panelists provided an in-depth review of the new Court’s first year.

Tom Hardy and his Tournaments Committee also should be congratulated for the excellent job they did in running the always popular tournaments. Hobie Claiborne and Sammy Brown out-performed even themselves in hosting the Young Lawyers Section dance on Saturday night which included music by “Timmy Kay in 3D.”

Membership Committee

Alison McKee and French Slaughter continue to provide outstanding service as co-chairs of the Section’s Membership Committee. At the summer meeting French and Alison presented a mid-year report which demonstrated continued progress in increasing our membership. As of July, 1986, 98 new members had joined the Association. Through July, 1987, 175 new members have joined, a 78% increase. These members should be swelled greatly after the induction of new members of the State Bar following the summer bar examination. The committee plans to hold a telethon to contact new inductees. Jackie Stone is coordinating this effort. Alison and French have worked long and hard for the last two years as co-chairs of the Committee and their efforts are obviously paying off. All of us owe them a debt of gratitude.

Highlights of Fall Activities

As Fall approaches, I would like to note preparation by four of the committees for very important upcoming programs. First, the Bridge-the-Gap Committee is preparing for its annual seminars which will be held throughout the State in October. This committee, under Nan Coleman’s leadership, is responsible, in conjunction with the CLE Committee, for providing the speakers and making all of the arrangements for these seminars. The Bridge-the-Gap seminars are not only an important project for the Section but they are important to the Bar as a whole as they provide new lawyers with a very important introduction to the “nuts-and-bolts” of the profession.

Also in October two important and timely Town Hall meetings will be held. The first, scheduled for October 20, 1987, in Richmond, will be a forum on the proposed state lottery. This topic, chosen by John
Ivins and his committee, will obviously be one of great interest and will come just a few weeks before the referendum on the state lottery. Anyone interested in the lottery should plan to attend what should be an interesting presentation.

In Northern Virginia, Melanie Reilly and her committee are presently scheduling a forum on AIDS in the School System. The focus of this panel will be on both students and teachers with AIDS and how these situations should be handled by the school systems, teachers, parents and children.

Jack Coffey and his Model Judiciary Committee have had little rest after completing the appellate process of the Model Judiciary Program in April, as they are preparing for the trial phase of a new competition early this Fall. Participants in this program are now truly situated all over the State. The trials are very well received by the school systems and by the judges and lawyers who assist in these programs. The Model Judiciary Program is a project about which the Association as a whole can be proud.

Finally, Elizabeth Edwards and Jessine Monaghan are busy getting ready for the Section's annual hosting of the Region IV competition of the National Moot Court program. That program, sponsored nationwide by the Bar Association of the City of New York, will be held on November 20 and 21 in the courtrooms of the United States Court of Appeals for the Fourth Circuit in Richmond. Region IV consists of law schools from Virginia, West Virginia, North Carolina and Kentucky. The preliminary rounds are judged by volunteer lawyers and the quarter and semi-finals by fellows of the American College of Trial Lawyers. The final round will be handled by state and federal court judges. All of the Virginia law schools participate in this program.

Nominating Committee Report and Announcement of Fall Meeting

The Nominating Committee of the Section met on August 11, 1987, and unanimously selected David G. Shuford as the nominee to be Chair-Elect of the Section, and Stephen D. Busch the nominee for Secretary-Treasurer. Anyone wishing to make additional nominations should send them in writing to the Chairman of the Nominating Committee, Ted Ellett, at 800 Independence Avenue, Room 1010, Washington, D.C. 20591. Nominations may also be made at the Fall meeting of the Section which will be held at Wintergreen at 10:00 a.m. on October 3, 1987. No nomination for an officer's positions will be accepted after the close of that meeting. If anyone has any questions about the nominating process please do not hesitate to contact me or Ted Ellett. The Nominating Commit-

Thomas F. Farrell, II is a Partner in the Alexandria office of McGuire, Woods, Battle & Boothe. Mr. Farrell received his B.A. in Economics and Speech Communication from the University of Virginia in 1976 and a J.D. from the University of Virginia School of Law in 1979.
thanks and congratulations. The Section's Bridge-the-Gap Seminars also received accolades by placing second in our division in the service to the Bar category. Finally, the Section was awarded certificates of performance for our Service to the Public project and our comprehensive application. Credit for these awards rests with all of our committee chairs, from this year and last, as well as Chuck Lollar who guided the Section through the first half of the year under consideration for the awards.

As you can see from this brief review of the highlights of the activities of the Section we continue to work hard to promote the Association both within the bar and before the public. If you should have any questions about any of our activities please feel free to contact me at any time.

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**Announcements**

The Virginia Bar Association announces three new services to members:

1. Discount on CONTEL cellular telephones and air time. Call 800-792-8400 for further information.
2. 25% discount on Harris/3M Facsimile machines. Contact Craig Mattice at 800-468-0147.
3. The Virginia Bar Association has an office available for use by members visiting Richmond. Please call the VBA office for scheduling at 804-644-0041.

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**REMINDER**

The Virginia Bar Association sends quarterly issues of the *Journal* to its members as one of the privileges of VBA membership. We want to remind you that for those who have not paid their 1987 Association dues, this issue of the *Journal* is the last you will receive.

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**Winners of VBA Tournaments**

*(continued from page 20)*

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<th>Ladies</th>
<th>18-Hole Low Gross Winner: Mrs. W. Gibson Harris (Jane)</th>
<th>18-Hole Low Net Winner: Mrs. Larry B. Grimes (Peggy)</th>
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**ROAD RACE**

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<th>Fastest Adjusted Time: Allan Saville</th>
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<tr>
<td>Ladies</td>
<td>Fastest Time: Mrs. John E. Coffey (Suzy)</td>
<td>Fastest Adjusted Time: Mrs. James L. Chapman (Susan)</td>
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<td>Men's Championship</td>
<td>Winners: Billy Hancock/Ed Yoder</td>
<td>Finalists: Hugh Antrim/Lex Eley</td>
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<td>Men's &quot;A&quot;</td>
<td>Winners: Tom Hardy/Mike Cole</td>
<td>Finalists: Ed Carl/Doug Nabhan</td>
</tr>
<tr>
<td>Men's &quot;B&quot;</td>
<td>Winners: Fred Tansill/Andy Miller</td>
<td>Finalists: Kirk McQuiddy/George Rowe</td>
</tr>
</tbody>
</table>

**Women's Championship**

<table>
<thead>
<tr>
<th>Winners: Doris Russell/Millie Geisler</th>
<th>Finalists: Becky Powhatan/M. Saville</th>
</tr>
</thead>
<tbody>
<tr>
<td>Women's &quot;A&quot;</td>
<td>Winners: Bev Talbott/L. Hazelgrove</td>
</tr>
<tr>
<td>Women's &quot;B&quot;</td>
<td>Winners: Steve Robinson/Page Dimos</td>
</tr>
<tr>
<td>Mixed Championship</td>
<td>Winners: N. Carl/Ed Carl</td>
</tr>
<tr>
<td>Mixed &quot;A&quot;</td>
<td>Winners: Allan Little/Becky Powhatan</td>
</tr>
<tr>
<td>Mixed &quot;B&quot;</td>
<td>____________________</td>
</tr>
</tbody>
</table>
Memorials

The Association notes with deepest regrets the passing of the following members:

E. Almer Ames, Jr. ...................................... 1903-1987

Stuart B. Campbell ...................................... 1916-1987

Denman T. Rucker ....................................... 1911-1987
  Life Member

R. C. Shannon ........................................... 1904-1987