A Look Forward: The Next 100 Years

The fall issue of the Law School Record celebrated the University of Chicago Centennial through a look back to events in the early life of the Law School. But a Centennial is about more than nostalgia—it looks forward to the next century. In this spirit of the Centennial celebration, we asked our faculty, alumni, and the president of the Law Students Association to offer predictions about the future direction of law practice, the courts, legal education, and legal doctrine.

We begin with three articles about the court system. Albert Alschuler discusses the criminal justice system, Larry Lessig looks at the Supreme Court, and Terry Hatter examines the federal judicial system. The next four articles consider particular fields within law practice. After Don Samuelson discusses professional responsibility, Cass Sunstein addresses environmental law, Leo Herzel discusses corporate practice, and Lillian Kraemer examines the future of bankruptcy law. The final four articles turn to areas of legal thought within the academy. Tia Cadahy sets out her ideas for the law school of the future, Gary Palm lays out a blueprint for clinical education, Douglas Baird writes about law and economics and Mary Becker discusses feminist theory.
The Future of Criminal Justice

Albert W. Alschuler

Winston Churchill once observed that the quality of a nation's civilization can be largely measured by the methods that it uses in the enforcement of its criminal law. In the final decade of the twentieth century, Americans can hope that there are other yardsticks.

Recent years have marked some milestones in our nation's penal history. Over one million Americans are currently behind bars, and the United States now imprisons a substantially higher portion of its population than any other nation whose incarceration rates we can approximate. A decade ago, South Africa and the Soviet Union imprisoned more people per capita than we did, but we have now overtaken them by a substantial margin.

As the number of Americans behind bars has burgeoned, so has the number under other forms of correctional restraint. The Bureau of Justice Statistics offered the following comparison: "At the end of 1980, approximately 1.8 million persons were under the care, custody, or control of a correctional agency or facility. At the end of 1989, total correctional populations numbered nearly 4.1 million adults."

The BJS reported that at the end of 1989 "[o]ne in every 25 men and 1 in every 173 women were being supervised."

Some demographic groups are obviously more vulnerable to participation in crime and to punishment than others. Today nearly one out of four black men in their 20s is under some form of criminal restraint—prison, jail, probation, or parole.

The doubling in the rate of criminal punishment during the past decade is not attributable to any increase in the rate of crime. Indeed, crime rates are lower today than they were a decade ago in almost every offense category. Americans appear to know more about occasional upward blips in the crime rate (the city's "bloodiest weekend in a decade") than about the generally downward slope. Because crime is news, some tilt in media reporting seems inevitable. In the electoral arena, moreover, figures who appeal to and contribute to the public's fear of crime seem never to have had the field so fully to themselves.

Political scientists suggest that we live in the time of the "plebiscite Presidency." Public officials can no longer count on the backing of stable coalitions organized along party lines. Their goal is often short-term approval, and they seek issues that promise immediate payoffs and that already have strong public support. Partly for this reason, they fear endorsing any position that an opponent can characterize as "soft on crime" in a 30-second television commercial.

As America's prison population doubled and more during the 1980s, the proportion of Americans who said that criminal sentences were "not harsh enough" increased from 79 percent to 85 percent. A former Chairman of the Illinois House Judiciary Committee, John Cullerton, told a conference of judges that he had struck a bargain with the other members of his committee. No one would seek to increase the sentence for a crime by more than one "level" during a single session of the legislature. "That way," Cullerton explained, "we could leave room to do it again."

The politics of resentment are more marked in America than elsewhere. Our treatment of capital punishment illustrates the contrast. Every Western democracy other than the United States has effectively abolished the death penalty, and when members of Canada's Parliament proposed reinvention of this penalty in 1987, the nation's Conservative Prime Minister led a decisive majority in opposition. America alone continues to enact new death penalty legislation and to impose capital punishment more frequently.

Similarly, America has embarked on a $10 billion-per-year war on drugs. Presidents and "czars" speak of a drug epidemic. As best anyone can judge, however, the rate of drug offenses has declined more substantially than the rate of other crimes. Only the number of drug cases in the courts has soared. The drug war itself probably is not the major cause of the decline in drug use. Law enforcement efforts have focused primarily on limiting the supply of drugs, yet cocaine and heroin have been among the few commodities in America whose prices have moved in the opposite direction from inflation. The combination of declining use and declining price suggests that diminished drug use is the product of reduced demand rather than reduced supply. People "just say no," and the use of legal drugs—alcohol and tobacco—has declined along with the use of illegal substances.

American criminal procedure has become an almost schizophrenic system of feast and famine. In 1990, the longest criminal trial in American history came to an end two years and nine months after it had begun. This trial did not involve financial machinations of great complexity or an army of white collar defendants; the defen-
more than 500 cases that she handled during the year. Robert followed her advice.

The authorities later realized that Robert H. was not guilty of the charge to which he pleaded guilty; through a bureaucratic error, they had confused him with someone else. Despite Robert's innocence, however, the public defender may not have given him bad advice. She told him that, if he pleaded guilty, he could go home that day; and if he wanted a trial, he could have one—after waiting in jail for perhaps another year.

Sentencing guidelines designed to promote equality have scattered years of imprisonment almost by lottery.

Because describing the appropriate influence of situational and offender characteristics on sentencing is difficult, sentencing commissions have emphasized rough indicators of social harm instead. These commissions have counted the dollars, weighed the drugs, and forgotten about more important things.

Indeed, the Supreme Court held last year that the Federal Guidelines require a court to weigh blotter paper, gelatin cubes, and sugar cubes containing LSD along with the drug itself in determining an LSD dealer's sentence. Although the sentence for a first-offender who sold 100 doses of LSD in sugar cubes would be 188 to 235 months, the dealer's sentence would have dropped by two-thirds if she had sold the same 100 doses in blotter paper. The dealer's sentence would have been cut more than in half again if she had used gelatin capsules, and the sentence would have been cut in half once more (to 10 to 16 months) if she had sold the LSD in pure form. The First Circuit recently held in fact that the weight of a drug courier's suitcase should determine his sentence; the cocaine that this courier had carried was chemically bonded to the suitcase. (The court did agree to omit the weight of the suitcase's metal fittings.) Results like these would have been inconceivable in the old regime of discretionary sentencing. Some judges are odd, but determining how many years to imprison someone by weighing blotter paper and suitcases is madness. As Richard Posner has remarked, we might just as well base punishment on the weight of the defendant. Sentencing guidelines and mandatory minimum sentences plainly have marked a changed attitude toward punishment—one that looks to collections of cases and to crude measures of social harm rather than to
individual offenders and the punishments they deserve.
As to the future, I offer two predictions. First, the prophecy that Abraham Lincoln called true and appropriate in all situations: "This too shall pass away." (Alas, I see little sign that it will happen any time soon.) And second, a still older prediction: "Whatsoever a man soweth, that shall he also reap." As Winston Churchill recognized, we cannot diminish the least favored members of our society without at the same time diminishing ourselves.

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The Supreme Court and Our Future
Larry Lessig

If a century ago one had predicted the Supreme Court’s next hundred years, one would no doubt have gotten it wrong. Within five years of such a forecast, the Court would have held that segregation was consistent with the equal protection of the law; sixty-three years later, that it was not. Within six years, the Court would have begun the transformation of the 14th Amendment from a guarantee of equality to a guarantor of economic liberty; forty-six years later, on that front at least, it would have beaten a full retreat. Within some sixty years, it would have launched a different activist campaign, this time to protect the rights of some of the weakest in society, but as the century closes, that battle too has come to an end. At best, it was a century of cycles; at worst, it was confused.

Of a prediction of the next hundred years, there is little reason to expect anything more. At most we can speak about the very near future, a clue to which may be found in the very recent past. Consider just one case. It is the law that a criminal conviction obtained by general verdict cannot stand if one of the grounds upon which the conviction could have rested is unconstitutional or in some other way illegal. As the Supreme Court held in Yates v. United States in 1957, "a verdict [must] be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected."

In Griffin v. United States, decided this Term, the Court considered the types of insupportable grounds that are within the rule of Yates—specifically, whether the Yates rule covers a ground that is insupportable because the evidence relied upon is insufficient as a matter of law. In an opinion written by Justice Scalia, the Court (without dissent) said that it did not. The Yates rule, the Court held, applied to "legal errors" only, and for these purposes, insufficiency of evidence is not "legal error." True, the Court said, in some cases the Court has held that insufficiency of evidence is legal error; indeed, it is constitutional error. But even if sometimes insufficiency of evidence is "legal error," sometimes it is not. In this case, not. As the Court viewed it, the difference was mere "semantics."

For what was important was that "what the petitioner seeks is an extension of Yates’ holding... to a context in which we have never applied it before." Griffin is a criminal (or at least may be); with respect to criminals, the Constitution now protects only what it now protects; its protections will not be extended to something more.

Which is not to say that they will not be contracted to something less. The recent past is littered with examples of the Court’s willingness to change constitutional law when change means less protection for the currently disfavored, and more protection for the currently favored: Less protection for criminals, for the poor; more protection for states, for racial majorities, and for the police. For this is no less an activist Court than courts before—activist both in the sense that it constructs constitutional barriers to the decisions of democratic majorities (by resisting affirmative action and creating "states’ rights"), and in the sense that it pursues its reconstructive task at an ever increasing rate.

Conservatives argue that such change is conservative because restorative, but restorative to what end? Even if the Constitution has been illicitly "amended" by past activist Courts, does anyone really believe that the public views this current restoration as a reaffirmation of original principles rather than as yet another illicit and political attempt by yet another president to "amend" the Constitution through judicial appointment? Will the result of this restoration be a public reawakened to the possibility of constitutional law, or a public increasingly cynical about constitutional politics? The Court calls itself conservative, but we have known conservatives. Justices Harlan and Frankfurter were conservatives. These justices are not. This Court, like the Court before it, like the Court before it, and like the Courts before it, has its own conception of a properly activist role, and with a certain unseemliness, is quite eagerly pursuing it.

The result will be a relatively more statist society, though statist in an oddly skewed sense. Government will have more power as individual rights are curtailed; but less power as majority rights (resisting affirmative action) and states’ rights (resisting regulation by Congress) are expanded. (The one exception may be economic and property rights. There, individual rights may increase—a gain for some of those already possessed of the most power in society.) And barring calamity, this will be the pattern for at least the next two decades, for the conservatives have succeeded in lacing the court with youth—the average age of the last five appointees is fifty-three, the average retirement age over the century is seventy-two; the most recent addition, Justice Thomas, will just speed the reform.

Beyond substance, however, there is something particularly arresting about
the form of the Court's most recent turn, a change that should lead some of us to ask whether we give the Court more attention than is due. Few doubt that the legal work-product of the Court has declined, as less is done by Frankfurters, or Jacksons, or Stones, or Holmeses, and more by clerks—our students, good students, but students just two years out of law school. Similarly, few doubt that the political product of the Court has increased, due again to who the Justices are not, and to what they have let their clerks become. Both trends should suggest the intellectually barren terrain that is the Court.

And yet the largest category of legal scholarship continues to be directed to the Court, reflecting on its work, its method, and its mission. Why? For what is most striking about this Court is its complete disengagement from anything like a reflective perspective on its work. While the academy continues to grind out essay upon essay struggling with the substance and theory of much of the Supreme Court's job (over the past decade, for example, there were some 1600 published articles discussing theories of constitutional interpretation), there is an inescapable sense that this is not a perspective that the Court finds either interesting or important, let alone comprehensible. Instead of advancing a theoretical debate to advance the practice for which it is a debate, we have engendered a theoretical debate for theory's sake alone. The rod has disengaged from the piston.

No doubt this is in part due to a change in our own work-product as much as to a change in the Court, as academics flee the law for economics, or philosophy, or literature, and as more and more of our work appears political, if only because it reveals the premises that we no longer share. But in part too it is due to an attitude of the current judiciary that abjures theory for approaches more pedestrian, that scorns the reflective to embrace the reactive, that has given up any sense that there is sense to be made of the practice as a whole, or at least that part which is the Court's practice.

My point is not about blame. It is instead to ask how we should respond to this current separation, whatever its cause. When the academy and the Court were closer, both in attitude and in interest, we may well have been right endlessly to engage questions of constitutional theory or theories of interpretation. These are, after all, questions about a certain kind of interpretive practice, and make sense as questions so long as they remain questions of that practice. But do they make sense when at most their answers play to an audience of none? Do they make sense in a world where most of what law routinely does it does quite poorly, and where they address not at all issues about what law routinely does? Is it possible that our greatest contribution is no longer to constitutional theory, but to ordinary practice? To the questions missed and yet unanswered by Zeisel and Kessler, rather than Dworkin and Rawls?

Whatever the Court will become a century from now, we know what it will not be for the next generation. It will not be the institution that advances this nation's, or law's, ideals. At best, it will wait for democrats to do that; at worst it will lend aid to the resistance. We should accept this and move on to more fertile ground.

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Future of the Judiciary
Terry J. Hatter Jr.

Our University is celebrating its Centennial, and the nation is still commemorating the two hundredth anniversary of the Bill of Rights of the Constitution. Most of us understand and appreciate what this great University has given us as we look back at our educational experience, and, of course, we exist in the codification of rights that we share as Americans through the first ten amendments. As important as this reflection on the past is, it is no less important that we attempt an assessment of what the future portends—particularly for the federal judiciary.

As a member of that judiciary, I have a great concern for its direction and as a citizen, I have an even greater need to believe that a strong and independent Judicial Branch will be a part of this nation's future. Indeed, I am quite fond of telling my jurors (and anyone else who will listen) that it is our independent judiciary, established by Article III of the United States Constitution, that sets our nation apart from the other nations of the world, even the so-called "free" ones. While it is the Constitution and its Bill of Rights that afford us great protections, it is through the interpretations of this "principled" document by the courts that we actually realize the rights as applied in today's society and, we hope, in tomorrow's rapidly changing world.

It is uncertain, at best, that our Third Branch will continue to evolve and remain a co-equal branch of federal government. There are danger signals all around us that give pause to an assurance that the court system as we have come to know it will continue to exist. For some, it is not necessarily a bad thing that the courts may be weakened in the future. However, for the majority, including minorities and women, a diminution of shared powers by the judiciary augers disaster. Indeed, without a constantly strong and independent judiciary, there is the true danger of tyranny by majority away without the protection of minority rights otherwise safeguarded by the Constitution—no real chance for all of us to play on a level playing field.

What danger signals? First, and foremost, how many people (even University of Chicago educated) realize that we spend less than one-tenth
of one percent of the national budget on the entire Third Branch of government? Every time a B-1 prototype goes down in a test flight in the California desert it represents an amount equal to at least a half-year's funding of the federal judiciary. For the first time in history, we have reached just two billion dollars of annual funding. We are the only courts of record without assigned bailiffs—a district judge must give up a law clerk in order to secure a bailiff to staff the courtroom. We are the last branch to obtain full computer capability, even while our caseloads skyrocket.

Together with an increasing caseload, there are more and more complex cases, both civil and criminal. What was once a court of limited jurisdiction has become essentially a general forum. This is in great part the result of ill-thought congressional legislation that has grown out of "tough-on-crime" politics. Such strange political bedfellows as Senators Ted Kennedy and Strom Thurmond have co-authored the Sentencing Guidelines, which are not guidelines at all but, instead, mandates that have effectively taken discretion in sentencing from life-time Article III judges and transferred it to young prosecutors. This "reform," along with mandatory minimum sentences, also legislated by the Congress, has added greatly to the number and length of criminal hearings.

The civil bar initially did not feel threatened by the "tough-on-crime" bills. As it becomes more difficult to find firm trial dates, however, the ABA and state and local bar groups are beginning to express their concern directly to the Congress. Even with this welcome intervention, it will take decades to undo the harm already done to a balanced civil and criminal caseload.

The most recent Congressional foray into the operations of the Third Branch comes under the guise of case management legislation, entitled the Civil Justice Reform Act. Written principally by Senator Joseph Biden, this bill "authorizes" district courts to set timetables and discovery limits, among other things, but, in actuality, represents little more than an attempt at Congressional oversight of the judicial process. Many of my colleagues in the Central District of California agree that the Civil Justice Reform Act mandates actually mirror the Local Rules that our court has had in place for many years in this, the largest district in the nation, which serves some fifteen million people. They also agree that this Act is a thinly-veiled encroachment on the federal judicial prerogative to establish and maintain procedural—not substantive—rules for the functioning of the courts.

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Another area of concern is the preservation of the jury system. I was a student at the Law School when Professors Kalven and Zeisel were doing their formative work that led to their groundbreaking study, The American Jury. Many of the insights, problems, and proposed solutions in that 1966 work are no longer timely, but they still give focus for the future. While many practitioners and law professors lament such jury changes as less than twelve-person juries, judge-conducted voir dire, and limited use of pre­emptory challenges, my concern is more with the increasing length and complexity of jury trials. I can envision our federal jury system emulating England in that jury trials will be seen only on the criminal side, and even there it will be difficult to obtain juries that are "legally" representative of a cross-section of the community. How can we expect ordinary citizens to take many months—and, indeed, years—away from work and family to sit on juries resolving other people's disputes? Moreover, the complexity of issues that jurors are asked to resolve is increasing as litigation itself increases, particularly in such fields as antitrust, patent, copyright, environmental, and space law.

Some champion ADR (alternate dispute resolution) as a cure for many of the present and perceived future ills of the judicial system. We see more arbitration, mediation, summary jury trials, and other experimental projects being tried in place of the traditional courts. In California, we even have something called "Rent-A-Judge." This "private judging" is another ADR tool that has proven effective in certain situations, but it also presents problems of its own. First, there is the appearance—indeed, the actuality—of a two-tiered justice system. One tier is swift and efficient and is available only to those few who can afford it. The other is the same crowded, under-funded system that less privileged litigants must continue to use. Second, many fine, experienced judicial officers are being siphoned into the more attractive (better pay, better hours) private system at further risk to the public courts. Especially worrisome in the long run is the fact that less attention will be given to improving the traditional court system as more of the "big players" leave it for the world of private judging.

Overlying the foregoing is what I perceive as a failure of confidence by the general public in the process of selecting federal judges, particularly at the highest level—the United States Supreme Court. The recent Senate confirmation hearings for Justice Clarence Thomas, while at times dramatic, were disquieting in result. As in the confirmation hearings of the two justices preceding Thomas, there was the constant undertone expressed by Senators of both parties that the President is owed deference in the nominating process. I submit that nowhere in the Constitution is "deference" to be found. Nor can it be argued that it was the original intent of the Founding Fathers to give deference to a President's Supreme Court nomination. Indeed, the Senate has done violence to the separation of powers which is, together with the Bill of Rights, the keystone of our Constitution. The repeated failure of the Congress to exercise vigorously its mandate to ensure a constitutionally selected Supreme Court "... by and with the Advice and Consent of the Senate" spells political disaster. It is the Court, not the nominee, to whom
deference is owed, and it is owed on behalf of the People.
Until the Congress and the Executive change direction, there remains a troubled future facing the federal judiciary and our nation, of which an independent court is such an integral part.

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The Need for a Renewed Professionalism
Don Samuelson

The law industry has just completed two decades of unprecedented prosperity and growth. Lawyers have increased in number from 300,000 in 1970, to 600,000 in 1980, to 900,000 in 1990. Law is presently a $90 billion industry which has grown at a 10 percent rate during the last decade compared to a 3 percent growth in the American economy. It has been common for partners in big firms in big cities to make between $300,000 and $900,000 per year. The law industry clearly prospered in the 80s.

What are the prospects for the 90s? In the economy in general, there is emphasis on quality, on value, on providing cost effective solutions to the needs of consumers. These are the principles that will be applied to the legal industry in the 90s. Are clients satisfied with the legal services they have been receiving? From a recent survey of owners of mid-sized businesses in Chicago, apparently not. The conclusions are:

1. Clients are dissatisfied with lawyer attitudes, narrow perspectives and costs.
2. Clients do not feel they are getting good value. The incentives in the current billable hour system appear to favor inefficiency, delay, and lawyer interests.
3. Lawyers do not adequately understand their clients' businesses. As a result, they don't appreciate the ways in which their experience, knowledge, and connections could create value for their clients.
4. Associate salaries and costs bear little relation to the value of their work. This is good for associates, good for leverage, good for senior partners, but bad for clients.
5. Law firms appear to have made little "investment" in their practices—developing products and systems, substituting technology for labor—to provide superior services at lower costs.
6. There is a paradox in the significant values that can be provided clients by senior lawyers in the early diagnostic and design phases of a legal matter and the great costs—rather than values—generated by younger lawyers in manufacturing the service. As much as 90 percent of the value can occur in the first 10 percent of the time. The remaining 90 percent of the time—and cost—produces the final 10 percent of the value.

Law is a profession, but it is subject to business principles. The legal industry today is a mature and competitive marketplace. It is a marketplace that is undergoing rapid and perhaps structural change. All industries proceed through stages in a common evolutionary process. The first stage emphasizes production. The product or service is new. The demand is high. There are few suppliers. The problem is in manufacturing the service and getting it out the door. This was the legal industry in the 70s and 80s, responding to the regulatory requirements of the Great Society.

The second stage involves "selling." Demand is not sufficient to "clear" all of the available product. Sometimes customers need to be persuaded to buy. Law firms added "marketing" staff to assist in this selling function in the late 80s.

The third stage requires "marketing." The focus is on the customer. What do they need? What value is the service to them? The basic elements are: a) the client has a problem; b) the lawyer has a solution; c) the client receives a benefit; d) the benefit is of value; and e) there is a reasonable relationship between the value and the price. These principles make up the "business" of law. By this I mean the client centered and efficient delivery of an appropriate and needed level of service.

When an industry enters the mar-
marketing stage of its evolution, the producer's challenge is to develop a system which can produce services at a cost less than their value to the client. The key point is VALUE TO CLIENTS. The practice of law in the 90s will not be "interesting cases" for lawyers. It will be recommending and performing a course of action—among a variety of alternatives—that is appropriate to the client's needs and objectives. For too long now lawyers have been looking through the wrong end of the telescope.

What must lawyers do to produce values for their clients in the 90s? First, they need to understand the principles, language, values, and motivations of the business community they seek to serve. A law firm does not need to become a business. It does need to understand business.

Second, lawyers need to be able to array a spectrum of legal solutions to client problems—not simply a single, zero defect conclusion. The art of lawyering will be to assist clients in selecting appropriate, co-effective solutions among a variety of options.

Third, the legal industry needs to develop systems and procedures—and the technology —so that the needed services can be produced cost-effectively, with the requisite degree of service and quality control, and at a price which is perceived to be a value to the client.

Fourth, lawyers need to reduce their manufacturing costs. They can "design" solutions with minimal manufacturing needs. They can substitute technology for labor in the manufacturing process. They can reduce labor (associate) costs. At the moment, lawyers produce high value diagnostic and design services. Their manufacturing processes result in low value products and services. A great deal of the current manufacturing process is unnecessary.

Fifth, both lawyers and law firms need to take longer term perspectives of their careers and law practices. They need to invest time, capital and creativity so that the costs of legal services can be reduced, resulting in increased value to clients. Lawyers cannot continue to sell hourly rate services, at ever increasing hourly rates, independent of the value of those services to clients.

Sixth, lawyers need to communicate their skills and capacities to clients in a persuasive and efficient manner, demonstrating how their services can be cost effective in advancing the interests of the clients.

The basic problem? There are not sufficient ownership interests in a law practice today to induce lawyers to take long term perspectives or to make investments in their firms or practices at the expense of current income. As a result, the prices for legal services rise—to reflect the increased costs of labor or the desire of partners for increased profits—with no offsetting increase in productivity. Markets shrink or are lost to more efficient industries. Revenues drop. Practices deteriorate. And law firms go out of business.

There is a message in this for the law industry. The practice of law needs to rediscover its professional premises. In a profession—or in any competitive marketplace—the interests of clients come first, not profit, not leverage, not the conversion of normal expenses and overhead items into cost-plus profit centers. Paradoxically, the marketplace pressures currently facing lawyers today are likely to result in renewed attention to the "professional" aspects of law practice.

Environmental Protection in the Twenty-First Century

Cass R. Sunstein

In the United States, environmental law has come in two stages. The first stage—from the creation of the Republic to about 1970—involved the use of the common law. The second stage—from about 1970 to about 1980—involved an extraordinary explosion of federal statutes. We are now entering an exciting third stage, whose contours are just beginning to emerge, and which might well simultaneously promote economic, environmental, and democratic goals. To understand that third stage, it is necessary to explore its predecessors.

As a regulatory system for protecting the environment, the common law had many advantages. It was highly flexible; it was decentralized; it allowed different accommodations to be reached in different areas. For many years, the common law worked reasonably well, at least insofar as it could control the worst abuses without imposing unnecessary obstacles to economic development.

As a complete solution, however, the common law is hopelessly inadequate. Judges are not experts in the complex issues of environmental protection. Equally important, they are not democratically accountable. The common law depends on the assumption that causation is clear; in the environmental context, causation is typically ambiguous. Finally, the common law depends on private initiative, when environmental protection affects so many people (including future generations) as to require a public role.

But what should replace the common law? The first generation of national environmental law was built on the understanding that the government should enact clear requirements, often to protect a "right" to a clean environment and usually to be imposed on all firms in order to bring about immediate compliance with new national principles. Some of these requirements were unrealistic, in the sense that they attempted to eliminate pollution entirely. Some of the requirements were based on sensationalistic anecdotes rather than a thorough.

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levels of reduction are appropriate, but instead on the largely incidental and nearly impenetrable question of what technologies are now available. The focus on the question of "means" also tends to increase the power of well-organized private groups, by allowing them to press environmental law in the service of their own parochial ends.

BAT strategies are simply one example of what is wrong with our current system: insufficient attention to incentives, excessive interest-group power, and too little information about the real-world of pollution control. In thinking about the next hundred years of environmental law, we are likely to focus on four emerging possibilities: (1) economic incentives, under the basic principle of "polluters pay"; (2) pollution prevention; (3) information and disclosure; and (4) the internationalization of environmental law.

1. By far the most important step involves the creation of economic incentives to engage in environmentally desirable conduct. An increasingly popular approach is to impose a tax on environmentally harmful behavior, and to let market forces determine the response to the increased cost.

Most generally, government might adopt a simple, two-step reform policy. First, those who impose environmental harm must pay for it by purchasing permission to do so, perhaps through a licensing procedure. Second, those who obtain the resulting permission should be able to trade their "licenses" with other people. This would mean that people who reduce their pollution below a specified level could trade their "pollution rights" for cash. In one bold stroke, such a system would create market-based disincentives to pollute and market-based incentives for pollution control. Such a system would also reward rather than punish technological innovation in pollution control and do so with the aid of private markets. An idea of this kind might be part and parcel of a system of "green taxes."

A large advantage of this shift would be democratic: it would ensure that citizens and representatives would be focusing on how much pollution reduction there should be, and at what cost. The right question would be put squarely before the electorate. Moreover, a system of financial penalties allows far less room for interest-group maneuvering. Special favors cannot readily be provided through a system of economic incentives.

2. Regulators will increasingly avoid specification of the technology "at the end of the pipe." Instead they will create incentives to ensure that pollution and other harms are addressed at their source by, for example, eliminating lead from gasoline. Pollution prevention, rather than technological fixes, is an increasingly prominent principle for environmental law. This means that regulators should reduce the levels of dangerous substances that are actually introduced rather than control those substances that have already been introduced.

3. In the future, environmental law will rely increasingly on education, disclosure, and the provision of information. An inexpensive way to prevent pollution is to promote awareness. People who reduce their pollution below a specified level could trade their "pollution rights" for cash. In one bold stroke, such a system would create market-based disincentives to pollute and market-based incentives for pollution control.

of the resulting risks, and to encourage people voluntarily to reduce pollution levels. Education of this sort has helped to reduce littering and to promote recycling. In addition, there will be a strong movement away from government dictation of particular outcomes and toward provision of information about the environmental risks that people face in their day-to-day lives. New laws increasingly require companies to disclose environ-

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Cass Sunstein
mental risks. These laws can trigger “market” responses from affected citizens, and they can also play a role in environmental education, which can in turn produce better-informed laws.

4. It is increasingly clear that environmental problems cannot be handled within national boundaries. With respect to the destruction of the ozone layer and the danger of global climate change, international agreements and international law are necessary. These developments bring home with new clarity the close connections among environmental issues, new technologies, energy, and the distribution of resources among rich and poor nations. International cooperation, resulting in changes in domestic law, will be a hallmark of environmental protection in the next hundred years. It is fervently to be hoped, and perhaps to be expected, that international efforts will draw on the three emerging innovations—economic incentives, pollution prevention, and information and disclosure—in domestic law. If so, the third stage of environmental law will be able to avoid the severe difficulties associated with the first two.

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**The Future of Corporate Law**

_by Leo Herzel_

Predictions about corporation law are hazardous. They are entangled with predictions about business, finance, politics and developments in other countries. Adding to the complications, in this article I do not separate corporate law from the practice of corporate law. Very large portions of corporate law never appear in statutes or court opinions. Practicing corporate lawyers create and recombine them every day using experience, intuitive ideas of fairness, and guesswork about what judges, administrators and the marketplace are likely to accept. Moreover, I expect that many of my readers will be more interested in predictions about the practice of corporate law. Without any more preface, here are my predictions of the main developments in corporate law and corporate law practice in the 1990s.

International corporate transactions, already very important, will become more important. Mexico, Central and South America, Europe (particularly the E.C.) and Japan are likely to be especially significant. However, the lessons for U.S. corporate law from foreign law will continue to be difficult to decipher or to apply.

There will be fewer voluntary or involuntary domestic mergers and acquisitions. Most domestic mergers and acquisitions are likely to be in the same or closely related industries. In the U.S., conglomerate acquisitions have in general been failures. Financial markets and boards of directors in the U.S. are likely to remember this for as long as five to ten years. Antitrust law enforcement in the U.S. with regard to mergers and acquisitions in the same or closely related industries is likely to remain relaxed because of the concern of politicians about very large, successful competitors in Japan and Europe. The number of foreign acquisitions in the U.S. will increase. Most of these will be voluntary, not hostile takeovers. Many of them will be by foreign conglomerates. Surprising as it may appear, Europe and Japan do not seem to have learned the lessons of failed conglomerates from the U.S.

Institutional stockholders who now own approximately 50 percent of the stock of large U.S. public companies will continue to increase their stock ownership absolutely and relatively. And they will continue to try to define what they can and should do with their power. There are many legal and practical obstacles to the effective use of that power and these are unlikely to go away. From the standpoint of the U.S. economy, the big danger is that institutions will try to do too much, in particular, that they will yield to pressures from their constituents and politicians and contribute to politicizing the U.S. economy.

As always, there will be pressure for more federal regulation of corporations. However, concern about international competitiveness may act as a moderating factor. U.S. law and enforcement policies will continue to be late and too punitive with regard to legal-ethical transgressions by large companies, particularly investment banks and other financial companies. The reasons for this are deeply embedded in U.S. society and are unlikely to change soon.

Delaware will continue to dominate state corporation law. Large states appear unable to separate corporation law from politics sufficiently to become effective competitors. It is probably too late for small states to duplicate the economies of scale which Delaware has with its chancery court system and corporate bar.

As the takeover market declines in importance, more attention will be paid to making boards of directors more effective. Boards perform quite well during crisis but their day-to-day performance is generally considered mediocre. There is no widely agreed upon solution to this important problem.

Derivative and class stockholder litigation will continue without much change. Arguments about conflict of interest and effectiveness will remain unresolved and legislative and judicial reforms will be minor. Litigation among large corporations will continue at high levels despite organized efforts for reduction by using alternative dispute resolution techniques. The high propensity to litigate reflects the combative nature of American society.

Corporate law practice will continue to become more specialized but very
often specialization will be a race to stay ahead, not a static condition. For example, financial instruments issued by companies to obtain financing and to hedge risks will become even more complex. Specialist lawyers who can make important contributions to the design of these instruments will be treasured. Once designed, however, even the most exotic of these instruments will soon become mundane commodities requiring only routine law work by lawyers or paralegals.

Corporate law practice will continue to become more specialized but very often specialization will be a race to stay ahead, not a static condition.

Federal income tax law will retain the system of separate taxation of corporations and stockholders without offsetting deductions or credits, which contributes to so many inefficiencies in U.S. corporations and capital markets. Lower capital gain rates will return and corporate tax law practice will benefit from the inevitable increase in legal complexity.

There will continue to be large losses of value in corporate bankruptcy reorganizations caused by cooperation and agency problems among creditors, equity holders, and debtor management and, to a lesser degree, the large fees paid to investment bankers, lawyers, accountants, and other expert participants in the process. Reorganization outside bankruptcy will continue to be very difficult because of cooperation and agency problems which are even more acute than those in bankruptcy. A bad tax rule which includes taxable gross income gains from the discharge or cancellation of indebtedness will continue to contribute to the difficulties of accomplishing corporate reorganizations outside bankruptcy. "Prepackaged" bankruptcies, where the debtor and sufficient creditors (two-thirds in amount and more than half in number) agree on a reorganization plan immediately before bankruptcy, will probably increase in number and will solve some of these problems.

Corporate law practice in the 1990s will be highly competitive, as it was in the 1980s. One of the main reasons for this is that the old social compact among large genteel law firms to substitute leisure for income broke down completely in the 1980s. It appears highly unlikely that it will be revived. Another important reason is the sharp increase in the importance of inside general counsels during the last 25 years, which is unlikely to be reversed in the 1990s.

Happily, the immediate practical implications for law students and young lawyers of these portentous pronouncements about the future are quite modest.

Learn two foreign languages. The sooner the better. It is much easier when you are young and have more time. Spanish would be my first choice.

Specialize as soon as possible. Very able general lawyers will still be eagerly sought after. Mainly, however, they will be older lawyers who are senior partners in large corporate law firms or general counsels of large companies. The best way to increase the probability of becoming a top general lawyer is to begin early as a successful specialist. Furthermore, specialists find it much easier to change jobs or professions. On the other hand, specialties frequently decline suddenly, for example, antitrust litigation in the 1980s and mergers and acquisitions at the end of the 1980s; or they may disappear completely when, for example, the law changes or a large client shrinks or leaves. In that case one must quickly change to another specialty or change jobs.

In large corporate law firms, young lawyers must be prepared to work very hard. The forces that have increased the competitiveness of corporate law practice in the last 25 years are unlikely to be reversed.

Most important, stay clear of the ethically dubious. The stakes will be higher than ever in the 1990s.

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The Future of Bankruptcy

Lillian E. Kraemer

Can one predict the future of bankruptcy without forecasting the health of the American economy as it enters the 21st century? It seems obvious not only that economic woes directly correlate with numbers of bankruptcy filings, numbers of lawyers who find themselves practicing bankruptcy law and amount of bankruptcy law being made, but also that during times of economic prosperity American society and America’s legislators turn their backs on the few failures. Only when failures become virtually the norm do we become generally agitated about how the legal system deals with them. Thus if economic recovery is just around the corner, won't bankruptcy law return to the status of arcane specialty, while if recession lingers, bankruptcy will continue to hold us fascinated (and/or horrified) as the legal profession's growth industry?

Reflection suggests such presumptuous forecasting can be avoided. There is good reason to believe that, irrespective of whether the U.S. economy is up or down at given points in time, bankruptcy law will be an important part of our legal future. First, it is probably a mistake to assume that bankruptcy is irrelevant in periods of economic prosperity, as opposed to periods of economic stability. The long, steady growth economy of the United States from the end of World
War II through the 1960s allowed several generations of lawyers to comfortably ignore bankruptcy. The much more volatile prosperity of the roaring 80s harbored at all times significant pockets of economic distress (such as farming, agricultural equipment, steel, airlines) that kept a growing bankruptcy bar well occupied.

Second, it is extremely important that bankruptcy has acquired a plausibility, even a respectability. Little more than a decade ago herculean efforts were made to avoid bankruptcy by companies in certain industries (automobiles and, however hard this may be to believe, air travel) that, it was thought, could not operate under court protection and by credit groups who found the problems too big for resolution through cumbersome court processes. During the 1980s, however, a combination of factors brought huge, household name companies into and (in most cases) through bankruptcy and so demystified the process. In part, bankruptcy became more inevitable as the constituencies affected by an enterprise's financial distress became more diverse. Today a bankrupt enterprise's parties in interest consist of many different types of lenders where once only banks and insurance companies were found. Other players include "bottom fishers," who bring claims acquired for large discounts from par to the table, and government agencies such as the Pension Benefits Guaranty Corporation and Environmental Protection Agency advocating their own complex agendas. Such disparate players are much less likely to reach the requisite unanimous consensus on the principles of an acceptable out-of-court reorganization. Perhaps even more important, in a society less sure of itself and its priorities, more and more fundamental social issues tend to get played out in the court of last resort—bankruptcy. Witness, for example, Manville's use of Chapter 11 to resolve its mass tort exposure, Continental and Eastern Airlines' resort to bankruptcy to address labor problems, Texaco's filing for bankruptcy to resolve an otherwise unappealable (because unbondable) massive judgment in favor of Pennzoil, LTV's ongoing attempts to resolve its pension and retirement benefit liabilities in its six-year Chapter 11, and the current flurry of environmental liability issues being addressed in bankruptcy courts. This developing use of the bankruptcy law to resolve important social policy issues will continue until legislatures, guided by clearer messages of society's priorities than seem now to exist, provide more coherent standards or at least better resolution mechanisms than the bankruptcy process. And this will continue whether the economy is in boom or bust.

Finally, there is an element of having let the genie out of the bottle. Lawyers and businessmen who have been through bankruptcy will be less likely to ignore bankruptcy principles in planning business ventures. For example, in the 1960s and 70s, very few corporate lawyers had ever used the words, much less understood the elements of, fraudulent conveyance. In the post-LBO world, lawyers will need to study proposed transactions very carefully for signs of this dread injustice to creditors. Similarly, rating agencies who once looked at individual company balance sheets have learned about the risks of a weak link in an affiliate chain and the formerly little known doctrine of substantive consolidation has crept, if not galloped, into the corporate lawyer's lexicon. Thus the future of bankruptcy is, I submit, all too bright. The perhaps harder question is what will happen to the system as we know it today over, say, the next twenty years? Here it is very hard to separate prediction from wish fulfillment—it is very human to assume that if one perceives a serious problem, the future will address it. With this principle in mind, can it be doubted that the future will resolve the wasteful jurisdictional morass that remains the legacy of Northern Pipeline Construction Co. v. Marathon Pipe Line Co. by creating Article III bankruptcy courts? It boggles the mind that with over 1,100,000 cases pending in the nation's bankruptcy courts at June 30, 1991, with each of the 291 then sitting bankruptcy judges receiving on average 3,025 new cases during the twelve months then ended, and with the largest of these cases raising issues of fundamental socio-economic policy, we can continue to consider bankruptcy judges as not "deserving" of Article III status, not to mention that it is downright lunacy to continue to plague a wildly overburdened system with jurisdictional gamesmanship.

Similarly, given the widespread recognition that bankruptcy remains an inefficient, overly long and overly expensive process, can it be doubted that the future will produce developments both to diminish the need for recourse to bankruptcy and to streamline the process? We might anticipate a resurgence in the appetite to resolve financial distress through consensual workouts, this time not because bankruptcy is a feared unknown but precisely because it is a known, far from perfect system. For this prediction (wish) to eventuate would, however, likely entail at least a significant change in tax law which now strongly favors in-court reorganization and perhaps some changes in bankruptcy law, such as to undo the effects of the LTV decision limiting the allowability of claims of bondholders who have accepted pre-bankruptcy exchange offers. We might expect to see embroilments on the pre-packaged bankruptcy concept with a view to making its major advantage—combining out-of-court majority consensus on the acceptable elements of a restructuring with bankruptcy law's ability to bind the dissenting minority—more broadly available.
Surely in the absence of such developments, there will be increasing and not necessarily salutary pressures to deal with perceived inefficiencies and excessive costs. Addressing these problems is necessary and laudable but not without risk. Too often the knee-jerk reaction to perceived inefficiencies or injustices is ill-advised special interest legislation. Well-intended cost control initiatives can result in measures that drive qualified professionals from the field generally or in certain geographic areas. This practitioner, at least, believes that the generalism and flexibility of the Bankruptcy Code that has been in effect since 1979 has allowed the system to deal with issues unprecedented in number, size, and complexity more effectively than anyone would have predicted twenty years ago. If we are, as I have suggested, looking at a legal future in which bankruptcy law and practice are important elements, we should remember that the statutory and administrative framework with which we commence the future has served us well during the recent extraordinary past.

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Law School of the Future

Tia Cudahy

The law school of the future will reflect the composition and needs of the entire community. Law schools will attempt to attract students from all backgrounds in order to ensure that important discussions about intractable social problems will include a broader range of viewpoints. Recognizing their unique relationship with law students, law schools will actively foster a sense of responsibility to the profession and society.

Law schools adhere to traditional performance indicators such as undergraduate grade point averages and LSAT scores in an effort to produce smart lawyers. Placing more emphasis on diversity of experience will create a less homogeneous community; perhaps one that is better equipped to think creatively about old problems.

Tia Cudahy

Revitalizing the intellectual inquiry in the classroom will improve the quality of discussion while also generating greater respect for legal education. The purpose of such an extension in admissions criteria is not merely affirmative action, but to reinvigorate legal scholarship by expanding the class of people equipped to think about legal issues. Some will argue that the quality of scholarship will deteriorate without rigid adherence to traditional performance indicators, but, from a student's perspective, at the very least diversity will enrich classroom discussion. Ideally, diversity in the classroom will reflect the diversity of society so that everyone will receive representation in the exchange of ideas.

The admissions office will also consider carefully each applicant's reasons for applying to law school. Law school too often serves as a default for intelligent but unfocused liberal arts majors who lack the imagination and inclination to figure out what they enjoy doing. These students are unhappy at law school and detract from the experience for everyone. The University of Chicago is one of the few schools that devotes the energy to conducting interviews of some applicants, and these interviews present at least one opportunity to investigate an applicant's motivations. The model law school will interview all eligible applicants, recognizing that an applicant is more than a sheaf of papers in a file. From a classmate's perspective, a student's interesting background and genuine desire to study law more than balance out a few missed questions on the LSAT.

Last, law schools will actively encourage a sense of responsibility for the profession and for society among students. The practice of law often means advising individuals in the most difficult moments of their lives, but law schools overlook the human element of a career in the law. Lawyers confront conflicts of interest and breaches of professional responsibility among colleagues far more regularly than they encounter most of the legal doctrines taught in law school, but classroom discussion is almost inevitably focused on the reasoning of the highest court to hear a case. Naturally students need to learn how judges reach decisions, but greater emphasis on legal ethics and professional responsibility will convey equally important skills and knowledge. Professional responsibility will be incorporated into every course, rather than packed neatly into one required but uninspired class. Students will gain respect for that aspect of practice and conduct themselves accordingly, and the resulting benefit to clients will enhance respect for the profession.

Law schools will also remind their captive audience that lawyers occupy a special place in society; we formulate public policy in disproportionate numbers and act as conduits between the public and justice. Although litigants realistically need lawyers to navigate the legal system for them, most Americans cannot afford to hire a lawyer. Given the importance of legal training in our society and the shortage of lawyers for the poor, lawyers have an affirmative moral obligation to return some service to the system that benefits us so much. Mandatory pro bono policies may be moot if each lawyer, encouraged by her law school, feels a personal obligation to pay this debt to society.

The renewed emphasis on the needs of those who cannot afford legal services will inevitably reshape law school curricula. Students will require more clinical education and public interest classes, as well as instruction on such far-reaching statutes as the Social
Security Act. In a litigious society, lawyers are in a unique position to help those who would otherwise lack a fair chance in the legal system, and law schools have a unique opportunity to reach aspiring lawyers with that message.

Tia Cudahy '92 is President of the Law Students Association.

Clinical Legal Education

Gary H. Palm

As I look to the future, I imagine a law school Clinic that adopts some of the best features of a teaching hospital operated by a great research-oriented University. The primary goals, as there, should be to provide excellent service to clients, practical instruction to students and applied research. At the teaching hospital, state-of-the-art equipment is purchased. First rate physical facilities are provided. Staffing arrangements are consistent with excellent services. The newest techniques and innovations are used or tested. Funding is from a combination of payments for patient services, government research and training grants, private philanthropy, foundation gifts and tuition. Low student/teacher ratios are maintained and all students are required to receive some clinical instruction. The legal clinic of the future should feature similar standards to assure that it too can fulfill its goals with excellence.

In a typical year, over 100 second-year students apply for the Clinic. In order to maintain a low student/teacher ratio of ten to one, fifty students cannot be accepted, resulting in a waiting list. Although many students on the waiting list eventually do get to work in the Clinic, others become discouraged or pursue other activities. It is my hope that, in the future, all students interested in the Clinic will be admitted. The Clinic will need at least fourteen clinical teachers, double the current number, to meet the on-going demand during the next twenty years. Different credit allocations and some changes in the program will be necessary too, but the most important change is a significant increase in the number of clinicians and the size of the Clinic.

The role of clinical legal education at a leading research-oriented University should include the use of law to eliminate poverty or alleviate the suffering caused by it. It is appropriate for the Clinic to help individuals who are seeking to escape poverty and use the legal system to secure entitlements from government and the private sector. But clinical teachers and students should also be expected to develop new legal strategies to meet the needs of the poor and even to eliminate poverty. Law reform and systemic change have always been at the heart of the research mission of the non-clinical law faculty. Therefore, it is also appropriate that the Clinic continue to represent clients in administrative rulemaking proceedings, legislative advocacy, test cases and class actions.

The Clinic should also continue to propose improvements in methods of advocacy used on behalf of the poor and work with other legal service organizations, the private bar, pro bono volunteer groups and governmental agencies to assure that poor clients receive prompt and effective representation. Indeed, as we train more stu-

help our students to become more imaginative and productive at using the legal system to solve the underlying problems of poor persons through systemic legal methods.

The very idea of locating a law office serving the poor in the Law School was startlingly innovative in the 1950s when our new law school building was planned. Through the years, all the deans have tried to meet the Clinic’s space needs but without long-term success. To provide effective instruction now we need more space and, as important, better designed space. Furthermore, today we have equipment and a sizeable support staff for our extensive litigation practice that were not contemplated in the original design for a legal aid office. If we are to meet the student demand, we need much more space. The only long-term solution is a new building or addition for the Clinic. The Clinic of the future will have adequate space for each student to share an office with one or two others; rooms for interviewing and counseling clients; areas for preparing for trials and practicing oral arguments; and small classrooms designed to teach lawyering skills and strategies. The offices, meeting rooms and secretarial space will be part of a central computer network. Video
The Future of Law and Economics

Douglas G. Baird

Law and economics has already worked a revolution in legal scholarship and education, but its promise continues to be great because it provides judges, lawyers, and legal scholars with two valuable tools. First, economic analysis of law offers a way to understand the structure of the law itself. Complicated legal doctrines, such as remedies for breach of contract, are often neither random nor arbitrary. A few basic principles may unite them and these principles are frequently economic ones. Economics, in other words, sometimes gives us a way to organize the law and understand the connections between rules that on their surface appear to have nothing in common. Second, and equally important, economics also helps us to understand what effects legal rules have. When we subject laws or judicial opinions to scrutiny or ask what shape incremental law reform should take, the effects of a legal rule are important. We want to know if a law can fulfill its ambitions. We want to know whether it can make the world a better place and at what cost.

Law and economics addresses precisely these concerns.

The earliest successes in law and economics were in antitrust because antitrust law embraces a policy that is based explicitly on economic principles. Law and economics has done much to aid our understanding of joint ventures, predatory pricing, tie-ins, sales, and vertical price restraints, but it has since shed light on many other areas of the law. Copyright and patent law, by constitutional design, offers writers and inventors rights to their work for a limited time in order to give them an economic incentive to create it in the first place. Determining how much of an incentive writers and inventors require and how to balance this incentive against the need to make new ideas accessible to others requires us to ask questions: what must economics equip us to know. How will the law of torts be designed in large measure to ensure that parties take account of the costs their activities impose on others. Environmental law may be similarly designed to ensure that firms take account of both the social and private costs of their actions.

In short, much of the process of lawmaking and judicial decisionmaking requires a weighing of costs and benefits and here law and economics is in its element. Law and economics can take us further than intuition alone. It enables us to make sense of legal rules and understand their effects. For both reasons, law and economics is now part of mainstream legal education and economic concepts such as cost-benefit analysis, moral hazard, marginal cost, competitive advantage, public goods, and least cost avoidance are a standard part of every law student's vocabulary.

Henry Simons, Edward Levi, Aaron Director, Ronald Coase, and others mapped the basic terrain. Today, the general principles of law and economics are well understood. Much work, however, remains to be done. The world, after all, is a complicated place and the behavior of discrete individuals cannot easily be reduced to a single algorithm. Account must be taken of imperfect information and the possibility of strategic behavior to understand how any group will respond to a legal rule. Even in fields such as antitrust that has been a focal point for
Many contributions to law and economics that have been made at Chicago are now so much a part of the established wisdom that it is easy to forget the controversy they originally provoked. These well understood contributions are not regarded as economic analysis of law, but simply as common sense.

including Daniel Fischel, Frank Easterbrook, and Geoffrey Miller, set much of the terms of the debate in law and economics in the 1980s and continue to find new paths to explore. Young scholars, such as Alan Sykes, Dan Shaviro, Stephen Gilles, and Randal Picker, are poised to challenge the conventional wisdom, even if what is now the conventional wisdom was once cutting edge law and economics.

The ultimate ambition of legal scholarship is to say useful things about how the world works. Hence, the question is not whether the assumptions of law and economics capture all the nuance and ambiguity that exists in the world, but whether these assumptions capture enough of the essence of our world to shed light on how it works. In the end, every contribution to law and economics should lead to an empirical test. In many cases, such as the law and economics of corporate and securities law, there is a wealth of data and the tests are easy. In other areas, data is less accessible and the challenges are greater.

A brief survey of the current projects at the Law School gives a sense of the many facets of law and economics, its broad focus, and its commitment to rigorous examination of aspects of the law that matter the most. Richard Epstein is writing on health law and the many ways in which government regulation of the medical profession affect the quality of health care in this country. Randal Picker continues his work on the basic principles of the law of bankruptcy and corporate reorganization. Daniel Shaviro is undertaking a major re-examination of our law of corporate income taxation. Alan Sykes continues using economics as a way of understanding the structure and the policies inherent in the laws governing international trade regulation. We remain confident that in these and other areas, careful and thoughtful economic analysis will make it possible to understand and improve the law.

Many contributions to law and economics that have been made at Chicago are now so much a part of the established wisdom that it is easy to forget the controversy they originally provoked. These well understood contributions are not regarded as economic analysis of law, but simply as common sense. Of course, if the idea had been a commonplace at its inception, it could not have been much of a contribution. Too often, however, we forget that the idea was first greeted with derision, hostility and disbelief. The ultimate test of good scholarship is whether it can make the passage from being an idea that is obviously wrong to being one that is obviously right. As one might expect, one of the swiftest passages was made by Coase’s “The Problem of Social Cost.” When he first presented the paper at Chicago, a vote was taken at the outset on whether Coase was in error and the vote was twenty to one against Coase. As George Stigler explained later, “If Ronald had not been allowed to vote, it would have been even more one-sided.” At the end of the evening another vote was taken, and there were twenty-one votes in Coase’s favor and none against.

Douglas G. Baird is Harry A. Bigelow Professor of Law and Director of the Law and Economics Program.

Mary Becker

The Future of Feminism

Mary Becker

The contemporary feminist movement began with a strong emphasis on sameness: that women should be treated like men because similarly situated. This was the thrust of the ERA, which dominated early analysis of women’s legal issues. Feminists concentrated throughout the seventies on equality arguments and the need to eliminate laws that categorized people on the basis of their sex.

In the eighties, many feminists writing in law began for the first time to talk about differences and the need to look beyond practices that treated women and men differently. Catharine MacKinnon paved the way with her criticism of the ERA approach in her first important book, Sexual Harassment of Working Women, which shattered the calm of a single shared image of the relationship between sexual inequality and law.
Since the early eighties, legal feminism has been filled with controversy and conflict among feminists, with each year bringing more disagreements on how best to use the legal system to improve women’s status and lives. Many of the new controversies and insights are related to a greater appreciation of differences: how women and men differ and how women differ from each other; why they differ; how to accommodate difference without accepting inequality.

There has still been little exploration among academic feminists in law, however, of women’s feelings and how those feelings differ from the feelings of men. One of the weaknesses of much feminist legal-academic writing is that it tends to be abstract, obscuring, rather than illuminating the ways in which specific laws or practices contribute to women’s subordination or are inconsistent with women’s needs. One reason for the tendency toward abstraction may be that for many issues, concrete exploration of the issue may reveal conflicts among women of different colors or races or sexual orientations or marital status or generations. In addition, discussing women’s feelings is often dangerous.

Let me use child custody to illustrate some of these points. Custody rules should make sense on an emotional level. Yet we tend to ignore emotions in analyzing custody. Ignoring emotions is not gender neutral. Custody laws ignoring emotions stronger for women (and their children) inevitably tend to be more consistent with men’s emotional needs than women’s (and children’s).

Although we all know that children mean different things emotionally to most women and men, feminists writing about custody standards have tended to downplay that difference. Indeed, with the notable exception of Martha Fineman (75), feminists have not even mentioned the fact that women’s bonds with their children are important. And no one has explored in any depth the differential quality of the emotional relationship of women and men with children.

This silence is easy to understand. Discussions of the emotional differences between mothering and fathering are dangerous and likely to produce, as well as reveal, conflicts among women. Such discussions are dangerous because they reinforce traditional stereotypes of women as mothers, as people whose essential fulfillment is in nurturing rather than self-actualization or achievement.

Such discussions are likely to produce conflict because different generations of women are likely to have different perceptions about the emotional meaning of mothering. Older women who have mothered are likely to realize that, no matter how important self-actualization and achievement are for them, mothering is also extremely important emotionally and more important to them than fathering is for the fathers of their children. Older women are likely to realize that equal parenting cannot be achieved by an act of egalitarian will by even the most egalitarian of couples. Younger women are more likely to believe that equal parenting is a real possibility, and that they and their partners will achieve it. Many women in both groups believe that equal parenting is necessary for equality between the sexes, and this belief silences older women, who are reluctant to make equality more difficult for younger women to achieve or to dampen young women’s hopes for realizing equality in their lives. Older women rightly realize that expressing their feelings about the importance of mothering will inevitably reinforce harmful stereotypes and make it more difficult for individual women to negotiate equal parenting in their relationships with men. Any exploration of maternal feelings in the context of child custody reveals a conflict between two goals, both of which are critically important for feminists: improving the quality of women’s lives, including their emotional lives, and reducing women’s subordination to men.

Yet silence is also dangerous. As Audre Lorde eloquently puts it in an essay in her book Sister Outsider: “What is most important to me must be spoken, made verbal and shared, even at the risk of having it bruised and misunderstood.” In the context of custody, silence can mean deep emotional injury for mothers and children when emotionally distant fathers receive custody because women’s emotional labor is invisible. Although I have used custody rules to make my points, I think that in the future feminists need to explore many legal rules and practices from the perspective, not just of sexual inequality, but also from the perspective of the needs of women living today, including their emotional needs. And similar conflicts are likely to arise in analyzing many issues: rape, pornography, sexuality, cosmetic surgery, religion, military service, maternal-paternal leave, marriage, sexual harassment, and beauty standards in employment, to name a few.

Feminist legal writing is still in its infancy. It is only within the last decade that feminist legal academies have begun the difficult task of exploring, in light of the differences between women and men and among women, how legal rules and practices should be adjusted both to move toward sexual equality and to reflect and protect women’s needs (including emotional needs). Although both goals are crucial, they often conflict. Exploring these conflicts and the conflicts among women is the feminist agenda of the nineties.

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