The judiciary and the Attorney General. Left to right: The Honorable Julius Hoffman, the Honorable A. L. Marovitz, the Honorable Hubert L. Will, JD'37, and the Honorable James B. Parsons, JD'49. All are judges of the United States District Court.

Dean Neal speaking to the Annual Dinner. Seated, left to right: Keith I. Parsons, JD'37, General Chairman of the 14th Annual Fund Campaign, Attorney General Clark, JD'51, and Peter N. Todhunter, JD'37, President of the Law Alumni Association.

Fund Chairman Parsons: "$160,000?". Dean Neal: "At least—and fast!"

The Honorable Jacob M. Braude, JD'20, with Mr. and Mrs. A. Bruce Schimberg, JD'52 and Assistant Dean James M. Ratcliffe, JD'50, at the Annual Dinner. Judge Braude had just been notified that he was to receive the distinguished public service citation of the University of Chicago Alumni Association.

Judicial Activism, Nonjudicial Passivism, and Law Reform

By Phil C. Neal
Dean and Professor of Law,
The University of Chicago Law School

Dean Neal was the luncheon speaker at the Ninety-Fourth Annual Meeting of the Chicago Bar Association. This article is based on the talk he gave on that occasion, and is reprinted from the Chicago Bar Record, Volume XLVII, Number 8, June-July, 1967.

I am delighted to have the privilege of making this maiden appearance before the annual luncheon of our Association. I am pleased to be here, but I also feel some sense of apology and regret that my own work these past several years has not involved me more frequently and actively in the affairs of this Association, whose work I have come to admire very much. Having been a member of the Illinois bar, though an inactive and mostly absent one, for nearly twenty-five years, I have a feeling of kinship that goes a good deal deeper than my relatively recent association with the University of Chicago Law School. My conviction is that the ties between a law school and the organized bar should be close and substantial, and I am happy that there is much in the past and present tradition of my law school to affirm the value of such ties, including the participation of a number of members of my faculty in the work of important committees of this Association and the recent membership of one of them on our Board of Managers.

I shall venture to say a few words on the ancient problem of law reform and its relation to the legal profession, a problem that perhaps more than any other bridges the interests of the law schools and the practicing bar. My excuse for talking about such a well-worn theme is not that I have new ideas but rather that old ones may have a timeliness that is likely to be neglected for the very reason that they are so familiar.

There is some impertinence about a representative of the law schools speaking to this Association about the role of the legal profession in law reform. The law schools have not, I think, been prime movers in the field of law reform in this country. Their main strengths have been in other ways. On the other hand, the record of bar associations such as this one is studded with important accomplishments. To take only our recent history, one thinks of such major achievements as the new judicial article in Illinois, our new Criminal Code and Code of Criminal Procedure, and the new Illinois Antitrust Act. Members of law faculties in this state have had a large hand in such work, I am happy to say, but the credit for initiating and pushing through these major changes in our law, and a good many others that could be listed, belongs much more to the practicing than to the academic side of our profession.

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failure. because as we has has against legal profession, that the confession as a powerful engine of law reform as we should hope and expect. The indictment is a gentle one because it is not easy to assign responsibility for this failure. A more intense and constant concern on the part of the average lawyer would no doubt have made a difference. But some of the causes are to be found in defects in our institutions.

Many types of evidence could be adduced in support of the general proposition. I want to dwell for a moment on one item in particular that underscores the problem and its significance. I refer to the Supreme Court and to the distinctive role that it has come to play in the past ten or fifteen years.

In speaking of the Supreme Court my aim is to be neutral in word, thought and deed. That is not a wholly congenial attitude for an academic lawyer, particularly one whose special interests lie in the territory of constitutional law and antitrust law. Law professors thrive mostly on subtle analysis and the fine art of judicial criticism. Much of what the Supreme Court has been doing in recent years seems to have been tearing down the points of reference that made the game fun, and the Court seems to have become relatively immune to intellectual criticism. Fortunately this trend has not altogether blunted the enthusiasm of some of the critics, such as my colleague Philip Kurland.

I am by no means calling for a moratorium on such criticism or asking for an amnesty on the Court's behalf. I wish merely to make the objective observation that the Court has become the most conspicuous source of legal change in the country. This in a way is more revolutionary than any of the specific changes in the law that have resulted from the Court's decisions, great as some of them have been. We had the earlier, long-standing image of the Supreme Court as essentially a resistant force, using constitutional doctrine and grudging statutory interpretation to slow the pace of legal change. This was followed, after the turnabout of the mid-thirties, by a permissive Court, a Court that exercised self-restraint in deference to the superior lawmaking credentials of Congress and the state legislatures. But in the Warren period we have seen a still further shift, the emergence of a Court that is itself an architect of change. In one area of law after another, the Court has led and the country has followed.

The change is reflected, of course, in the cliché that describes the Warren Court as "activist." It is reflected in the attitude of sizable segments of the population that look to the Court as a champion and expect it to bring the Nation's laws into closer conformity with democratic and egalitarian values. It is reflected also, I think, in the Court's view of itself—in its ways of speaking and its practices. One symptom of this is the growing number of opinions that read more like a statute than a decision, and that purport to lay down detailed rules or guidelines for the future—even to the point of specifying cut-off dates for the application of its new commands. Another is the Court's greater hospitality to issues that transcend the narrow interests of specific litigants, a tendency reflected in the weakening of barriers such as the requirement of standing and the doctrine of political questions. Another manifestation of the same tendency is the Court's increased receptiveness to amicus curiae participation. In these and other ways the Court's work has taken on a stronger legislative cast than it has ever had before.

There is not much need to document this view of the Court as a reforming institution. Major areas in which it has accelerated the pace of legal change are familiar. The obvious and dramatic ones are segregation, reapportionment, and state criminal procedure. But there are hosts of other examples, both constitutional and statutory, that will come readily to mind. From my own field I would cite the rapid conversion of the antitrust laws into a set of rigid per se doctrines, especially but not exclusively in the field of mergers. The Court has even moved strongly into the field of private and common law, as in its new doctrines in the law of defamation. It has now given the signal for sweeping changes in the procedures and indeed the whole philosophy of juvenile courts. There are intimations that in the field of criminal procedure it may move on from problems of self-incrimination and right to counsel to imposing constitutional requirements of pre-trial discovery. The expanding concept of state action has become a quite open-ended war-

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I begin with this confession because I want to follow it with a gentle indictment, an indictment that runs against the legal profession as a whole.

The indictment is that the profession, for all its good work, has not been as powerful an engine of law reform as we should hope and expect. The indictment is a gentle one because it is not easy to assign responsibility for this failure. A more intense and constant concern on the part of the average lawyer would no doubt have made a difference. But some of the causes are to be found in defects in our institutions.

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rant for intervention in new areas of the law previously left to the states, as in the Court's recent decision forbidding California to repeal its fair-housing law by a constitutional referendum (one-man, one-vote notwithstanding).  

The fact that so much initiative in legal change has passed to the Supreme Court is in a sense paradoxical because it has occurred at a time when judicial lawmaking in general is very much in eclipse. It has been obvious for a long time that the creative era of the common law is a thing of the past and that legislation has become the dominant form of law. The steady trend toward ascendancy of statute law over judge-made law has not abated. The explanation of the paradox, of course, lies in the fact that the Federal Constitution is the principal remaining source of judicial power to make new law. We have had a Supreme Court that has exercised that power in a bold fashion.

There are some obvious reasons for doubting that a system is ideal when it leaves heavy responsibility for initiating legal development in a court whose chief power comes from having the last word on what the Constitution means. Heavy involvement of the Court in great political problems is only one of the dangers. Another is the irreversibility of changes that are made under the auspices of the Constitution. In the face of the rapid development of constitutional doctrine, efforts like that of the American Law Institute and the American Bar Association to deal painstakingly with the problem of criminal procedure, and of Congress to lay down standards for legislative apportionment, have more than the irony of locking the barn door after the horse is gone; the problem is how to re-open the barn.

As lawyers, however, we must be interested not merely in observing this shift in the balance of lawmaking power, and in criticizing or deploring the Court's tendencies, but in trying to understand the forces that have brought it about. It seems improbable that we can account for it solely as the product of the particular personalities that circumstance has placed on the Court, or that it is likely to be drastically changed by new appointments. I have no intention of attempting to give a full account of those forces even if I were able to do so, as I am not. But I suggest that the current position of the Supreme Court is among other things a reflection of an older problem and an older defect in our legal machinery.

There are different ways of viewing the Court's recent behavior. It is possible to think of the Court as a group of adventurous knights charging off to discover new causes and do battle. Another and more charitable view is that the Court has felt itself responsible for overcoming some of the lag in the response of our law to new pressures and conditions, compensating for the inertia of other agencies in the system. I have little doubt that the Court has often seen itself in the latter role, and has believed it was assuming initiatives forced upon it by the default of others. That clearly has been its position on the great problems of school segregation and reapportionment. Very likely a similar defense could be advanced for it in a good many other areas as well. (No doubt the Court found more than poetic justification for its long-expected miscegenation decision in the case this Term that originated under the compelling caption of Virginia against Loving.) The wide acceptance of Gideon v. Wainwright, for example, suggests that the bar was merely waiting to be formally advised of a responsibility that it had come instinctively to recognize in the many years since the Court had taken the first steps toward implementing the right to counsel in criminal cases.

The new position of the Supreme Court emphasizes the need for some renewed attention to the efficiency of our arrangements for legal development. Where else besides the Constitution and the Supreme Court should we look for constant and vigorous attention to the whole spectrum of issues of law reform? The issues that the Court can lay its hands on are of course only part of the problem, and a tiny fragment at that. If there is lag in our response on problems of the kind the Supreme Court has been considering, what of the vast areas of the law that get little public notice, that have little political appeal, and that find no special interest groups to urge their reform?

Over a hundred years ago de Tocqueville made this observation:

"The Americans, who have made so many innovations in their political laws, have introduced very sparing alterations in their civil laws, and that with great difficulty, although many of these laws are repugnant to their social condition. The reason for this is that in matters of civil law the majority are obliged to defer to the authority of the legal profession, and the American lawyers are disinclined to innovate when they are left to their own choice. "It is curious for a Frenchman to hear the complaints that are made in the United States against the stationary spirit of legal men and their prejudices in favor of existing institutions."  

Those charges would be hard to sustain today against the total record of law reform in this country, for a good deal of which the bar and agencies of the bar have been responsible. But a more accurate criticism that a student of our government might have made then and might still make is that we have not built into the system any mechanism specifically charged with perfecting and remodeling our laws. And of course the need for it is much greater now than then.

Much has been done, to be sure, by groups such as the American Law Institute, the Commissioners on Uniform State Laws, committees of national and local bar associations, rules committees, and innumerable special committees and commissions created from time to time by the legislatures and the executive branches of state and
local governments. The law schools, too, have made their contribution. But most of such work is ad hoc and sporadic. Often it is directed to problems that have already become urgent by the time they are given attention. Much of it focuses on a few selected areas that seem appropriate for a major project. Our law reform machinery works in a jerky and uneven way. It also works for the most part with casual or part-time interest and help. The legislatures, while theoretically responsible, cannot be relied on to give continuous and careful attention to improving the laws. They too operate largely in response to specific pressures. Besides they are heavily preoccupied with taxing and spending, and with current controversies.

These are old complaints, and they led long ago to constructive proposals for remedying them. The case for some permanent machinery for law reform was made early in the nineteenth century by Bentham and Brougham in England and early in this century by Cardozo and Pound in the United States. For the most part such proposals have failed to command wide public interest, or to arouse the professional support necessary to overcome inertia. A few states in this country, notably New York and California, have succeeded in establishing law revision commissions, with results that have been widely praised in those states. The idea is not a new one in our own state. Twenty years ago a careful and persuasive article by a young Chicago lawyer, Mr. Ben Heineman, led to a proposal that had the support of this Association but that nevertheless failed to receive the blessing of the legislature. (I suppose we might infer that Mr. Heineman concluded this was not the way to run a railroad.)

There are signs now of a revival of attention to this sensible and rather obvious step for getting a better grip on the problem of law reform. Not long ago Judge Henry Friendly made a powerful argument calling for a law revision agency in the federal government. In England the experience with a lengthy history of ad hoc law reform committees has led at last, under the leadership of the current Chancellor, Lord Gardiner, to a permanent Law Reform Commission. The Commission has set for itself an impressive first agenda for systematic re-examination of various fields of English law. Some of its work has already begun to come in, after one year of operation, and there seems little reason to doubt that it is destined to have a profound impact on the law of England.

My question is whether the time has not come to take old blueprints out of the closet and renew our interest in this idea as a progressive step for Illinois. A law reform commission is needed, not to take over all the work of development of the law, but to provide a steady source of energy and initiative. A commission would not displace bar committees, committees appointed by the Supreme Court, and other existing sources of law revision work.

It would share the field with them and would draw upon these existing resources for advice and assistance in its own projects. It could do a great deal to make more effective use of sources of help that are now scattered and uncoordinated, including members of law faculties and even law students. Much good might come from diverting some of the student talent on the law reviews that now goes into refined criticism of the judges' work and turning it instead into research and drafting on legislative problems. We have recently had an encouraging experiment of that sort at our School, in a seminar directed by Professor Julian Levi which collaborated with the Legislative Commission on Low Income Housing, chaired by Representative Robert E. Mann.

The aim should be to create a small commission composed of men of great professional stature who are prepared to devote a major part of their time, preferably full time, to its work—and who would be compensated accordingly. There is obvious merit in Judge Friendly's suggestion that some of the talent might well be found in retired judges and in senior lawyers who have reached the point where the opportunity to make a lasting contribution to the law may have greater appeal than further success in practice. Appointment to the commission should be invested if possible with prestige rivaling that of membership on a high court. There should be close links with the legislature, presumably through ex officio membership of leaders of the judiciary committees. But the legislature ought not to look upon the commission as a rival but as an aid. The success of the commission would depend not upon authority but on the quality of its work and the wisdom of its recommendations.

The potential field of effort of such a commission would be broad. A substantial part of its work would be a kind of legal gardening that is now no one's special responsibility—keeping the trees pruned, the lawns weeded, and the leaves raked up. This is unspectacular but important work; each year's judicial decisions draw attention to a host of small but cumulatively significant technical points on which intelligent draftsmanship could clarify the law and eliminate some difficulties. A second major area of effort would be those more comprehensive re-examinations of whole fields of the law, like the drafting of the new Criminal Code, that are necessary from time to time if the statute book is to be kept up to date and in good working order.

But it is to be hoped that the charter of such a commission would not stop with these traditional kinds of technical law revision. It is in this respect that I think Illinois has an opportunity to press beyond the existing models of law revision commissions in this country. Such a commission should be encouraged to take a broad view and a long view. No area of the law or of our legal machinery should be barred from its field of interest. It would, of course, be expected to move modestly and cautiously at
the beginning. It should establish a solid basis for confidence in its work by superior craftsmanship in technical and noncontroversial parts of the law. But it should not be too modest. It should hope to become in time a source of perspective and wisdom, and even of bold proposals, on reforms in the law that may take a long time in coming and that may require the kind of perseverance that led to the new Judicial Article. It should expect to produce not only proposed legislation of matters appropriate for immediate action, but thoughtful reports on emerging problems that may not yet be ripe for final recommendations. It should aim to inform, and to elicit wide interest and debate, not only among the members of the profession but also in the public at large. We should judge its success not solely by its batting average in each session of the legislature, but by the extent to which it builds a record of reasoned statements that can constitute a foundation for the progressive development of the law.  

As Sir Leslie Scarman, the chairman of the English Law Commission, has reminded us, law reform is in many respects too serious a matter to be left to the legal profession. The profession must be on guard not to exaggerate its claim of competence to decide what is good for society. But our society has been in the habit of looking to lawyers for guidance. I am sure we believe that the habit should be encouraged and the faith vindicated. In Sir Leslie's words, "The real test for law reform and ... for the legal profession ... is whether we as professional men are prepared to lay our hands to the reform of questions of law which profoundly affect interests of great importance to society."  

It would be good to be able to believe that the old suggestion of a Law Reform Commission is an idea whose time has come. Surely there is no project with greater promise of lasting benefit to our legal system than an association such as ours might seek to advance. I think I can assure you that in any such effort this Association would have the warm support and cooperation of the law schools and the academic lawyers of this State.  

FOOTNOTES  
1. See in CHICAGO BAR RECORD 140 (1967).  
11. See FOR BETTER HOUSING IN ILLINOIS, Report of the Legislative Commission on Low Income Housing, 75th General Assembly (1967).  
12. An excellent example of the kind of study that is needed in many areas is the admirable report on Illinois antitrust law prepared by a committee of the Association under the chairmanship of Robert W. Bergstrom, Esq., which laid the basis for a new and greatly improved state antitrust statute. THE LAW OF COMPETITION IN ILLINOIS, A Study by the Special Subcommittee on Illinois Antitrust Laws of the Chicago Bar Association (v. o. ILLINOIS LEGAL SERIES, 1962).  

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law more directly.  
But all the studies on which this essay will report have one thing in common: they were made for the purpose of being used by the law and in many instances have affected its course.  

We shall report these studies in the order of the spectrum that ranges from the narrowly but sharply focused controlled experiment to the broad, diffuse survey.  

Controlled Experiment  
There is no more powerful tool for assessing a legal innovation, or any innovation for that matter, than the controlled experiment. But since its essence is to apply a rule of law to one group of cases and to withhold it from another, such purposeful discrimination would seem at first to violate the equal protection guaranty of the Constitution. Indeed, there are substantive limits to legal experimentation; there can be none that involves withholding of a right, guaranteed under all circumstances. It would be impossible, for instance, to insist that some criminal defendants be tried without counsel in order to find out what effect counsel has. But there are several reasons why, outside this rigidly protected sphere, the law should permit experimentation. First, the experimental discrimination is by definition temporary; second, the discrimination is applied impartially, by lot; third it is the very purpose of the experiment to learn what, if any, effect the discriminating rule would have: hence, at the outset, one cannot even be certain that there is discrimination; and fourth, the ultimate aim of the experiment is to eliminate the rule if it should be found to discriminate unfairly.  

Controlled legal experiments, not surprisingly, have largely been confined to rules that convey privileges rather than rights.  

The first controlled experiments within the precincts of the law were probably conducted by the Adult Prison Authority of the State of California, which tried to assess the effectiveness of a variety of prisoner treatments. The most daring of these experiments was an effort to deter-
the beginning. It should establish a solid basis for confidence in its work by superior craftsmanship in technical and noncontroversial parts of the law. But it should not be too modest. It should hope to become in time a source of perspective and wisdom, and even of bold proposals, on reforms in the law that may take a long time in coming and that may require the kind of perseverance that led to the new Judicial Article. It should expect to produce not only proposed legislation of matters appropriate for immediate action, but thoughtful reports on emerging problems that may not yet be ripe for final recommendations. It should aim to inform, and to elicit wide interest and debate, not only among the members of the profession but also in the public at large. We should judge its success not solely by its batting average in each session of the legislature, but by the extent to which it builds a record of reasoned statements that can constitute a foundation for the progressive development of the law.12

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