Some Off-Center Observations About Our Tax System

A Talk delivered by Walter J. Blum, Professor of Law, University of Chicago Law School at a Tax Institute sponsored by New York University.

My function at this Institute needs to be defined. I was asked to speak on any topic of my choice, subject to two limitations: I was not to talk on any procedural or substantive aspect of federal taxation, since the mere mention of the name of any case or the number of any Code section would almost certainly clash with the jurisdiction of some other speaker. And I was to confine myself to remarks appropriate to this opening day, dinner session of the Institute. To comply strictly with this latter requirement, I turned to precedent as a guide. You can well guess my initial reaction upon finding that in previous years the spot I now occupy was reserved for entertainment, and that my nearest predecessors appear to have been a professional ventriloquist and a renowned fortune teller. Naturally I began to wonder what precisely was my reputation among my hosts—considering that I am, as you might know, somewhat closely associated with another annual tax conference.

But as time went by I realized that these precedents were perfectly sound. The fortune teller and the ventriloquist surely are the proper motifs for this occasion on which taxes are to be discussed, but not at close range and not in a practical vein. What could be more in order tonight than a few peeks into the crystal ball—a la the fortune teller—regarding taxation in the next ten years, and a report thereon—a la the ventriloquist—which might just occasionally seem to have been delivered out of the side of the mouth?

My role tonight is thus clear. In it, of course, any statement which I am forthcoming does not necessarily represent the views of my hosts, the government, the Corning Glass Company, or even myself.

My first glance into the tax future raises an unmistakable image of the highly progressive character of our income tax. I feel on perfectly safe ground in foreseeing that our income tax will continue to feature graduated rates; the interesting question is whether the degree of progressivity of the tax will change significantly.

There are signs today that the crest of progressive taxation in our country has passed and that we might expect a considerable relaxation in its application. In the last few years there has been a revival of dispassionate analysis of the role of progression in our society, and the case for it has been re-examined closely and critically. The predominant note in these studies has been that the case for progression in a private enterprise society is far from easy. In fact, the more penetrating the analysis of it, the more difficult is the defense of steep progression. While these studies might not demonstrate that progressive taxation is wrong in principle for our type of society, they might well serve to brake enthusiasm in pushing its application. To the extent that the case for progression has weaknesses, the reasonable man might hesitate to go along with it far.

Another sign pointing in the same direction is the apparent decline in political fervor for redistribution of wealth and income. In large part our present progression is an outgrowth of the New Deal of the thirties. This movement put together a heavy emphasis on more economic equality as a social goal and some spurious economies according to which equalization of income would tend to promote prosperity. While these economic doctrines have not by any means disappeared, they no longer are in vogue; and on the surface the same seems to be true of economic equality as a political goal.

Still another sign is the growing sense that, despite rockets and satellites, our country is not faced with a continuous or permanent military emergency. If the New Deal is one parent of our present steep progression, national emergency is the other. Finance during both World Wars provides evidence that there is a strong notion in the community that emergencies justify a high degree of progression. As the feeling of emergency recedes, is it not reasonable to expect that this support for continued high progression would diminish?
In my glimpse into the future, however, all three of these signs turn out to be misleading. Steep progression is likely to be with us for some time to come.

To begin with, the more careful re-analyses of the case for progression do not appear to have reached or interested a wide audience. A prime illustration of this is to be found by a perusal of the textbooks now in use at the college level (as well as the high school level). When they deal with the problem of allocating the tax burden among the people, most of them state the case for progression in a loose, uncritical manner. In many instances progression is equated with equity on the basis of some overgeneralized and unexamined notion of ability-to-pay. Frequently there is an endorsement of progression on the ground of an equalitarianism which is impliedly accepted as a good without any adequate supporting analysis.

I am not under the illusion that what appears in school books is likely to be of political importance. In the long run, however, the values we impress on youth in school are bound to have some repercussions in our political doctrines. In the short run, moreover, they can serve as an instrument for measuring the penetration of ideas in various directions in our society. By this standard, education pertaining to progressive taxation is today about where it was ten or even twenty years ago.

The apparent decline in greater economic equality as a political goal likewise should not be over-rated as regards the future of progression. Even assuming such a decline has really taken place—and the assumption is at least doubtful—there may be reason to believe that this has not necessarily been accompanied by a change of attitudes toward steep progression. An exploratory investigation conducted by the University of Chicago Law School indicated that, among people who comprehend what a progressive rate structure is and who approve of progression, only a small minority think of progression as accomplishing a redistribution of income. The great majority think about progression in terms of some ability-to-pay notion and approved of it on this ground. In other words, the widespread foundation for progressions seems to be divorced from equalitarian ideals and to stem rather from a view that money has a declining utility—that the last dollar of the richer man will be less important or produce less satisfactions for him than the last dollar of someone not so wealthy.

This might be taken to suggest that a decline in equalitarianism as a political goal would not even affect the support for progression. Such a view of the relationship, however, is too simple. The exploratory investigation also indicated, roughly, that those who advocated progression as an equalitarian measure favored a steeper degree of progression than those who favored it on some ability-to-pay basis. If this correctly captures the situation, it is possible that a decline in equalitarianism as an ideal would be reflected in a lessening of support for very steep progression.

The effect on progression of a diminution in the feeling of national emergency likewise is easily overestimated. So long as the total tax burden remains virtually the same, it is most unlikely that the allocation of it will be changed substantially. Historically it has been the case that the progressivity of the system has been altered significantly only when revenue goals have been modified. Our Law School experimental study also showed that there is a very wide acceptance of the status quo in distributing the burden, whatever the status quo happens to be. Thus a change in feeling about the existence of an emergency is likely to have a bearing on progression only if it is accompanied by a material reduction in total taxes.

But it would be simple-minded to think that because taxes became more progressive with the emergency, the lesser degree of progression which existed beforehand will be restored afterwards. Several forces work against such symmetry. First, it is unlikely all will agree that the emergency is completely over at any particular time. People differ widely in their perception of the military threat with which we are confronted. Second, for some persons the emergency was only an excuse for heightening progression; they would have advocated it then on other grounds, and they will continue to do so. Third, most people ap-
parently have one standard for applying their ability-to-pay ideas to tax increases, and another to tax reductions. The experimental work at the Law School again is suggestive here. We asked people what they thought was the fairest way of allocating a given increase in tax burden necessitated by a national emergency; and then later we asked them a comparable question about tax reduction at the end of the emergency. In the case of most of our respondents, the share of the increase imposed on upper income families was substantially larger than the share of the reduction assigned to them. Ability-to-pay apparently has a decided one-directional bias. Fourth and finally, the long duration of the emergency seems to have established steep progression as a kind of norm. The burden of persuasion in effect has been shifted to those who wish to return to the distribution of taxes that previously prevailed.

In reporting this look into the future of progression, I am not even remotely suggesting that there are inevitable forces at work here which cannot be controlled. On the contrary, it should only be concluded that mitigation of our high progressivity will require a considerably greater educational effort. If less progression is to prevail, more persons will have to be brought to face up to the redistributational impact of progression, to the desirability of continuously coercing economic equality, and to the emptiness of the idea that differential taxes can be meaningfully set on the basis of ability-to-pay, which is little more than a slogan.

My second glance into the future brings the subject of capital gains into focus.

It is with considerable confidence, but also regret, that I foresee the continuation of preferential treatment for capital gains. In part this vision is tied up with the past and future of progression. While we have been willing to legislate a steeply progressive income tax, never have we been willing to accept such progression without providing escape hatches; and favorable treatment for capital gains has been the most important way out. Unless we were to become much more serious about effectuating a redistribution of income through taxation, it is highly probable that in the future these same conditions will obtain.

But continued special treatment for capital gains seems a likelihood even if the progressivity of our surtax rates were substantially moderated. To be sure, there has been considerable talk about arranging a kind of political deal by which the elimination of various preferential provisions would be swapped for a reduction in surtax rates. This thinking seems most unrealistic. I cannot imagine who would be in a position to act in a representative capacity for purposes of such a bargain. Furthermore, those who are the principal beneficiaries of the capital gain provisions surely understand that, dollarwise, they are far better off now than they would be under any conceivable reduction in surtax rates in the near future. And only the most naive would fail to appreciate that the present capital gain haven is more secure from pronounced change than are the regular rates of tax, which (despite any implied compact of the moment) can always be raised in the future without confronting technical or conceptual difficulties.

Continued on page 26

Dean Levi introduces guests at the luncheon following the groundbreaking. Thomas R. Mulroy, JD'28, Chairman of the Committee for the Edward Douglass White Lecture Hall, is visible at right center.

Laird Bell, JD'77, Hon. LLD'53, former Chairman of the Board of Trustees of the University of Chicago, Hon. Jacob Braude, JD'20, and Moses Levinson, JD'13, join in the groundbreaking.
He was most generous with his time and efforts in being of assistance to young men who came to him for advice and counsel.

Among his leading characteristics were versatility and resourcefulness in adjusting himself to all changing conditions. An example of this was in connection with the federal income tax and estate tax laws. These laws were passed in the latter part of 1913 and 1916. In the early part of 1913 before either of these laws had been formulated, Father drew a number of trusts for himself and for his clients which to this day have been of great value to the parties in interest and could not have accomplished the same results had their execution awaited the effective dates of the law.

Father in his seventy-ninth year was stricken while playing his customary eighteen hole golf game and died seventeen days later.

I cherish and value above all others the twenty years which I was privileged to enjoy working with my Father.

JOHN P. WILSON

Blum—

Continued from page 8

More plausibly it has been suggested that, while an explicit deal is out of the question, the lowering of surtaxes might create an atmosphere in which the elimination of preferential provisions could become a political practicality. The underlying thought is that since we have been willing to impose high rates only by offering special exits, the reduction of rates will lessen the pressure to retain the exits, including of course the capital gain passageway.

There is obviously much sense to this view: today a material decrease in progressivity is virtually a prerequisite to accomplishing something drastic in removing preferential provisions from the income tax. Yet I am not hopeful that even a very great reduction in rates would eventuate in taxing capital gains on a par with other income.

It should be recognized that the more than thirty-five years of favorable treatment for capital gains has had a pronounced effect on attitudes toward the whole matter. Capital gains are thought of by many as being different from other income if for no other reason than that we have for such a long time treated them as being different. The law indeed has been an educational force here. And of course it is the people who have been nearest the tax law who are most convinced that capital gains are something wholly apart from ordinary income. If you want to know, don't ask the man who owns one; ask his tax lawyer or his tax accountant!

The prevailing feeling that capital gains are not ordinary income is strongly augmented by the inflation we have experienced. Among the many points raised in behalf of going lightly on capital gains, that with widest appeal today is the notion that most advances in the value of property are fictitious in the sense that they reflect a decrease in the purchasing power of the dollar. People have become highly sensitized to the rising price level; and they understand that there is a general relationship between increases in asset values and the deterioration of the dollar. However, they forget that particular capital gains
generally have no direct relationship to the inflation; they overlook the fact that to take account of the inflation for all persons it would be necessary to adjust all gains and all losses for changes in the value of money; and they lose sight of the fact that among persons possessing wealth it is those who have capital gains who fare best in the inflation. But as long as inflation is perceived in this one-sided manner, there is likely to be strong support for taxing capital gains lightly during a period of rising prices. In my crystal ball the coming decade (despite the mood of the stock market at this moment) will have a pronounced inflationary tilt; and capital gains will continue to be generally associated in the public mind with the inflation.

With the continuation of bargain treatment for capital gains, a main issue in the future, as in the past, will be the definition of capital gains. Here I must confess to a somewhat clouded preview. The boundaries of capital gain land have frequently shifted over the years, and no doubt will remain fluid. From time to time some so-called capital gain loopholes surely will be closed. All this means is that some particularly novel or jarring device for achieving a capital gain will be ruled out-of-bounds, so that a few especially adept schemers will have had their plans frustrated. Of course these loophole-closings will be given great notoriety by our professional publications, and a considerable number of us will thereby learn about some of these outmoded tricks of the trade for the first time. But while this variety of pea-shooting might be good sport, in total it can make only an infinitesimally small inroad on the whole capital gain territory. Perhaps it has the unheralded merit of keeping the fiscal watchdogs alert by giving them some kind of practice.

In contrast, it is hard to foresee any major contraction of the capital gain area and easy to envisage substantial expansion. Unless we were to equate capital gains strictly with inflationary price changes—which we never have done—the definition of a capital gain necessarily must be arbitrary. Our whole concept of capital gains is a creation of the tax law, and the concept has been pretty much fashioned out of the air over the years. This fact is likely to be of considerable importance in shaping the future of the definition. Since the delineation of capital gains is arbitrary, our political representatives will be hard put to defend taking away the privilege from any substantial group so long as others retain it. And they likewise will find it difficult to resist enlarging the arbitrary definition to include additional situations which are analogous to those now blessed.

Accordingly I would not be surprised to find, in an inflationary economy, that capital gain treatment has been at least in part extended to such items as interest on government savings bonds, periodic payments from retirement or pension plans, and various welfare payments that are not tax exempt. But these are only illustrations, and the line of candidates will no doubt continue to form on the right. On another occasion I shall be only too happy to explain why, if we are to have favored treatment for capital gains, I am convinced that the purest form of capital gain is the salary of a law teacher in a Midwestern urban university.

My third look into the crystal ball conjures up a vision of the complexity of our tax law of the future. This part of the act hardly needs any magical props. We all know that our income and transfer taxes have grown more complex year by year almost since their inception. Most of us, I am sure, intuitively feel that this process will go on, come what may.

Nevertheless there need be no mystery about why this process occurs. At least three aspects of it can be distinguished. The first is the now familiar point that high graduated rates of tax in our society apparently can be had only at the price of numerous special exceptions. It is patent that an exception, which means a special rule, necessarily adds complexity to the law. The capital gains apparatus, for example, is the prime contributor to the complications we presently enjoy. But what is important for explaining the sustained growth of complexity is the observable fact that exceptions have a persistent tendency to breed other exceptions and exceptions to exceptions, and the progeny have a complexity potential all their...
own. The matter is almost this simple: when we grant preferential treatment to one group, it is not long before others can demonstrate that their cases are equally deserving, and then there is need to define the scope of the new preference.

A second aspect of increasing complexity is common to many areas of law, but stands out in the case of taxation. As general principles and rules are interpreted and applied to particular situations, subordinate principles and rules are evolved. The law thus becomes more extensive and more highly structured. In tax law, this process operates at an unusually fast pace. New situations are often created by taxpayers and their advisers in response either to the development of rules or to their absence; the new situations in turn lead to new issues; and the resolution of these contributes to the further evolution of rules and principles. This kind of evolutionary growth is virtually inherent in tax law for a dynamic society. We should recognize, however, that its dimensions expand greatly as the number of root distinctions built into the law are increased.

A third aspect of the growth of complexity is somewhat related. We have increasingly turned to legislative codification of our tax law, and in doing so have increasingly sought detailed specification of the rules. A variety of causes underlie this approach to taxation. There is the desire for increased certainty about the rules; there is the misguided optimism about the omniscience of legislative draftsmen, even of top quality; there is the belief that courts (particularly appellate courts) fail to appreciate the niceties of taxation; there is the widespread conviction that an administrative agency cannot be relied on to give taxpayers a fair shake in applying general rules; and there is the feeling that Congress after all houses one’s best political friends. But whatever its causes, we can easily understand why the detailed codification approach to taxation tends to promote expanding complexity in the law.

To start with, in a comprehensive type statute there is a temptation to cover every situation which comes to mind, whether or not they have actually arisen. Consequently the rules proliferate more than might otherwise be the case. In the next place, the attempt to use language to cover the host of situations which have been envisaged aggravates the difficulty of finding words which say precisely what is meant, and no more. Every new phrase introduces possible ambiguity which can augment the complexities of the law. Then, too, the effort at specificity provides taxpayers and their advisers with a temptingly detailed map of these boundaries which are soft and remain to be tested. This invites the kind of probing and planning which constantly produce new situations that call for further interpretation of the rules, and thus require the creation of yet additional rules.

There is another but more subtle characteristic of detailed codification of tax law which makes for increasing complexity. Often our tax law represents a compromise of not wholly consistent ideas or principles. When the law is left to evolve on a case by case basis, the gaps and inconsistencies are apt to be less noticeable or less awkward. A lack of consistency can always be attributed to a bad decision; head-on clashes of ideas or doctrines generally can be avoided by courts; and even when they cannot be postponed, courts usually need only attempt a partial reconciliation, and then only after the profession has had ample time to talk and write about the problem. Almost the opposite seems to be true of a comprehensive codification. The gaps and inconsistencies tend to come to the foreground; once discovered there is apt to be impatience with them; and the demand for correction or improvement by further legislation is very likely to be raised. The more experienced and more agile minds among the profession of taxmen will be the quickest to recognize shortcomings in the detailed statute. And when these experts are appointed to advisory committees they of course will be capable of proposing the greatest amount of legislative repair. And, naturally,
the solutions they offer will frequently consist of additional detailed rules, even more highly structured than before. If illustration be needed, our recent experience with the income taxation of trusts and estates is made to order. We might have guessed that the solution offered by the experts to the defects of the two-tier system would be a four-tier derivation.

Please understand that none of this is said in criticism. It is only intended to explain why the effort to simplify the Code in 1954 resulted in increased complexity of the law, and why successive amendments of that Code most probably will do the same. Further, it might put us on guard that the next Internal Revenue Code, despite the best of intentions, probably will be twice as long and at least twice as complex.

From these observations I should like to remark briefly on the certainty or clarity of tax law in the future, without even a pass at my crystal ball. The increasing specificity of the statute will make the law both more certain and more uncertain. This is an ancient paradox of law, but by now taxmen surely ought to be in the lead in appreciating it. The law becomes more certain in that particular old problems are specifically answered. New uncertainty, however, is introduced because, as already noted, we can never be sure that language used to solve these old problems will be understood to mean precisely what we wanted it to mean. The very words which clear up one problem thus may well create others. In taxation this disconcerting development is especially likely to occur because, with dollars involved, each of us at some time or other might try to discover the furthest limits to which a rule will allow us or clients to go.

All this is more acutely conveyed by the story of the tax lawyer who telephoned his colleague shortly after the gift in contemplation of death provision of the estate tax was liberalized by inclusion of the specific rule that gifts more than three years before death were never so tainted. With considerable emotion he complained: "How can they expect me to plan properly for my clients under this sloppy draftsmanship? Now I’ll have to wait until the Regulations come out before being sure whether the day of death is included or excluded in computing the three years."

My fourth effort at seeing into the future, unlike the others, is something of a command performance. I feel that while my crystal ball is warmed up, I am obligated to my hosts to see what I can about the future of tax institutes. And I am sure it will be understood that what I am about to say should be legally privileged, since it is but an accurate report of that which I have been graciously privileged to foresee.

Happily I can set my hosts at ease. Tax institutes, and in particular this Institute, will flourish. Ten years from now the Twenty-sixth Annual Institute of New York University will meet. The attendance will be heavy, indeed so heavy that the sessions will have to be held in the Coliseum. The speeches will be longer, despite everyone’s good intentions of making them shorter. The papers as usual will be even longer than the speeches; and their length will make it impractical to publish them in a single volume. Fees for attending the Institute of course will have to be raised accordingly. The speakers, however, will as ever remain uncompensated.

Perhaps all of you, and no doubt members of the Planning Committee for the Institute, are wondering what will be the principal topics at the 1967 meeting. Anticipating this, I knowingly squeezed my crystal ball very hard, and I can only hope that the images which arose, and which I now relay to you, were not too distorted by my eagerness. With this caution, I give you the titles of a few of the talks which seemed most intriguing, as well as some commentary on them:

(1) "How to avoid having a group of trusts taxed as multiple trusts." After much trying, the forces of righteousness finally got Congress to pass a watered-down provision to curb the use of multiple-trusts. Though it has been in the law for several years, there apparently has not been a single instance in which the provision has been found applicable. This talk,
by a leading developer of multiple trusts, should help to keep the record clean.

(2) "The eight-tier system for taxing distributions of trusts and estates." Enacted as a simplification of the old four-tier system, this new system has the merit of putting every distributee in his proper place. In tax parlance it is known as the "do re mi fa so la ti no-do" arrangement. The advisory council which sired it thought that a full octave range of tiers might simplify things by enabling the official instructions to be set to music. Perhaps an adaptable score would be "Beat me Daddy, Eight to the Bar."

(3) "The proposed multiple-corporation legislation." This proposed legislation does not have the endorsement of any known association of lawyers or accountants. One taxpayer appeared before the Congressional Committees to urge its adoption. It appears that his only connection with corporations is that he works for one. The Treasury, however, is enthusiastic about the proposal, even though it is copied after the infertile multiple-trust provision.

(4) "The collapsible individual." Though spurred on by what I thought was a particularly fine title, I was unable to set any clues about this talk, other than the fact that a collapsible individual is a taxpayer.

(5) "How to squeeze the last drop out of percentage depletion for water." Old-time taxmen might be surprised today to learn that percentage depletion will soon be extended to water, especially in view of the widely-held idea that oil and water do not mix. But once it was decided under existing law that sand and clay were entitled to percentage depletion, some very learned persons pointed out that on this planet water was only slightly less rare. The law, quite appropriately, provides different percentage rates for the depletion of ordinary water, ice water, hard water, soft water, fresh water, salt water, mineral water, and branch water. Ice manufacturers, incidently, are contending that they are entitled to base their percentage depletion for water on the price of ice cubes.

(6) "Accelerated amortization for automobiles." This talk explores a brand new provision. In years when the sale of passenger autos falls below industry expectations, the Secretary of the Treasury, upon petition of any one manufacturer, is authorized to certify that all purchases of new model autos are entitled to amortize their purchase price over a two-year period. The origin of this arrangement is interesting. Certain Michigan economists proposed it as a sure-fire means of keeping our economy in high gear and hitting on all cylinders, through fuel injection. This is known as the new forward look in taxation.

(7) "When to claim the optional standard business deduction." The problem of policing expense accounts and similar expenditures became so sticky that Congress finally came to the rescue of the administrators; it did so by allowing any taxpayer in trade or business to deduct 10 percent of his trade or business income in lieu of itemizing expenditures for entertainment, meals and lodgings while in travel status, and the like. From now on any taxpayer who chooses to itemize these items must attach to his return a certified report of a recent lie detector test.

(8) "The new simplified method for taxing partnerships." Ever since 1949 some of the best brains in the profession have been working on the problem of how to simplify the taxation of partnerships. The 1966 Act tackles the problem in a new way. It allows partnerships to be taxed as trusts. No doubt the next simplification will be to permit trusts to be taxed as partnerships.

(9) "How to convert ordinary income into capital gain." No commentary is needed regarding this talk, except perhaps to note that a dozen new methods of accomplishing this old stunt were newly discovered by younger men in the profession. A number of them, very likely, are here in the audience tonight.

Some of you may be curious about what the speakers will say on their various subjects, especially after twenty-five annual tax institutes have gone by. While it is not given to me to know their exact texts, a few refrains were emphasized by so many of the participants that I could not but help pick up traces of them. What follows is a quasi-quote which perhaps is the best available sample of these points:

"Now we all know that the amendment of Section 100,001 of the 1964 Code made by the Technical Changes Act of 1966 was specifically intended to bring order out of the chaos produced by the multiplicity of inconsistent decisions which the courts had handed down. You will remember that the Tax Court first adopted one position and then overruled itself; then the district courts tended to adopt the initial position of the Tax Court; then the circuit courts split three different ways on the issues; and then the Supreme Court finally confused this whole area of law. It handed down a decision on grounds which worried all of us because it seemed to give the government the power to successfully attack these tax-saving arrangements no matter how skillfully they were contrived. The Technical Changes Act amendment was designed to undo this damage and provide a simple, clear rule of law. It has to be read very carefully, for it has eleven separate sections, some of which I am afraid are quite involved. In addition there are important glosses provided by the Committee Reports of both the House and the Senate and the Report of the Joint Committee, and there are several
supplemental Committee Reports which fill in a few of the gaps. But because the amendment, for practical considerations, had to be pushed through Congress rapidly, there unfortunately are a number of questions about it which are vexing, to say the least. In fact, some experts have suggested that technically there is doubt whether the legislation is adequate to reverse the Supreme Court decision which set it in motion. Moreover, even assuming it does this much, there is a disquieting rumor that the Treasury will again thwart the intention of Congress by adopting a very narrow construction in its forthcoming proposed regulations. In the meantime we are very much at sea since the Service refuses to issue any rulings on the vital questions. Under these circumstances, things at the moment are almost as unsettled as they were before passage of the amendment. Perhaps by this time next year we will have some definite word in the form of Regulations and will be able to make our plans with confidence. We can only hope that the Treasury will see the light and interpret the Amendment reasonably so that we won't have to ask Congress to amend the Amendment.

In view of the fact that I chose this excerpt only as a sample, I am sure you will understand my omission of the author's name. I hope that he, too, will be understanding.

Finally there is one other item concerning the 1967 Institute program which candor compels me to reveal. On the opening day there is a dinner session. The announcement of it, which is set in exceptionally bold type, reads as follows: "This session is reserved exclusively for entertainment; absolutely no speeches of any kind will be permitted."

Continued from page 11

Meltzer—

The effectiveness of sanctions against improper conduct once it is disclosed.

I will not speculate on the sense of shame of those involved in the serious abuses uncovered by the Committee, beyond saying that those disclosures do not warrant any optimism. The inescapable danger under the pending legislation is that disclosure regulation, unaccompanied by effective sanctions against improprieties disclosed, would have no significant effect on the conduct of thick-skinned and faithless fiduciaries. Disclosure regulation which at best produces confessions, without repentance, scarcely justifies the heavy burdens which such regulation would impose on honestly administered plans and on the government.

The sanctions now applicable to maladministration of the plans involved have, as the Subcommittee's investigation has indicated, been inadequate in practice and may remain so. In this connection, it is important to note that notwithstanding the superficial resemblance between the contemplated disclosure legislation and the Securities Act of 1933, there is a basic difference between them. In the securities field, there is a drastic and well-known sanction supplementing the criminal provisions for false disclosure. A stop order by the SEC will, in general, make the securities unmarketable. No comparable sanction exists for disclosure in the context of welfare and pension plans. Furthermore, it seems clear that in exercising its authority to issue stop orders, the SEC considers not only the adequacy of disclosure but also any overreaching or unfairness in a securities offering. The SEC is thus in effect exercising a regulatory authority, which would not be available to the enforcing agency under the pending legislation.

It is possible, of course, that the contemplated disclosure requirements, coupled with effective federal-state cooperation, might lead to more effective enforcement on the state level by state agencies as well as by the beneficiaries of the plans. But the variety of state regulatory systems and the substantial obstacles to effective enforcement by beneficiaries which would persist leaves this matter in considerable doubt.

The foregoing discussion suggests that (1) disclosure regulation, without direct and effective sanctions against malfeasance by trustees (as distinguished from sanctions for false reports) may be ineffective in advancing the statutory purposes; and (2) there is, accordingly, a serious question as to whether the conjectural benefits of such legislation justify the heavy burdens involved. Alternative means of regulation, which do not involve general disclosure requirements

Emil Sandstrom of Sweden, President of the International Association of Legal Science, and Andre Bertrand of France, Secretary-General of the Association, with Professor Soim Mentchikoff.