Fall 9-1-1963

Law School Record, vol. 12, no. 1 (Fall 1963)

Law School Record Editors

Follow this and additional works at: http://chicagounbound.uchicago.edu/lawschoolrecord

Recommended Citation
http://chicagounbound.uchicago.edu/lawschoolrecord/31

This Book is brought to you for free and open access by the Law School Publications at Chicago Unbound. It has been accepted for inclusion in The University of Chicago Law School Record by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
The Challenge of the Courtroom: Reflections on the Adversary System

By Morris B. Abram, JD'40

Mr. Abram's lecture was delivered to the entering students of the Law School, and to the Visiting Committee and Alumni Board, on the opening day of the academic year, October 1, 1963. Mr. Abram, who had been a Rhodes Scholar, and a member of the American staff at the Nuremberg Trials, was for more than twenty years a distinguished member of the trial Bar of Atlanta. He recently became a partner in the New York firm of Paul, Weiss, Rifkind, Wharton and Garrison. He has served also as General Counsel of the Peace Corps, and is a member of the boards of the Twentieth Century Fund and of the Field Foundation.

Despite the multiplication of the specialties and sub-specialties of the Bar, lawyers today may still be classified as doing office or trial work. Some do both. Since 1870 the number of office practitioners has vastly increased and the relative number in the trial Bar has diminished and continues to do so. I have heard a leader of the New York Bar say recently that there are fewer

Continued on page 3

The Class of 1966

The student body of the Law School continues to be national in nature, both with respect to colleges attended and the home states from which the students come. On the basis of college grades and aptitude tests scores, it also continues to be of remarkably high quality.

Members of the class entering in October, 1963 had an average Law School Admission Test score falling in the 92nd percentile of all students in the nation taking the test. The 143 members of the class were selected from among more than 950 applications for admission.

They hold degrees from seventy-three different colleges and universities, divided as follows:

Albion College .................. 1  University of California (Riverside) .......... 1
Amherst College .................. 3  Carleton College .......... 1
Antioch College .................. 1  City College of New York .... 1
Bates College ................... 1  Colby College .......... 1
Bowdoin College .................. 2  Colgate University .. 1
Brandeis University ............. 1  Columbia University ... 1
Brigham Young University ....... 1  Cornell College ...... 1
Brown University .................. 1  Connecticut College .... 1
Bucknell University ............. 1  Dartmouth College .... 1
Continued on page 2
The Class of 1966—Continued from page 1

<table>
<thead>
<tr>
<th>University</th>
<th>States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cornell University</td>
<td>5</td>
</tr>
<tr>
<td>Dartmouth College</td>
<td>4</td>
</tr>
<tr>
<td>DePauw University</td>
<td>2</td>
</tr>
<tr>
<td>Earlham College</td>
<td>1</td>
</tr>
<tr>
<td>Emory University</td>
<td>1</td>
</tr>
<tr>
<td>Fordham University</td>
<td>1</td>
</tr>
<tr>
<td>Grinnell College</td>
<td>4</td>
</tr>
<tr>
<td>Hamilton College</td>
<td>2</td>
</tr>
<tr>
<td>Harvard University</td>
<td>3</td>
</tr>
<tr>
<td>Haverford College</td>
<td>1</td>
</tr>
<tr>
<td>University of Hawaii</td>
<td>1</td>
</tr>
<tr>
<td>Holy Cross College</td>
<td>1</td>
</tr>
<tr>
<td>Hope College</td>
<td>1</td>
</tr>
<tr>
<td>Illinois Institute of Technology</td>
<td>2</td>
</tr>
<tr>
<td>University of Illinois</td>
<td>5</td>
</tr>
<tr>
<td>Indiana University</td>
<td>1</td>
</tr>
<tr>
<td>Kalamazoo College</td>
<td>1</td>
</tr>
<tr>
<td>Lawrence College</td>
<td>1</td>
</tr>
<tr>
<td>Loyola University</td>
<td>2</td>
</tr>
<tr>
<td>Massachusetts Institute of Technology</td>
<td>1</td>
</tr>
<tr>
<td>Michigan State University</td>
<td>1</td>
</tr>
<tr>
<td>University of Michigan</td>
<td>9</td>
</tr>
<tr>
<td>University of Minnesota</td>
<td>1</td>
</tr>
<tr>
<td>University of Nebraska</td>
<td>1</td>
</tr>
<tr>
<td>University of New Hampshire</td>
<td>1</td>
</tr>
<tr>
<td>Northwestern University</td>
<td>3</td>
</tr>
<tr>
<td>Notre Dame University</td>
<td>5</td>
</tr>
<tr>
<td>University of Pennsylvania</td>
<td>1</td>
</tr>
<tr>
<td>Pepperdine College</td>
<td>1</td>
</tr>
<tr>
<td>Pomona College</td>
<td>1</td>
</tr>
<tr>
<td>Princeton University</td>
<td>4</td>
</tr>
<tr>
<td>Purdue University</td>
<td>2</td>
</tr>
<tr>
<td>Rice University</td>
<td>1</td>
</tr>
<tr>
<td>University of Rochester</td>
<td>1</td>
</tr>
<tr>
<td>Roosevelt University</td>
<td>3</td>
</tr>
<tr>
<td>Rosary College</td>
<td>1</td>
</tr>
<tr>
<td>St. Mary’s College</td>
<td>1</td>
</tr>
<tr>
<td>College of St. Thomas</td>
<td>1</td>
</tr>
<tr>
<td>Sarah Lawrence College</td>
<td>1</td>
</tr>
<tr>
<td>Swarthmore College</td>
<td>1</td>
</tr>
<tr>
<td>Trinity College</td>
<td>1</td>
</tr>
<tr>
<td>Tufts University</td>
<td>1</td>
</tr>
<tr>
<td>Vanderbilt University</td>
<td>1</td>
</tr>
<tr>
<td>University of Vermont</td>
<td>1</td>
</tr>
<tr>
<td>Wabash College</td>
<td>1</td>
</tr>
<tr>
<td>Washington State University</td>
<td>1</td>
</tr>
<tr>
<td>University of Washington</td>
<td>1</td>
</tr>
<tr>
<td>Wellesley College</td>
<td>1</td>
</tr>
<tr>
<td>Wesleyan University</td>
<td>1</td>
</tr>
<tr>
<td>Whitman College</td>
<td>2</td>
</tr>
<tr>
<td>William &amp; Mary College</td>
<td>1</td>
</tr>
<tr>
<td>Williams College</td>
<td>1</td>
</tr>
<tr>
<td>University of Wisconsin</td>
<td>4</td>
</tr>
<tr>
<td>Wittenberg University</td>
<td>1</td>
</tr>
<tr>
<td>Yale University</td>
<td>8</td>
</tr>
</tbody>
</table>

Twenty-eight states and the District of Columbia are represented in the entering class. They are:

- Arkansas
- California
- Colorado
- Delaware
- District of Columbia
- Georgia
- Hawaii
- Idaho
- Illinois
- Indiana
- Iowa
- Kansas
- Maine
- Maryland
- Massachusetts
- Michigan
- Minnesota
- Missouri
- Nebraska
- New Hampshire
- New Jersey
- New York
- Ohio
- Pennsylvania
- Texas
- Utah
- Vermont
- Washington
- Wisconsin

Placement—The Class of 1963

During the academic year 1962-63, about seventy law firms and other employers of young lawyers visited the School to interview senior students for permanent positions, and in a majority of instances, second-year students for employment in the summer. In addition to these opportunities, approximately 200 listings of specific openings were secured by the School and made known to its students and graduates.

The employment choices of members of the class were quite varied, both as to occupation and location. The distribution was as follows:

- Private Practice with Law Firms: 16 in Chicago, 6 in New York City, 2 each in Washington, Boston, Minneapolis, and Milwaukee, 1 each in Los Angeles, Phoenix, Lincoln, Nebraska, Jacksonville, Florida, and London)
- Law Clerks to Judges: 35
- Graduate Work: 9
- Federal Government: 8
- Teaching and Research: 7
- State and Local Government: 3
- Corporate Legal Departments: 1
- Miscellaneous: 3
- Military Service: 22
- Unknown: 5
- TOTAL: 106

Again this year, it is worth pointing out that the number of graduates in private practice, apparently thirty-five, is deceptively small. When the great majority of students in the judicial clerkship, graduate work, military service, and unknown categories are added to this figure, it is a reasonable estimate that more than 75 per cent of the class will be found in law firms.

Henry D. Moyle, 1889–1963

The Law School notes with sorrow the death of Henry D. Moyle, JD’15, distinguished lawyer, educator and church leader.

Following graduation from the Law School and service as a Captain in the Infantry in World War I, Henry D. Moyle practiced law in Salt Lake City for thirty years. During this time he also served for twenty-five years as a member of the Faculty of the Law School of the University of Utah, and for two years as a United States Attorney.

In 1947, Henry D. Moyle interrupted his legal career when he was chosen a member of the Council of Twelve Apostles of the Church of Jesus Christ of Latter-Day Saints (Mormon), and in 1959 he was elevated to membership in the three-man First Presidency of his church. At the time of his death President Moyle was First Counselor to the President of the church. Noteworthy among his many services to his church was his pioneering work in the church’s welfare program, of which he was General Chairman for twenty years.

Dallin H. Oaks
than a dozen advocates he could suggest today to handle a great case in the courts of that community. That is not to say that there are not others who are qualified but the trial bar has its fashions no less than Paris, and the models of the litigation bar have grown quite restricted in a relatively declining specialty. Yet in our legal system the trial with its opposing advocates is the ultimate place for the resolution of all unsettled disputes, and all prudent office lawyers do their work with one eye on what a court might say or do to their work product. As Justice Holmes remarked, to a lawyer the law, realistically speaking, is a prediction of what a court may do.

The latest edition of a popular encyclopedia says a lawyer “is a man or woman who represents members of the public in a court of law.” I suspect that if you are like other freshman law students most of you were probably drawn to this profession by the magnetic attraction of this image. However, unless you make some decisive efforts to resist, the law of probability will pull you from this magnetic field into that constellation in which most lawyers today orbit and practice.

Judge Learned Hand has said: “...in my own city the best minds of the profession are scarcely lawyers at all. They may be something much better, or much worse; but they are not that. With courts they have no dealings whatever and would hardly know what to do in one if they came there.”

I have not come here to belittle or demean the other branches of the profession. Of my 29 partners, 22 do not practice in the common law courts. These men are, however, responsibly engaged in this profession, and without the efforts of men like them our present economic and social system could not function. They are often bold, imaginative and creative. As David Riesman wrote:

Only lawyers had in the post-Civil War period the particular gift, for the framing of corporate charters, security issues, and all the rest; the particular courage to work ahead of the cases and statutes in order to give powers to corporations which had never been tested (and have never yet been tested) in court; the particular tradition to give body to such decisive inventions as the fiction of the corporation as a “person.”

Though Sir Henry Maine did not live to know the modern corporate practitioner, he surely would have included his effort as a prime contribution to social progress in the context in which he wrote: “The movement of the progressive societies has hitherto been a movement from status to contract.”

The business lawyer has been the midwife of the emergence of self-determining separate individual and business and other legal forms from the network of family and other group status ties. Not only that. The modern corporate lawyer who does not set foot in a courtroom does more actual law enforcement than all the judges and prosecutors in the country combined. When counsel to a business tells a client not to issue a security, he enforces the Securities and Exchange Act, or a Blue Sky law; when he advises against merger, he enforces the antitrust statutes; when he consents for his client to a decree, he imposes more effective control than the marshall of the court. Without a responsible bar of office lawyers, there would not be enough government lawyers or courts to execute the statutes now on the books.

Let no one say, therefore, that the office lawyer serves only his client and himself. He is an officer of the court in which he never appears and plays a vital role in the legal and social system in ways which he seldom has time to stop to contemplate.

But I am not here to exalt the business, corporate and estate bar. I came to tell you of another life in the law—that of the advocate in the adversary legal system. The reason I or any other chooses this practice is, to be candid, a matter of temperament. The plain truth is I would find any other practice a bore.

I do not claim any comprehensive knowledge of the Tax Code. I do not want to acquire the expertise to advise a client on the intricacies of corporate law which affect a merger or reorganization. But I enjoy immensely the detailed study of any legal issue isolated as it must be, at the point of legal controversy. I have therefore never found a dull tax case, or real estate case, or any other litigation. It is the dispute which draws my interest, stirs my reason, charges my adrenals, and consumes me so that I am unaware of the passage of time. And frankly, when I have digested the facts and studied all the law bearing on the dispute, I have always been sure that I was on the side of right, whatever my misgivings were at first. I am engaged in the practice of all branches of the law when the issues are sufficiently narrow to negotiate a settlement or to fight them out in a legal forum. I am a generalist in the law and a specialist only in procedure and drama. The principles of my branch of the profession are drawn not only from the cases but from Machiavelli and Clausewitz.

As an advocate I am enmeshed in the adversary system which settles disputes by setting contending parties to fighting through their respective lawyers. These in the courtroom sometimes refer to one another as “my brother” or “counsel opposite,” or by name. At times we refer to one another as “my adversary,” and that is what we all are in the courtroom. Mark that well. The courtroom is a cockpit in which the legal rules and formalities shape and control but do not obscure the basic fact that battles are fought there.

Many law students will come to realize this instinctively and withdraw their initial interest in litigation. For the courtroom is often a cruel test for lawyers as well as clients. One enters to win but as often one loses, and the losses cannot be concealed. On the scoreboard of the
courtroom a lawyer will be considered to have done everything well in retrospect—if his client wins. If his client loses, he will seldom receive much credit for the numerous skirmishes which he won during the trial, many of which the client will have remarked upon enthusiastically at the time.

An old practitioner once put it to me this way: "When I win a case, then I have done everything right; when I lose, I have done nothing well."

Not everyone is emotionally suited to play for such stakes. This circumstance naturally and properly discourages many from the trial bar.

Others, however, after tentative and sometimes even rhapsodic expressions of interest in court practice, announce other plans, assigning as the reason a disenchantment with the adversary system itself.

Often this is merely an excuse to cover an emotional unsuitability; but many people sincerely adhere to this position which is widely shared by intelligent members of the lay public. I believe it is a mistaken view and decisions based upon it are in my judgment ill-advised and sometimes mischievous.

The most fundamental defense of the adversary system is that there is none better for the resolution of most disputes which cannot be settled by negotiation. Basically the adversary system supposes an impartial judge of the law and impartial finders of fact before whom contending parties lay their claims. The ultimate decision is based upon the facts brought forth during the trial by the contestants and permitted to be received by the Judge. The issues in any such proceeding are carefully controlled and the evidence admitted circumscribed by more or less established rules. Logicians can demonstrate without much effort that all the relevant facts are seldom permitted to be received in a courtroom, and every trial lawyer knows that many relevant and admissible facts are withheld, and ethically so, by trial counsel. In theory, the adversary system presents more facts through the competitive efforts of the contending lawyers than would be developed by an investigation conducted by a neutral. In part, this attitude may reflect a stubborn belief of the free enterprise society that competitive efforts of individuals produce more work product and perform more social benefits than effort from some other motive.

Whatever your economic theories may be, I would suggest that in most cases the adversary system does work better than any system, which is predicated upon an investigation and decision by a neutral.

On September 25 of this year Lord Denning, Master of the Rolls of Great Britain, issued his report on the Profumo scandal. He said: "... in carrying out the inquiry I have had to be detective, inquisitor, advocate and judge, and it has been difficult to combine them."

Indeed it would be. One who sets out to seek a certain fact usually finds it, or what to him passes for it. The lawyer who seeks facts on one side, for example, usually can make a case; but his efforts in the adversary system are counterbalanced. Furthermore, since neither the judge nor jury is engaged in the initial investigation, neither is contaminated by the subtle influences of the inquiry. The trial forum sterilizes the field exactly as an operation chamber and brings forth the permissible work product of the contending counsel. If less than the truth emerges, it is at least not because the judges have become committed to one side or the other by private investigations which create unverbalized impressions not subject to rebuttal. Everything which is received in the courtroom has to pass the test of competitive opposition. I do not say that the rules of evidence or those of discovery always permit the "whole truth" to emerge; but it is difficult to say what the "whole truth" is anyway, and I do not know of any system which will assure that it is discovered.

The most important truth about the adversary system for me has been a discovery for which I hope you will not judge me a cynic: the trial is a method by which we get decisions—not necessarily acceptable but which must and therefore will be accepted. I say this not in disparagement of our legal system but in its support, for we must realize that trial by law courts is the successor to personal force, community lynching, trial by ordeal, and trial by combat. It is the way in which man has come to settle disputes without private violence or publicly approved combat. If we should wait until psychiatrists have defined guilt, psychologists discovered irrefutable methods of ascertaining what philosophers will agree is truth, and genetics has bred a race of perfect judges before we set up a legal system, we all should have been so intimidated by violence and uncertainty that modern society could never have developed.

I must also say that I do not regard the discovery of "truth" to be the only end of the court system. There are some higher principles in my system of values than truth. This may shock you but I hope you will agree with me when I have stated a few examples.

If truth is the sole end of criminal investigations, I submit we should force every defendant to take the stand and abolish the presumption of innocence. By these steps we would have opened to the light of discovery the prime source of information—the defendant himself, and we would have removed an imbalance against one side not present in any other type of trial.

If truth is the highest end in civil trials, we should clearly impose a duty on the defense lawyer to withhold no facts discovered from his client, no matter how damaging they may be to his cause.

By these simple procedural changes we would get more truth, but we would have impaired the liberty of all and dismantled the bar by destroying the lawyer-client privilege. These simple reforms would, I suggest,
have done away with the whole criminal and civil legal system as we know it.

I will admit that the present-day adversary system is not a good forum for resolving certain kinds of cases. It is the best we know for bringing to an end certain kinds of controversies—principally those in which the important issues are narrow enough to be thrashed out in a courtroom within a reasonable length of time. Did Smith strike Jones’ car from the rear while Jones was stopped for a red light, or did Jones make a pass at his girl friend and suddenly brake his machine without warning? You may be sure that a trial of this issue will elicit the main facts that bear on the issue. The courtroom in such a case is a screen on which is flashed a reconstructed photograph of the events in the 30 seconds important to the judgment of the case. The trial may consume two days but the photograph will fall into focus.

On the other hand, the issues in a divorce case involving a couple married for 25 years, with children and property complications, cannot really be fairly adjudicated by a debate over the instances of “cruelty” alleged in the petition. Moreover, the adversary proceeding itself serves to create new issues, inhibits the chances of reconciliation, digs into old scars, and always leaves new sores.

There is, however, something to be said for the adversary trial in the matrimonial case. I mention it only to illustrate a principle of wider application. Our legal system is, as I have suggested, a successor to an old tradition of private remedy often involving personal violence. This is the institutional history; but some of our substantive law has also developed from the same traditions. Justice Holmes in his Common Law pointed out that the law of negligence was in part derived from the substitution of damages for personal retribution. As Holmes explained, the natural reaction of a person injured even by an inanimate object as, for example, a door, is to kick the door when it pinches the finger. The discharge of resentment and anger is a prophylactic measure for personal emotional health, but the control of the discharge is a social necessity. The adversary courtroom is the approved forum for the debating out of pent-up resentments. After a good hard trial, even the loser sometimes feels better. He has at least had his say and he may substitute now his resentments against the faceless jury for his foe. Like the patient who has his operation to talk about, the client now has had his trial and he may enjoy considerably embroidering fact with fancy as he decry against courts, judges, juries, and lawyers—maybe even his own.

The jury is a part of the adversary system but such a system does not by definition require a jury. Recently Justice Desmond of my state called for the limitation of the jury system in civil cases, as was done in England during and since the last war. I well understand the shortcomings of the jury system, but I agree with Lord Simons, the late Lord Chancellor of Great Britain, who opposed the English limitation of the civil jury. Writing in 1947 Lord Simons said:

To restore and even to extend the pre-war practice of empaneling a jury for civil as well as criminal cases would have the real advantage of bringing the average citizen in greater numbers into touch with the law. That jury service is often a burden is true; perhaps it should be better rewarded. But let it be thought some reward if the jurymen can say that in him English justice is embodied and expressed.

I have never sympatized with the complaint that the jury system clogs court calendars and prevents the prompt trial of cases. Of course it does take less time to try a case before a judge without a jury. But if the jury system has inherent advantages, as I believe it has in most cases, then surely this country can afford the relatively insignificant cost of sufficient judges, jury panels and courtrooms to administer justice expeditiously.

I believe in juries because of some of the judges I have known; I believe in juries because within a framework of strict law, they arrive generally at equity; I believe in juries because they leaven out and control the point of view of a single judge who is always human. It may surprise you but in my experience most judges are typed by lawyers who know them well; there are plaintiff-minded judges, defendant-minded judges, merciful judges and hanging judges. Don’t forget that in most jurisdictions there is but a single judge. Consider the plight of the lawyer and his client who must always go before this single man to try every case on the facts as well as the law. I do not trust many single men enough to make of him the sole dispenser of justice within a community.

I spoke to an intelligent lay friend the other day about this engagement. He said: “Tell them the jury system stinks. I know for I have sat on many.” He went on to say: “The only purpose of the jury system is to keep the judge honest.” May I submit that this would be a worthy and sufficient purpose, and even more so if one adds: “and to keep one man from inflicting his own predilections on a community for years.”

There are of course tyrannical judges but these are rare. But all judges are human. I would usually not agree to try a criminal case without a jury before a judge who has been a prosecutor unless the issue could almost certainly be predicted to turn on a question of law.

In our federal courts many district judges have been government attorneys. Moreover, it is natural that these judges, housed in the same building as the district attorneys, keep friendly relations with the prosecution, often socializing and lunching with them. There is nothing venal about this but I submit that this circumstance cannot but influence any human’s point of view. Thus I said the other day to a distinguished lawyer: “Some day I am going to run for Congress on a single platform:
the United States judges shall not be housed in the same building as the United States attorneys." He replied: "Go ahead, and when you bring your bill before the Committee of Congress, I will tell you some witnesses you should call. They would be secretaries to district judges who could furnish you with some right good ammunition."

It is furthermore natural that a district judge, even though enjoying life tenure, may wish to be a circuit judge or may even dream of higher things. In our country the Attorney General is chief federal prosecutor, the administrator of the Department of Justice and the initiator of judicial appointments. What ambitious man wishes to deliberately offend the source of future preference in a matter that could reasonably be decided either way? And I defy anyone to show me many legal issues on which a good rationalizer cannot at least make a creditable case.

Now mind you, my clients and I have had the short end of a jury's deliberations. From experience I can and still say that the jury system fails in a small community where one cannot possibly summon a panel which does not already know the participants and its version of the facts. It fails when called upon to deal with issues on which there exist a strong community prejudice. I regret to add, however, that judges also fail frequently under such conditions. I recently spoke to a State court judge in the South who told me that though 50 per cent of the citizens of his county were Negroes, the name of not one had ever been in the jury box. He went on to say that he knew this was wrong and that he intended to do something about it but he added: "Now isn't the time." By and large, the jury which does not know the participants nor the facts before trial, guided by an able judge in a trial of reasonable length, gives not only the appearance of justice but substantial justice as well.

It is almost impossible, however, for a jury to do justice in the three-ring circus which the modern federal conspiracy trial has become in which a score of defendants are tried together in cases lasting for months. After all, who could really recollect the evidence of a six months trial involving many defendants? Who could remember which evidence was admitted as against which defendant and excluded as to others? I maintain that this country can afford enough judges and juries to permit proper and speedy trials without the deprivation of due process. There is no reason why the institutions of justice should be manipulated in the interest of expediency. This country does not have to try a host of men, whoever they may be, in tandem.

You may have concluded that I do not share the TV point of view of criminal law—one which separates the cops and the robbers, the cowboys and the Indians, the good guys and the bums. You are right. Criminal law and procedure is a stagnant pool which cries out for reform. But there is no reform and for a good reason. How can a society reform in a field in which it has no philosophy and no consistent point of view? I was chairman of the Atlanta Citizens Crime Committee for three years. There I came to realize that no one knows what purpose the criminal law is to serve—neither the legislators, the judges, nor the citizens. Is it the purpose of criminal law to deter crime by punishment? That is hardly its effect as statistics show that those who have been punished most continue to do the most horrendous crimes. Is the purpose to rehabilitate? Hardly so inasmuch as we know that most prisoners have few, if any, resources for that purpose, and particularly in view of the fact that the Director of the United States Bureau of Prisons has publicly said that he knows of few persons who have been reformed in a prison who could not have been reformed better on the outside. Is the purpose to separate dangerous men from society? Then why do we release dangerous men from prison after having served a set term? Is it to satisfy our primitive desire for revenge? Probably, but this would be denied most vehemently by the system's chief supporters. Unfortunately, most lawyers and the most influential officers of the bar have had no contact with the criminal law and could not care less. Men who would not permit the law of trust to remain unpurposeful and ineffective have given little or no thought to this field of great social significance. The trouble with the criminal law in this country does not derive from use of the jury system, but from a lack of overall philosophy and purpose, from a failure to coordinate ends with means or even to think what the ends are or should be. It is tragic that the criminal law of this country remains a game played on a hit or miss basis. No one knows this better than the criminal trial bar, including the public prosecutors who have adapted to play the game rather than exert the effort to make it a serious business to others than those who play and lose.

Now I come to a most important point. This country is experiencing a great spiritual, legal and social change. This has been too long delayed. Much of it originated in the work of the United States Supreme Court of the last two decades. Today that court is not a body of en­crusted legal technicians but a vital third branch of the government, interpreting and defending the constitution and moralizing through law to other courts, public officials and private citizens on the principles of our political heritage.

The rising tide of Negro protest and demonstration has been widely described as a revolution. If it is a revolution, it is the most peculiar one the world has ever witnessed. Most revolutions are efforts to overturn the constitutional form of government; to subvert the established principles of society; to achieve by force and violence an overturning of legally established government. The Negro protest has a contrary purpose and thrust. It strives to support the constitution and to enforce its terms generally and completely; it demands that sub-govern-
ments and the agencies of society generally obey and implement the ideals of the Republic and the stated purposes of the instruments on which our national life was established. The Negro protest movement is a revolution only in the sense that it attempts to achieve finally the original purposes of the revolution which began in 1775. It is a movement to support the Constitution, not to subvert it.

As one who was less than a year ago a Southerner, I assure you that the rights of the Negro; nay the rights of every man under the Constitution, can when they are purposefully denied, usually be restored only in litigation. The impetus which first denied such rights is ordinarily powerful and persistent. These rights can only be wrung from the oppressor in the courtroom. This is no task for the summer patriot nor the corporate draftsman. The only forum for the re-establishment of the rights guaranteed by the first ten Amendments and the 14th and 15th Amendments to the Federal Constitution and the corresponding provisions of State constitutions is the courtroom.

When I was a teenager in college I decided I wanted to rid my native state of the county unit system of election. This was a method of electoral unit voting in which it took 100 votes in Atlanta to equal that of one person in another county. Since this object was reasonable, I thought it could be accomplished by reason, and certainly through education and accompanying political action. I was wrong. Then 15 years ago I started legal attacks on the system. An older lawyer, Stevens Mitchell, brother of Margaret Mitchell, said to me: "Morris, I am all for it. I hate the unit system but you will never get rid of it by lawsuits. The unit system is a damnable outrage and I am willing to go to the barricades to fight over it. But I cannot get other people to join me. People never get their rights if they are unwilling to fight for them, so it is a hopeless cause." Well, we finally destroyed the county unit system through the courts and Georgia is a changed state. Stevens Mitchell was right about one thing: the systems of malapportionment could never be rectified by persuasion. He was wrong about another: in America the courts are the safety valves which permit justified revolution without the violence of the barricades.

The architect of the continuing American revolution is the trial lawyer—the product and the instrument of the adversary system. The trial lawyer tends to be an individualist. He is generally not as dependent on retainers as others and therefore is freer than most. For this he pays a price. His income is variable; he leaves part of his body in every courtroom; he is constantly subjected to grave temptations and frequently accused falsely of succumbing to them. He risks the obloquy of contempt citations; he is tortured by mistakes which hindsight points up after every day of trial. The trial lawyer in short lives dangerously; but he lives.

Special Events

As the Record goes to press, the Conferences and special lectures listed below were definitely scheduled for the Autumn Quarter; more will be added. All except the final Conference will have taken place by the time this issue reaches its readers.

October 1—Welcome to entering students. Morris B. Abram, JD'40, will deliver the featured lecture, on the subject of "The Challenge of the Courtroom; Some Reflections on the Adversary System." Mr. Abram is a distinguished trial lawyer with the New York firm of Paul, Weiss, Rifkind, Wharton and Garrison.

October 13-15—Institute on Religious Freedom and Public Affairs. Sponsored jointly by the School, and the National Conference of Christians and Jews, this Institute is a closed, working conference for participants only, except for one public session. On the evening of Monday, October 14, the Honorable Abraham A. Ribicoff, JD'33, U.S. Senator from Connecticut, will deliver a public speech on "School Financing and the Religious Controversy."

October 23-25—The Sixteenth Annual Federal Tax Conference. Held in the Auditorium of the Prudential Building, in downtown Chicago, this Conference will again be presented in six sessions for an audience of about 450.

November 22-23—Conference on Discrimination and the Law, jointly sponsored by the School and the Anti-Defamation League of B'Nai B'Rith. Attendance at most of the sessions of this conference will be restricted to participants.
How the West Was Won

The Record is very pleased to report a noteworthy lecture by Professor Soia Mentschikoff in the words of the Oregon lawyers who heard her. Alfred A. Hampson, Esq., of Hampson and Weiss, Portland, wrote:

As you may know, Professor Mentschikoff lectured before the lawyers of Oregon at the Continuing Legal Education session of the annual convention.

The lecture she delivered, which was some two and a quarter hours in length and delivered without notes, was uniformly recognized as the best lecture that any of us had ever heard. It set forth the Uniform Commercial Code as none of us had ever had it set forth before, and in that short period of time made sense out of what seemed a hopeless morass to many of us.

My partner, a graduate from the University of Chicago Law School (Robert L. Weiss, J.D'48...Ed.), has long been telling me that it is the finest law school in the United States and with Soia Mentschikoff as an emissary, it is very hard for me to dispute that argument.

And, on the same topic, the School heard from the Honorable George Rossman, J.D'10, Justice of the Supreme Court of Oregon, in the following terms:

You will be pleased to know that Miss Mentschikoff delighted the Oregon Bar and won a host of friends not only for herself but also for the Law School when she addressed the Bar at its meeting last Friday.

Saturday noon, September 21, the State Bar's Committee on Continuing Legal Education held a luncheon meeting to which it invited all of its past members, of whom I am one. About fifty or sixty of us were present. No formal speeches were made, but many spoke informally. Enthusiastic references were made to Miss Mentschikoff's address. More than one stated that he was amazed that a speaker could hold the rapt attention of an audience for nearly three hours upon a technical subject such as the Commercial Code. Many referred to her intimate knowledge of the Commercial Code and of her ability to give enlightening explanations concerning it.

Miss Mentschikoff drew the largest audience that any speaker before the Oregon Bar has ever had.

New Teaching Fellows

Three new appointments of Bigelow Teaching Fellows and Instructors were made for the academic year 1963-64. Those appointed were William J. Church, of England, B.A., L.L.B., Cambridge University; Richard S. Ewing, A.B., Cornell University, L.L.B., New York University Law School; and C. Michael Flesch, L.L.B., University of London.

Appointed as Teaching Fellows and Instructors in the Foreign Law Program were Ulrich Drobnig, of West Germany, M.C.J., New York University, Dr. Jur., University of Hamburg; and Hans-Werner Laubinger, Referendar (University of Göttingen), M.Comp.L., University of Chicago.

Michael Lester, B.A., Oxford University, who was a Bigelow Teaching Fellow and Instructor last year, returns as Senior Teaching Fellow and Instructor.

Peace, Uniformity and Professor Dunham

Early in 1963 the Peace Corps decided to undertake a program in which twenty-five or thirty young Law School graduates would be sent to five Central African countries, for a period of two years each, to do a variety of work, ranging from compiling a digest of the decisions of the courts in Nigeria to working on tribal and customary law in Ethiopia.

The plan involved having these students spend about three months at an American university to learn something about the country to which they would be assigned. During that period they would also do background reading in the law of that country. Following this basic training they were to spend three weeks together in an intensive, specialized course dealing with methods of handling the specific legal problems which they would encounter.

Professor Allison Dunham agreed to organize this Law Program, and to serve as one of the principal Faculty members during the three-week course. His principal associates were Kwamina Bentsi-Enchill, J.S.D. '63, of Ghana, and Professor Lloyd Fallers of the University of Chicago Department of Anthropology.

The program was housed at the Law School of Yale University, and took place during September. Upon its conclusion Professor Dunham attended conferences in Dar-es-Salaam and Florence, and ended a remarkable summer with a brief vacation in Greece.

The summer was a notable one not only for his Peace Corps activity, but also for Professor Dunham's appointment to the newly created position of Executive Director of the National Conference of Commissioners on Uniform State Laws. Professor Dunham has long been associated with the Commissioners, and will henceforth devote a substantial amount of his time to their work on a formal basis, although, of course, remaining as a regular member of the Law School Faculty.
"Construction in Space in the Third and Fourth Dimension," by Antoine Pevsner. This remarkable sculpture is the gift to the School of Alex L. Hillman, Class of 1924, whose generosity had earlier provided the Isaac Hillman Seminar Room. Further background on the sculpture, its arrival and installation, will appear in subsequent issues of the Record. It is expected that, upon the sculpture's installation in the reflecting pool and formal dedication, a descriptive brochure will be available.
At the Washington Alumni Luncheon, left to right: H. Charles Ephraim, JD'51, Howard Adler, Jr., JD'51, Assistant Dean James M. Ratcliffe, JD'50, Frederick Sass, Jr., JD'32, and Dean Neal.

For Mr. Neal, the Twain Do Meet

Last spring, Dean Neal met the alumni of the School in New York and Washington. A luncheon meeting was arranged in Washington by Frederick Sass, Jr., JD'32, who is a Regional Vice-President of the Alumni Association. Since the meeting was timed to coincide with the annual meeting of the American Law Institute, Professors Walter Blum and Soia Mentschikoff and Assistant Dean James M. Ratcliffe also attended.

In New York, Byron Kabot, JD'41, took charge of a late afternoon reception and cocktail party for Mr. Neal. Both events, of which photographs appear in this issue of the Record, were well attended and highly successful.

In September, Mr. Neal and Jerome S. Weiss, JD'30, President of the Law Alumni Association, visited Los Angeles and San Francisco. In Los Angeles, they were guests at a luncheon arranged by Irving I. Axelrad, JD'39, Regional Vice-President of the Association, and the Honorable Benjamin Landis, '30, Judge of the Superior Court of Los Angeles. In San Francisco, they met with many of the Bay Area alumni at a luncheon arranged by Marvin Tepperman, JD'49, and were guests of honor, the following day, at an alumni luncheon meeting held in connection with the Annual Meeting of the State Bar of California. Mr. Tepperman and Dudley Zinke, JD'42, Regional Vice-President of the Association, arranged the latter gathering.

The four cities mentioned are the homes of one-third of the School's 1,800-1,900 alumni who live outside Illinois. While the larger concentrations of alumni have always held local meetings, and have been greatly helpful to the School in matters such as placement of students and fund-raising, it is expected that one result of the tour described above will be a greater degree of local organization, and an intensified support of the Alumni Fund, placement, and other vital activities of the School.

The Journal of Law and Economics


The article on "Social Cost," by Professor Ronald Coase of the University of Virginia, has been widely noted and is leading to a revision of the conventional theory on private and social costs. Professor Coase also contributed the article on the Federal Communications Commission, in which he examines critically the underlying justification for licensing frequencies.

Professor George Stigler of the University of Chicago contributed a basic article on "The Economics of Scale" and a critical review of Galbraith under the title, "Private Vice and Public Virtue." Professor Jacob Viner of Princeton contributed an article on "The Intellectual History of Laissez Faire." Professor Reuben Kessel of the University of Chicago contributed the article on "Discrimination in Medicine," and Professor John McGee of Duke, in his article on "Predatory Price-Cutting," challenges the accepted view that price-cutting was an important factor in the history of the old oil trust.
The New Field Code

The A.L.I. Proposed Division of Jurisdiction between State and Federal Courts

A speech delivered to the Conference of Chief Justices, on August 8, 1963.

By Philip B. Kurland
Professor of Law, The University of Chicago Law School

My text for this morning derives not from Shakespeare's currently popular *Antony and Cleopatra* but rather from the same author's *Julius Caesar*. From that drama I take the lesson: "The fault, dear Brutus, is not in our stars, But in ourselves, that we are underlings." Had I turned to *Cleopatra*, I might have chosen a gloomier theme: "We have kiss'd away kingdoms and provinces."

Let me begin by reminding you, if I may, of the genesis of the project for a redistribution of judicial business between state and federal courts. For, with all due respect, this is your baby and the question is whether you are going to abandon it entirely to the mercies of those who will bring it to maturity in a different faith than your own. I quote, then, from the Report of the Proceedings of the Eleventh Annual Meeting of the Conference of Chief Justices, held in the somewhat more effulgent climate of Miami Beach in 1959:

1. At its Tenth Annual Meeting . . . the Conference . . . resolved "that the Chairman . . . appoint a special committee to examine the allocation of jurisdiction between the state and federal courts . . ." and "that the Committee make recommendations to the Conference for achieving a sound and appropriate distribution of judicial power between the nation and the states." . . .
2. Subsequent to this action by the Conference, the Chief Justice of the United States recommended to the American Law Institute that it undertake a study toward the same ends . . .
3. Your Committee made a preliminary study of the problem. It concluded that the project is one which should be carried out . . .
4. Your Committee recommends, therefore, if the American Law Institute should undertake the task . . . that the Conference should continue its Committee on the subject; that the Committee appoint an advisor who is a specialist in this area; that the Committee, with the help of its advisor, examine the work of the American Law Institute as it is produced and report to the Conference . . . and thereafter make known the Conference's views to the Council of the Institute; and that, if and when the work of the Institute is presented for Congressional adoption, the view of the Conference be expressed through this Committee to the Judiciary [Committees] of the Senate and House of Representatives of the United States . . .

I repeat this history to remind you of your commitment. For it is a commitment that must be kept if you are not belatedly to discover that the reallocation of judicial business consists of adding to the burdens of the state courts and to the powers of the national courts.

In this light, let me turn to the Tentative Draft No. of the new Field Code. No one—certainly not I—can venture to criticize it without great trepidation. For its reporters, Richard H. Field of Harvard and Paul J. Mishkin of Pennsylvania, and its advisory committee, Judges Davis, Friendly, Lord, Weintraub, Whittemore, and Wisdom, Messrs. HorSky and Kohn, and Professor Hart, are as learned and experienced in the subject as any group could hope to be. It is perhaps foolhardy of me to propose "to beard the lion in his den," and hope "unscathed to go."

My first faltering step is to agree with the two major propositions tendered by the draft, at least as I read them. The first is the desirability of a severe limitation on the federal court's diversity jurisdiction; the second is the utilization of the federal courts for the resolution of judicial controversies that no state court is empowered to reach. But if I agree with these objectives, I am largely opposed to the methods proposed for securing them. And I am disturbed by the rationalizations used to justify the methods proposed.

I would point out that the essential function of the proposed draft is the protection of the federal courts. At the outset the Field Code announces that "the present inquiry has a special urgency"—an urgency not reflected in the amount of time taken to produce this first draft—"because of the continually expanding workload of the federal courts and the delay of justice resulting from them." (P. 1.) Apparently of little consequence to the draftsmen is the fact that the state courts in municipal areas are facing an even greater crisis. Let me quote their own language. After recognizing that any relief of the federal court diversity docket "would increase the burden upon the State courts already the farthest behind in their work," p. 124, they brush off the problem by saying that the solution of the State court congestion problem is a responsibility of the States "and would easily be handled by the corrective measures which the States ought to take in any event." P. 125. I am sure that the members of this Conference would be very happy to learn from the authors of this Code how the problem of state court congestion could be "easily handled" and what the "measures" are that "the States ought to take in any event." The American Law Institute speaks as if it were *de minimis*, to add each year, as I understand their figures, 500 trials—not cases docketed but trials—to the caseload of the state courts in New York County, 380 trials in Philadelphia, 430 trials in Chicago, 160 trials in Baltimore, 340 trials in Los Angeles, and 300 trials in San Francisco. I point out this cavalier treatment of state court problems not because I do not think that the diversity jurisdiction in the federal courts should be abandoned, but rather because, in the absence of adequate representation of state interests, diversity jurisdiction would be curtailed without recognizing the necessity for compensating relief of state courts. It should be noted
that state courts now handle as much federal judicial business as federal courts handle state judicial business. It is this Marie Antoinette attitude of “Let them eat cake” that I decry.

Let me return, however, to the rather complicated machinery that is proposed for the limitation of federal diversity jurisdiction. On what rationale did the promulgators of the new Field Code rest in proposing what Judge Clark of the Second Circuit has called “this quite tentative and highly controversial, possibly courageous, possibly foolishly, argument for preserving a shell of diversity jurisdiction, but only in sharply restricted form.” *Arrowsmith v. United Press International*, 7 FR Serv 2d 4d. 31, case 1 (June 11, 1963). In the words of its reporters:

Its basic principle is that the function of the jurisdiction is to assure a high level of justice to the traveler or visitor from another State; when a person’s involvement with a State is so substantial as to warrant his being held responsible for the quality of its judicial system he should not be permitted to choose a federal forum, but should be required to litigate in the courts of the State. (P. 2.)

In the rather polite terms of the commentary: “Without disparagement of the quality of justice in many State courts throughout the country, it may be granted that often the federal courts do have better judges, better juries, and better procedures.” (P. 37.)

In fact, no sound rationale for the continuance of diversity jurisdiction as governed by *Erie R.R. v. Tompkins* was found. A “shell of diversity jurisdiction” was preserved on the theory that federal courts afford a higher order of justice than state courts and only certain persons, those who do not share in the sin of failing to raise their state courts to the heights of federal courts, are entitled to enter the Valhalla of a federal court. And this result, even though the federal court in rendering its higher order of justice, will be required to apply the lesser quality of justice written by you and your colleagues on the state high courts. Assuming for a moment that there is merit to their proposition of the general superiority of federal courts, an assumption that I find contrary to experience, another difficulty is presented. The standards utilized to separate the sheep, entitled to the superior brand of justice available in the federal courts, from the goats, condemned to the second class justice of state courts, is so complex that, at least for several years, any potential saving of time of the federal courts will be lost in deciding the large number of jurisdictional questions that will necessarily arise under the new code provisions. And, while the Federal court load remains unabated, the state courts will be bearing the additional load of diversity cases without any compensating reduction of Federal question business now left to state courts for disposition in spite of their second-class nature.

I would amend the first essential proposition put forth by the new Field Code to provide that, with the exception I am about to discuss and in cases where actual bias is shown, federal courts should not exercise jurisdiction because of the citizenship of the parties.

When I come to the second of the Code’s major proposals, I again find myself in agreement with its essential conclusion. That is, where a case involving multiple parties cannot be resolved by a state court for want of personal jurisdiction over an indispensable party, the case should be remanded to a federal court empowered to exercise national—or indeed international, we are told—jurisdiction. Again my quarrel is with the means for accomplishing this objective.

I should say, parenthetically, that I believe that the doctrine of indispensable parties is a disappearing notion and that the number of cases which fail of resolution because of the absence of such a party is very small indeed. Certainly it is much smaller than the 500 diversity cases the codifiers would add to the trial burden of the New York County courts on the argument of *de minimis*. I am, therefore, somewhat dubious that the subject requires the extensive treatment that it receives.

The new Field Code, however, is likely to make into a large category that which has heretofore been a very small one. Had they simply authorized the removal of any case that a state court held could not be decided because of the absence of jurisdiction over a person who should be a party, I should have been satisfied that the evil, however small, had been cured. Instead, however, they have created a basis for invoking the original as well as the removal jurisdiction of the federal courts. And this jurisdiction may be invoked, not on the basis that a state court has held that it cannot dispose of the claim, but rather measured by a federal standard of whether “complete relief” can be “accorded the plaintiff,” § 2341(b), or by the federal standard of whether the absence of a defendant “may leave the defendant subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligation by reason of his claimed interest,” § 2343(b).

Worse even than this expansion of federal judicial power, however, is the authorization to federal courts to make their own choice of law rules in these cases. I can not take your time now to argue that no such new fount of federal authority ought to be created, except to say that essentially the problems to be resolved in these cases are problems with which the federal government has no concern except to provide a forum where the state courts cannot do so. For the rest, I leave you to the writings of your colleague, Mr. Justice Traynor, and my former colleague, Professor Brainerd Currie.

Obviously I have not been fair to the great effort and the myriad details that have been put into the A.L.L.’s white paper. I have talked in generalities where the code-makers have been most specific. But I think that it is
essential to see the forest, lest the trees obscure it. If, like the annual meeting of the American Law Institute, you are confined to picking fault with details in the complex code offered for approval, you are trapped into consent to the concepts on which those details are based.

In closing, I want to make it clear that I am not asking you to invoke the "uranium rule" that has, in this atomic age, replaced the golden rule: "Do unto others before they do unto you." Instead I would again counsel you from Shakespeare, this time from Henry V, where he reminds us: "There is some soul of good in things evil, Would men observingly distil it out." The Field Code will make a great contribution to the proper reallocation of judicial business between state and federal courts. But you will rue it if you do not participate in its formulation at least to the extent you committed yourselves to act in 1959. "Come, my friends, 'Tis not too late to seek a newer world."

Visiting Professors, 1963–64

The School is pleased to note the addition to the Faculty of three distinguished visitors during the current academic year.

ARGYRHIOS A. FATOUROS, Visiting Assistant Professor of Law

Born in Athens, Greece in 1932. Graduate of University of Athens; diploma and certificate from Faculty of letters of University of Paris, through French Institute of Athens. Master of Comparative Law, Master of Laws, Doctor of Science of Law, all from School of Law, Columbia University.

Research Associate in International Legal Research at Columbia, 1956–57.

Ensign, Royal Hellenic Navy, 1957–60.

Lecturer, Faculty of Law, University of Western Ontario, 1960–62; Assistant Professor, 1962–. Author of Government Guarantees to Foreign Investors, Columbia University Press, New York and London, 1962, and of numerous articles and book reviews in American, Canadian, and Greek journals.

He will spend the academic year 1963–64 at the University of Chicago Law School, and will teach Decedents' Estates, Comparative Law, and a seminar in International Business Problems.

GUENTER H. TREITEL, Visiting Lecturer in Law


Assistant Lecturer, London School of Economics and Political Science, 1951–53; Lecturer, University College, Oxford, 1953–54; Fellow and Tutor, Magdalen College, Oxford, 1954 to date.


During the academic year 1963–64, he will teach Equity, Restitution, and a seminar on Problems in Contracts, and will join Professor Malcolm Sharp in teaching the first-year Contract course.

E. ALLAN FARNSWORTH, Visiting Professor of Law


Assistant Professor, Columbia University School of Law, 1954–1956; Associate Professor, 1956–1959; Professor since 1959. Visiting Associate Professor, University of Michigan Law School, Summer, 1958. Visiting Professor at the University of Istanbul, Fall, 1960.

Professor Farnsworth is the author of Cases and Materials on Negotiable Instruments (1959), and Introduction to American Private Law (1961) (in Turkish).

He will be at the University of Chicago Law School during the Autumn Quarter, 1963, and will teach Commercial Law I.

The Return of the Native

Francis A. Allen has been appointed University Professor in the Law School and the School of Social Service Administration.

Mr. Allen received his A.B. from Cornell College, in 1941, his LL.B. from Northwestern in 1946, and the honorary degree of Doctor of Jurisprudence from Cornell College in 1958.

Following graduation from Law School, he served for two years as law clerk to Chief Justice Fred M. Vinson, of the United States Supreme Court. He taught at Northwestern University's Law School from 1948 to 1953, when he became Professor of Law at Harvard. From 1956 until 1962 he was Professor of Law at the University of Chicago; for the past year he has been a member of the Faculty of the University of Michigan Law School.

Mr. Allen is the second person to be appointed a University Professor. Last fall, the Board of Trustees of the University established a program providing for special recognition for top-ranking scholars and scientists, by authorizing the creation of ten University professorships and five named chairs for distinguished new members of the Faculties.

An internationally recognized authority on criminal law, Professor Allen was one of the principal architects of the new Illinois Criminal Code. He served from 1961–63 as Chairman of the United States Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice. The Committee's report, which is
The Expatriation
Forbidden
Dialogue:
Arizona
Wolf
v.
Gideon
v.
States
United
Sit-In
of
Flags
The
School-Prayer
the
Supreme
performance
of
existence,
as
land,
it
the
United
Law
the
Supreme
The
University
Their home
daughter.
Delinquency.

on
tion
to
major
posed
in
Law,
Criminal

14
The
defendants
in
Law,
Criminal

Chapter
Recent
with
Soul
Administrative

of
Booking
Conflict
of
the
Supreme
Court

Cases:
Great
Cases:

Weinstein:
The

Convenience,
Leading

Israel
the
British

Criminology,
fields

MORRIS E. FEIWELL
E. HARRISON
SOLOMON
MOSES
LEVITAN
NORMAN
H.
LEVINSON,
DWIGHT P.
CHARLES R.
CLAUDE O.
CHARLES
W.
HENRY F.
1919:
Class
Chairman
LEO J.
CARLIN
1903–1912, Executive Committee
CLAude O. NETHERTON, ’09
NORMAN H. PRITCHARD, ’09
CHARLES R. HOLTZ, ’10
Dwight P. Green, ’12
DAVID LEVINSON, ’12
1913: Class Chairman
MOSES LEVITAN
1915: Class Co-Chairmen
HENRY F. TENNEY
MORRIS E. FEIWELL
1916: Class Chairman
SOLOMON E. HARRISON
1919: Class Chairman
LEO J.
CARLIN
1924: Class Chairman
REUBEN S. FLACKS
1925: Class Chairman
LESTER ABELSON

...
1930-1939, Executive Committee
C. Malcolm Moss, '30
Brimson Grow, '34
Byron Miller, '37

1930: Class Chairman
John D. Hastings
Milton K. Joseph

1931: Class Chairman
Durmont W. McGraw

1932: Class Chairman
John F. McCarthy
Peter J. Ciammas

1933: Class Chairman
Walter Leen
Harold L. Lipton

1934: Class Co-Chairmen
Robert R. Shapiro
Jerome Wald
Edwin Shafer

1935: Class Chairman
Bernhard, Morris E.
David C. Claufox, O. C.

1936: Class Co-Chairmen
Madden, E. L.
Levitan, Morton

1937: Class Chairman
Emler Heifetz
Harry Schulman

1938: Class Chairman
Henry A. M. Johnson

1939: Class Chairman
Stanley K. Fish

1940-1949, Decade Chairman
J. Gordon Henry, '41

Executive Committee
Charles F. Harding, III, '43
Richard McGuigan, '47

1940: Class Chairman
Mrs. Frances Crowin

1941: Class Chairman
Theodore Fields

1942: Class Chairman
Out-of-Town Chairman:
Edward W. Saunders

1943-1946
Charles F. Harding, III

1947: Class Co-Chairmen
Robert S. Fiffer
Ernest Greenberger

1948: Class Chairman
John A. Cook

SPECIAL GIFTS COMMITTEE
Claude O. Netherton, '09
Norman H. Pritchard, '09
Charles R. Holton, '10
Dwight P. Green, '12
David Levinson, '12
Moses Levin, '13
Morris E. Feiwel, '15
Henry F. Tenney, '15
Edgar Bernhard, '21
Frank Madden, '22
L. Julian Harris, '24
Russell Baker, '25
Llewellyn Wescott, '26
Maurice A. Rosenthal, '27
Andrew Hamilton, '28
Arnold I. Shure, '29
Stuart Bradley, '30
Charles Satinover, '30
William Burns, '31
Norman Nagan, '32
Morris J. Lieberman, '33

1949: Class Chairman
Mildred Giese

1950: Class Chairman
MAURICE JACOBS

1950: Class Chairman
Executive Committee
Julian Hansen, '52
Merrill Fiedler, '53
A. Daniel Fiedler, '55

1951: Class Chairman
Marvin Green

1952: Class Chairman
Davie Kahn

1953: Class Chairman
Daniel E. Levin

1954: Class Chairman
Hugh Brooky

1955: Class Chairman
John R. Grimes

1956: Class Chairman
Lewis Ginsberg

1957: Class Chairman
Howard G. Krane

1958: Class Chairman
Robert E. Allard

1959: Class Chairman
Frederick S. Lane

1960-1962, Decade Chairman
Jerome H. Storm, '60

1960: Class Chairman
Neil A. Adelman

1961: Class Chairman
Donald J. Egan

1962: Class Chairman
Gerald Sherman

Out-of-Town Chairman:
New York:
KENT V. LUKINGBEAL, '42

Private Vice and Public Virtue

By GEORGE J. STIGLER

Charles R. Walgreen Distinguished Service Professor of American Institutions, Department of Economics and Graduate School of Business, The University of Chicago

Reprinted from the Journal of Law and Economics, Volume IV, October, 1961, with the permission of the author and the Editor of the Journal.

People are supposed to be vain about themselves or their children, but I think they are really much more vain about the importance and difficulty of the times in which they live. Never before, we confidently assume, has there been a period in which problems so grave, so numerous, and so urgent have been thrust upon a nation. We are engulfed in issues that do not permit of a leisurely piecemeal solution. When it is not the survival of civilization, it is the welfare of sorely distressed people or badly deteriorated real estate, the salvage of irreplaceable talents of our young people, the placing of an American taxpayer in orbit, or some equally pressing goal.

I personally think it would be a great advance in our political and social life if a quota of only one urgent problem were allowed each year or two. The solution of problems would proceed as rapidly as at present—this indeed is a cheap claim. And we could throw off the persecution mania we now have against history.

But of course the proposal is idle; it would take many years of self-discipline to achieve any really casual attitude toward life; probably we should have to abolish newspapers, radio, television, and politicians under the age of 70. So we are going to live in an urgent age, and the question I shall discuss is: on whom can we rely to deal with it?

My discussion will be limited to economic problems, although in this age that is not as much of a limitation as I would wish it to be. Whom can we trust to solve the routine as well as the urgent economic problems of our time? There are only three candidates: the great private economic organizations, big business and labor unions; the individual citizen; and the state. Let us consider them in turn, to determine which are trustworthy and efficient instruments to conduct our economic affairs.

1. THE ORGANIZED BLOCS

BIG BUSINESS

That anyone has ever liked big business is almost beyond belief—how can anyone like something which is intrinsically impersonal? One can admire its achievements or denounce its failures, respect or despise its leaders, but never like the system itself.

But since colonial times Americans have not merely failed to like big business, they have distrusted it. There have been ebbs and flows in the growth of this dislike:
a muck-raking, trust-busting pre-World War I decade; a complaisant era in the 'twenties; a violent hostility in the 'thirties; a measure of tolerance in the post-war decade. But always there has been suspicion, and at the end of every decade big business finds itself subject to a wider range of governmental controls.

The distrust continues to wax. The lobbying activities of certain natural gas producers displayed old-fashioned rapacity, guided by a caveman intelligence. The era of the quiz program scandals “showed” that even the corruption of professors and clergymen would be undertaken if lipstick sales were helped. The conflicts of interest which Chrysler Corporation has publicized “showed” that the profits weren't even shared with the stockholders. And now comes the General Electric-Westinghouse-etc. case, in which vulgar intrigue permeates a vast industry.

This distrust of big business penetrates every part of our social life. Almost the only secular belief shared by all the major religions is the dislike of capitalism. The organization man has become the butt of sociological humor. Perhaps as telling a sign as any is that, where once property was a requirement for full citizenship, it has now become a disqualification for public office.

LABOR UNIONS

There was a time—a mere generation ago—when the word “labor” connoted a sturdy, hardworking group of men, callously oppressed by big business, bravely fighting through “organized labor” for decent treatment. This romantic picture has been replaced by one less romantic and also less flattering.

The workers are no longer in overalls and carrying lunch pails on the 6 A.M. street car—it didn’t take statistics to change this picture. The union leaders resemble well-fed, well-manicured politicians more closely than they resemble hungry martyrs.

Prosperity and publicity are to blame for the change in the stereotype. When organized labor means extortionate airline pilots or ruthless New York Harbor tugboat employees, public sympathy must be diluted. When unions number hundreds of thousands of members and industry-wide bargaining is the fashion, the dignity of the individual worker is as likely to be suppressed as protected by organized labor. When strategic economic power is in the hands of a man no more widely admired than Mr. Hoffa, a fear of irresponsible private power cannot be suppressed.

The big purpose of unions can hardly be said to be protection of the worker from gross exploitation—when the wage rates are what they are now—or prevention of exhausting labors—when featherbedding during a 40 hour week has become an important issue in so many labor disputes. In the popular image unions still do some “good” things such as protect older workers from arbitrary discharge, but unions are no longer equated to things a warm-hearted man endorses.

So much for the character assassination on the great private economic organizations. I believe the increasing public hostility toward both big business and big unions is not justified by any increases in their power. The amount of power possessed by a big business or a big union is usually very small, so that even with the worst will in the world it could do only a very modest amount of damage to the community.

But I also believe that there is no likelihood of any increase in public confidence or affection toward these groups. We are not going to turn over the big economic problems of our time to great organized groups of employers and employees, and quite frankly, I don’t think we should. So let us turn to those ill-matched rivals, the citizen and the state.

2. The Private Citizen

There was a time when, at least in our formal protestations, virtue reposed in the average man. In its less romantic versions, the democratic philosophy conceded that every town would have its share of fools and all too seldom its saint: yet the average man had at least strong common sense, plain decency, and honorable ambition. Alas, he too is losing his admirers.

Frontal attacks on the competence of the individual citizen have been few and far between in our professedly democratic society. Indeed we have the interesting paradox that those intellectuals who are doing most to undermine confidence in the individual, are usually most vociferous in demanding wider suffrage in Mississippi, Angora, and Indonesia. But one can attack a ruling philosophy much more effectively by indirect than direct attack.

The attack on the competence of the individual has been the basic creed of reformers for three-quarters of a century. Let me give just four instances:

1. Compulsory school attendance laws.
   Such laws obviously assume that the individual family will often fail to give its children an adequate education, unless compelled to do so.

2. Industrial safety provisions.
   These laws obviously assume that the individual workman will not demand the installation of safety devices on industrial machinery, and the state must do so.

3. False advertising.
   The prohibition on false advertising clearly reflects the belief that the individual consumer cannot detect fraudulent claims and promises.

4. The regulation of occupations.
   A hundred occupations are now widely licensed in this country. These licenses are demanded of practitioners because it is believed that individuals either could not detect incompetent physicians, lawyers, barbers, and wrestlers, or because the individual would not insist upon a high enough level of competence.
I have chosen examples which I believe are representative of the great variety of reforms designed to protect the individual from his own incompetence. Sometimes the limitations of the individual's ability to cope with a problem were genuine, sometimes nonsensical. But in every case the allegation of incompetence was clear.

This implicit criticism of the individual has recently undergone a radical extension, at the hands of J. K. Galbraith, Vance Packard, and others. One part of the extension is in a sense familiar: Packard in particular argues that the consumer is incompetent to buy most things—that he is a dupe of contrived obsolescence of automobiles and television sets, and does not have the ability to judge the social consequences of consumption of our natural resources. This extension is not original: it was done by Stuart Chase in the 1930's, and indeed done far better than in Packard's shockingly incompetent book.

Ambassador Galbraith's extension is more radical: it is essentially that the economic system is so constructed that a rational use of our resources is impossible. I shall discuss it in some detail because its impact upon the public at large and the present administration have been substantial.

The criticism of private luxury is an ancient theme: for centuries men have argued that most wants are artificial and economic activity is unimportant. I am fond of quoting a passage that was written somewhat over 200 years ago about a man "whom Heaven in its anger has visited with ambition":

He finds the cottage of his father too small for his accommodation, and fancies he should be lodged more at his ease in a palace. He is displeased with being obliged to walk afoot... [He] judges that a numerous retinue of servants would save him from a great trouble... [He] devotes himself for ever to the pursuit of wealth and greatness... [He] submits in the first year, may in the first month of his application, to more fatigue of body, and more un­eastness of mind, than he could have suffered through the whole of his life from the want of them... Through the whole of his life he pursues the idea of a certain artificial and elegant repose which he may never arrive at, for which he sacrifices a real tranquility that is at all times in his power, and which, if in the extreme of old age he should at last attain to it, he will find to be in no respect preferable to that humble security and contentment which he had abandoned for it. It is then, in the last dregs of life, his body wasted with toil and diseases, his mind galled and ruffled by the memory of a thousand injuries and disappointments which he imagines he has met with from the injustice of his enemies, or from the perfidy and ingratitude of his friends, that he begins at last to find that wealth and greatness are mere trinkets of frivolous utility... 

The author of this ascetic passage, oddly enough, was (young) Adam Smith, the patron saint of private enterprise.

Such criticisms of the pursuit of luxury always encounter one serious difficulty: the separation of that which is sensible and convenient from that which is ostentatious and useless. Let me quote another 18th century philosopher, this time Mandeville:

If every thing is to be luxury (as in strictness it ought) that is not immediately necessary to make Man subsist as he is a living Creature, there is nothing else to be found in the World, no not even among the naked Savages: of which it is not probable that there are any but what by this time have made some Improvements upon their former manner of Living; and either in the preparation of their Eatables, the ordering of their Huts, or otherwise, added something to what once sufficed them. This Definition everybody will say is too rigorous: I am of the same Opinion; but if we are to abate one Inch of this Severity, I am afraid we shan't know where to stop. When People tell us they only desire to keep themselves sweet and clean, there is no understanding what they would be at: if they made use of these Words in their genuine proper literal Sense, they might soon be satisfy'd without much cost or trouble, if they did not want Water: But these two little Adjectives are so comprehensive, especially in the Dialect of some Ladies, that no body can guess how far they may be stretchd. The Comforts of Life are likewise so various and extensive, that nobody can tell what People mean by them, except he knows what sort of Life they lead. The same obscurity I observe in the words Decency and Conveniency, and I never understand them unless I am acquainted with the Quality of the Persons that make use of them. People may go to Church together, and be all of one Mind as much as they please, I am apt to believe that when they pray for their daily Bread, the Bishop includes several things in that Petition which the Sexton does not think on.

Galbraith is of course aware that the naked parading of a Harvard professor's tastes would not seem very persuasive to the American public (although the dislike of plebeian luxury is not restricted to Harvard professors). So he contrived two arguments that our present social system encourages private waste at the cost of inadequate public services.

The first argument is that we neglect public needs for private waste because private desires are synthesized and artificially stimulated by massive, skillful advertising. I may quote a passage or two to indicate his position.

If the individual's wants are to be urgent they must be original with himself. They cannot be urgent if they must be contrived for him. And above all they must not be contrived by the process of production by which they are satisfied. For this means that the whole case for the urgency of production, based on the urgency of wants, falls to the ground. One cannot defend production as satisfying wants if that production creates the wants.

And he goes on to say:

The fact that wants can be synthesized by advertising, catalyzed by salesmanship, and shaped by the discreet manipulations of the persuaders shows that they are not very urgent.

On the other hand, the public wants, the wants for public provision of services, are not synthesized or created artificially.

I find this a most unconvincing and peculiar distinction. On the one hand I would have thought that all private and public wants or if you wish, tastes, were at all times synthesized—that a man is not born into the world with a particular set of literary and gastronomic...
tastes. In good part our tastes have been a traditional cultural heritage, developing largely by imitation of the upper classes by the lower classes. Perhaps the most striking phenomenon of modern times in this respect is that the formation of tastes instead of being traditional and in a certain sense dictatorial (one is born into a stable society and abides by it) has become competitive. Anyone in our society who sees prospects for gain can attempt to change tastes in any direction. And advertising is no monolithic force: indeed much advertising takes the form of cancelling itself out: the automobile manufacturers attempting to get people to buy automobiles, the steamship or airplane people wishing that they would travel instead by their media, the banks meanwhile urging people to do neither but to put their money in a savings account.

On the other hand, the implicit assumption that public wants are not advertised seems to me especially anomalous. In the year 1960 a very modest estimate at least $200 million of radio and television time was devoted to creating dissatisfaction with the provision of public services in the United States. And indeed the public sector has the valuable boon that its advertising is deemed to be news, and hence escapes both the costs and measurement of other forms of advertising. I happened to have a copy of the New York Times before me when I was preparing this essay, and it contained the following advertisements:

1. At least four full pages whose effect is to argue that we must spend more on Cuban revolts.
2. Three columns advertising the need for increased aid to Laos, one column on the Congo, and one editorial asking for increased aid to South America.
3. Two columns asking for more expenditure on space exploration.
4. A column asking for larger military appropriations.
5. A column of Kefauver Committee hearings, advertising for stricter controls over business.
6. A column on the need for expanding the public rural electrification program.
7. A half column on the need for greater municipal care of neglected and mistreated children.
8. A column requesting 10 new parks.
9. One editorial for a new cabinet level department of Urban Affairs and Housing.

In candor I must add one item on the other side—criticism of a price fixing bill for milk markets—in a letter to the editors!

And the advertising has paid: the immense expansion of public activities is surely one of the best known facts of our time. Even the non-defense activities of governments have doubled their share of national income since 1900 (from 6 to 12 per cent). Only Mr. Galbraith can stand on Pike's Peak and lament his unhappy residence in a monotonously level country.

I shall pause only for a moment to notice Galbraith's other criticism: that we have grossly neglected investment in education. And while this is not spelled out, one is told that this neglect is due to a defect in the market mechanism: somehow the market fails to induce an amount of investment by the society in the education of people which would be economically justifiable. Let me quote him:

Nearly all of the investment in individuals is in the public domain. And virtually all of it is outside the market system. It is the state which, through primary and secondary schools, and through the colleges and universities, makes the largest investment in individuals. And where, as in the case of private colleges and universities, the state is not directly involved, the amount of the investment is not directly related to the eventual pay-out in production. Investment in refineries being higher than in textile mills, the refineries will draw investment funds. But engineers to design the refineries may be even more important—in effect yield a higher return. And the highest return of all may come from the scientist who makes a marked improvement in the refining process. These are not imaginative possibilities but common probabilities. Yet the high return to scientific and technical training does not cause the funds to move from material capital to such investment. There is no likely flow from the building of the refineries to the education of the scientists.

This is a view which has now become quite fashionable, and yet is simply false. On the one hand a great deal of education takes place outside of formal institutions of education. Indeed I once engaged in a little arithmetic to estimate what portion of the economic education of the community (by which I mean the education which leads to increases in the income-earning power of the individual) was performed in formal institutions and what proportion was acquired by experience and instruction within the factory or office. Even for as late a period as 1940 in the United States I found that on the order of something like two-thirds of the effective amount of education in the United States was being provided after one left formal educational institutions and I suspect that in most societies and in most times the amount has been seven-eighths or more. The identification of education, then, simply with the residence in buildings that have the word "school" written on them leads to a very mistaken view of how much we really have invested in this way, and who has done the investing. The second point is that investigations which are under way indicate that at the present time in the United States, going to college yields approximately 12% (before taxes) on investment. This is an over-estimate because no one has yet been able to measure the difference in quality of college graduates and high school graduates. Building a refinery or a machine tool yields about 13% before taxes. So that if one wishes to use the criterion of maximizing the returns on capital outlays of society, we are if anything entering a period of over-investment in education, not that I would consider this a basic criticism of education.

3. The State

It would be at least as easy to write a character assassination of the state as it has been for those who have
directed their criticisms toward private individuals and organizations. Do we wish instances of fraud and venality?—then the Federal Communications Commission, the Internal Revenue Service, and the administrative staffs of Congressmen will supply them, if we do not wish to look at the state and local level.

Do we wish records of magisterial incompetence in dealing with economic problems? Our farm program is surely an adequate instance of protracted, extravagant failure: if we had bankruptcy for governments as we do for businesses, the Department of Agriculture would go bankrupt every three years. Equally illustrous examples can be found in our maritime program, our water conservation programs and our river and harbor projects. Or consider a local government: during the 1949-50 water shortage in New York City the choice was offered of building a dam at Cannonsville or reducing the leaks in the water mains or metering the users. One could get the additional water from Cannonsville for $1000 per million gallons, or save it by repairing the mains at $1.61 per million gallons, or by metering customers at a cost of $160 per million gallons. Naturally the city chose the Cannonsville project.

But it seems both unnecessary and irrelevant to labor the fallibility of the state in dealing with economic problems. It is unnecessary because we already know it. The public criticism of the federal regulatory bodies, for example, is at an all-time high. The failures of our foreign economic aid program are written in major headlines. In fact I challenge anyone to cite an example of distinguished, continued success in any economic activity by the state.

It is more serious that criticisms of public efficiency are irrelevant. We have accepted the desperate faith that only government can solve our problems. If large organizations are selfish, and individual man is shallow-minded and equally selfish to whom else can we turn? If the government does a thing badly, give it more money, more men, and more power—and more duties. No doubt the government is all too inefficient, we say, but it is all we have to cope with the problems, and with good will we can make it tolerably efficient. This is an attractive position for a politician: he has no rivals, and failure will be punished by larger appropriations.

And this is the position that I wish categorically to dispute. The individual citizen, mortal and imperfect though he be, lacking both omniscience and clairvoyance, is not an oversize infant, who will stumble from folly to catastrophe. The state, acting through men whose characters and wisdom are seldom elevated by the move to Washington, D.C., will do many things worse than even our less enlightened citizens.

Even this is not the real issue: even if the state were always wise and benevolent, it would be tragic to turn over the conduct of our lives to it. Our society is not dedicated to the principle that the good society consists of large herds of well-cared-for people. It is dedicated to the principle that the good society gives each individual the maximum possible responsibility for his life and the maximum possible freedom to meet this responsibility.

4. The Policy Implications

Most people, I believe, will accept the ethical priority of individual freedom and responsibility, and they will accept it more easily and wholeheartedly if it is presented in the broadest terms in 4th of July orations. But I believe it should be a basic operative principle in every decision, and my final remarks are intended to illustrate a few of its applications. I would rather have individualism clearly understood and violently opposed as a basic principle of social policy than have it affectionately embraced as a hollow political cliché.

One act before the present Congress would give federal funds for education to each of the 50 states. In roughly half the states, federal taxes would take more than was given, and in half taxes would take less than was given. So far as the states that would gain go, the logic of the proposal is that New York should help Georgia. For present purposes I shall grant this. So far as the states that would lose go, the logic is that if federal taxes finance federal education expenditures, the schools of New York can get more money than they could get by going directly to local taxpayers. The elimination of local governmental control over schools is deemed a net advantage. But if one wishes the utmost possible freedom and responsibility for individuals, it is a decisive objection that the individual's responsibility and control are much greater in his local school board than in the U.S. Office of Education.

Again, our social security system applies uniformly to rich and poor. One might interpret the act as saying that even a man with an income of $25,000 will make no provision for unemployment, illness, or old age. Or one can interpret the act as saying that it would be an administrative nuisance to distinguish between people who might and might not need compulsory insurance. Whatever one thinks of the basic principle, I believe that the exclusion of well-to-do families from both taxes and benefits would be highly desirable. With all our purported affluence, we should be able to afford some attention to the individuals who have produced it.

Both of these examples were chosen to show that even if one accepts the goals of modern legislation, it would be perfectly possible to give a much larger scope to differences in individual and community differences. The reason we do not give such scope is simply that it is no longer an important goal, certainly not important enough to sacrifice the comfort and ease of bureaucrats.

But of course a true individualist would go much fur-
ther, and challenge many of the policies themselves. Our farm program, if anything so disgraceful can be called a program, is designed to support an unnecessarily large agricultural plant by maintaining prices well above the costs of production, and employing extensive output controls to prevent the sinking of the Midwest under the weight of corn bins. This generation-old debacle serves no rational purpose, individual or socialistic. I would argue for a program, of say 5 years' duration, of assistance in retraining and moving farmers to urban occupations, with the expenditures under present programs reduced by a fifth each year. Any farmer who wished could remain a farmer and produce as much as he wished of any crop, and of course most would remain: but thereafter they would be self-supporting, independent producers, not the instructed agents of Orville Freeman.

Many people react to such proposals in a fearful manner. Individualism may be good, and it may have great scope today—but it's such a long, hard, politically unpalatable program. I agree that it is difficult, although perhaps less so than some of our other goals such as the elimination of poverty and tyranny throughout the world. I agree that it would be unpalatable to many people, which is another way of saying that individualism is no longer for them a cherished goal. For me, and I hope for most people, it is a cherished goal, worth all the trouble it may cost. In fact I think it would be a splendid bargain even on so-called practical grounds—we would be able to face the outside world with a concept of democracy that amounted to more than friendship for the United States. But cheap or not, practical or not, it has been the great creed of western civilization since the Reformation, and if we are to abandon it now, let us kill it, not leave it to starve to death.

FOOTNOTES
5 Galbraith, op. cit. supra note 4 at 273.

Professor Tefft in California

Sheldon Tefft, the James Parker Hall Professor of Law, has added another title to his collection. Mr. Tefft is spending the Autumn Quarter, 1963, at the Law School of the University of Southern California, where he has been appointed Legion Lex Distinguished Visiting Professor.

The ABA in Chicago

The Eighty-Fourth Annual Meeting of the American Bar Association was held in Chicago in August. As is customary, a number of other important legal organizations met during the week prior to the ABA convention. These gatherings gave the Law School an opportunity to arrange for three special events.

On the evening of August 8, the School was host at a dinner party, held in the Harold J. Green Law Lounge, for the members of the Conference of Chief Justices and of the National Conference of Commissioners on Uniform State Laws and their wives. Dean Neal welcomed the guests, the Honorable James E. Livingstone, Chief Justice of the Supreme Court of Alabama and retiring Chairman of the Conference of Chief Justices, Walter P. Armstrong, Jr., retiring President of the Uniform Commissioners, and special guest Sylvester J. Smith, Jr., retiring President of the American Bar Association, responded. Among the special guests were the Honorable Frank R. Kenison, Chief Justice of the Supreme Court of New Hampshire and incoming Chairman of the Conference of Chief Justices, and a member of the Law School Visiting Committee, Lewis Powell, incoming President of the Uniform Commissioners, and Walter Craig, President-Elect of the American Bar Association. Shortly before the dinner, the American Bar Association held a cocktail party for Chief Justices, Commissioners and Law Faculty across the street from the School at the American Bar Center.

The Law Alumni Association holds a luncheon each year during the annual meeting of the American Bar Association. This year, that luncheon was held at the Law School. (Chicago's weather, famed for stability and predictability, produced a 60-degree day with 25 MPH winds in mid-August, so the luncheon was held in the Green Lounge, rather than outside, around the reflecting pool, as originally planned.) More than 350 alumni and their wives heard Jerome S. Weiss, President of the Association, who presided, Dean Neal, who spoke briefly and introduced the featured speaker, the Honorable Archibald Cox, Solicitor General of the United States.

During all of mid-August, the Green Lounge was turned into an exhibition hall. An extensive display of rare books and manuscripts, drawn from the University's own collection and, through the invaluable help of Louis H. Silver, JD'28, from a number of noted private collections as well, was assembled by Miss Frances Hall, Law Reference Librarian. A collection of prints and drawings, produced by distinguished artists on legal subjects, was assembled for the Law School by Edward A. Maser, Chairman of the University's Department of Art.

Conducted tours of the Law Buildings were provided six times daily during the ten-day period of meetings. Guides were provided by the Law Student Association.
THE ALUMNI LUNCHEON, HELD ON THE OCCASION OF THE ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION

We dislike printing a picture of the back of a lady's head, especially when the lady is Professor Soia Mentschikoff, but the reader's loss is clearly the gain of Professor Dallin H. Oaks, JD'57, and Glen A. Lloyd, JD'23, Trustee of the University who recently retired as Chairman of the Board.

The American Law Student Association, which, as an arm of the ABA, meets concurrently each year, sponsored a moot court competition in the Kirkland Courtroom between the winner of last year's national moot court competition and a team from Osgoode Hall, of Canada. Professor Soia Mentschikoff acted as Chief Justice. The Law Student Association arranged a reception for participants and audience following the competition.
At the Speaker's Table, left to right: Norman H. Nachman, J.D.'32, President of the Chicago Bar Association, the Honorable Sterry Waterman, Judge of the U.S. Court of Appeals, Second Circuit, and member of the Visiting Committee, and Charles W. Boand, JD'33, Chairman of the Alumni Fund Campaign. Dean Neal, standing, is being ignored.

President Weiss grows emphatic with Dwight P. Green, JD'12, past president of the Law Alumni Association, and Mrs. Green.

Before the luncheon, left to right: Professor David P. Currie, Mrs. Currie, Mildred J. Giese, JD'49, Mrs. David Levinson, and David Levinson, JD'12.

The Alumni Luncheon is a chance to renew old acquaintanceships, left to right: Edward D. McDougall, Jr., JD'23, of Chicago, member of the Alumni Advisory Council, Ross W. Shumaker, JD'23, of Toledo, and Richard Bentley, Editor of the American Bar Association Journal and member of the Visiting Committee.

Dean Neal addresses the Alumni Luncheon

Jerome S. Weiss, JD'30, President of the Law Alumni Association, presiding over the luncheon.
THE SPECIAL EXHIBITS

A limited number of Exhibit Catalogues is available for readers interested in a detailed description.
The Mechem and Kirkland Scholars

Nine outstanding students, now members of the Law School’s entering class, were named recipients of the Floyd Russell Mechem Prize Scholarships for 1963. Announcement of the awards was made by the Honorable Tom C. Clark, Associate Justice of the U.S. Supreme Court, who is Chairman of the Selection Committee. Other members of the Committee are the Honorable Roger Traynor, Associate Justice of the Supreme Court of California; the Honorable Sterry Waterman, Judge of the United States Court of Appeals, Second Circuit; William Merritt Beane, Professor of Politics, Princeton University; Ross L. Malone, Past President, American Bar Association; J. Roland Pennock, Professor of Political Science, Swarthmore College; and Whitney North Seymour, President of the American Bar Foundation and Past President of the American Bar Association. Justices Clark and Traynor, Judge Waterman, and Messrs. Malone and Seymour, are members of the Visiting Committee of the Law School.

The Mechem Scholarships, each paying $3,000 annually to recipients, were established in January, 1962. The winners of the 1963 awards were:

Stephen L. Babcock, born in Freeport, Illinois in 1939; University of Wisconsin; College of William and Mary, B.A., 1963; Ford Foundation Scholarship, Phi Eta Sigma scholastic honorary fraternity; editorial board, college literary magazine; William and Mary Chamber Orchestra; resides in Freeport, Illinois.

Donald J. Christl, born in Chicago in 1941; St. Mary’s College, Winona, Minnesota, B.A., 1963; President’s Scholarship; president, student government; president, debate society; resides in Elmwood Park, Illinois.

Robert J. Donovan, born in Boston in 1941; Holy Cross College, Wooster, Massachusetts; Tufts University, B.A., 1963; Economics honor society; varsity wrestling; resides in Drexel Hill, Pennsylvania.


J. Scott Hamilton, born in Bronxville, N.Y., in 1941; Purdue University, B.A., 1963; National Merit Scholarship; Tau Beta Pi Engineering honorary society; vice-president of the student body; Purdue literary award; resides in Park Ridge, Illinois.

Duane W. Krohne, born in Keokuk, Iowa, in 1939; Grinnell College, Grinnell, Iowa, B.A., 1961; Worcester
College of Oxford University, B.A., 1963; Phi Beta Kappa; Rhodes Scholarship; president, student council; varsity baseball and football; resides in Perry, Iowa.

ROGER P. LEVIN, born in Chicago in 1941; Columbia University, B.A., 1963; Phi Beta Kappa; Rhodes Scholar; president, student council; varsity baseball and football; resides in Highland Park, Illinois.

WALTER J. ROBINSON, born in Seattle in 1941; University of Vienna; University of Washington, B.A., 1963; Phi Eta Sigma honorary scholastic fraternity; student government; resides in Yakima, Washington.

G. PERRIN WALKER, born in Rigby, Idaho, in 1939; Brigham Young University, Provo, Utah, B.A., 1963; Phi Eta Sigma Scholastic honorary fraternity; Tau Kappa Alpha, forensics honorary fraternity; Pi Sigma Alpha, political science honorary fraternity; resides in Idaho Falls, Idaho.

The mean undergraduate academic average of these nine young men was 3.64, on a scale on which 4.0 means straight A's; the mean Law School Admission Test score was 732; the highest score to which the testing service assigns a national percentile rating is 725, which is described as constituting the top 4/10ths of 1 per cent in the country.

It is interesting to note that of last year's nine Mechem scholars, the first group, seven have been selected, on the basis of their first-year grades, to compete for membership on the Board of Editors of the University of Chicago Law Review.

The Weymouth Kirkland Scholarships were established by the Robert R. McCormick Charitable Trust. Students receiving Kirkland Scholarships may use them to attend any law school they choose within the five-state Chicagoland Area. This year, three of the six Kirkland Scholars enrolled at the University of Chicago.

KARL R. BARNICKOL, of Chicago, Secretary of the Student Council; member of Pi Sigma Alpha; honorary political science fraternity, member of Blue Key; received the A.B. degree from Johns Hopkins with General and Departmental Honors; elected to Phi Beta Kappa.

ROBERT M. BERGER, of Chicago, A.B., University of Michigan, Phi Beta Kappa in junior year; member, College Administrative Board; Chairman, Joint Judiciary Council.

JAMES E. BETKE, of Chicago, A.B., Hope College, cum laude and with Faculty Honors; President, Blue Key Society; A.M., University of Chicago (in educational psychology) Teaching Assistant in Psychology, University of Chicago.
THE FACULTY'S DINNER FOR THE CONFERENCE OF CHIEF JUSTICES AND THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

Professor Allison Dunham, newly appointed Executive Director of the Commissioners on Uniform State Laws.

The dinner for the Chief Justices, the Commissioners, and their wives.

Sylvester J. Smith, Jr., retiring President of the American Bar Association.

The Honorable James E. Livingstone, Chief Justice of Alabama and retiring Chairman of the Conference of Chief Justices.

Walter Malcolm, the new President of the Commissioners on Uniform State Laws.

Walter E. Craig, new president of the American Bar Association.
Foreign Law at Chicago

The University of Chicago Law School serves both as a center for study of American law by foreign lawyers, and, through its Foreign Law Program, as a major stimulus to the study of the civil law by American lawyers. In the prospectus describing the Foreign Law Program, Professor Max Rheinstein wrote:

To meet the growing demand for American lawyers who understand the legal system of Civil Law Countries, the University of Chicago Law School has initiated a Foreign Law Program. This program is designed to train graduates of American law schools for effective work in the legal system of a Civil Law country and thus to facilitate the conduct of American legal business abroad and to enrich the student's understanding of his own system in his work either as a practitioner or as a teacher.

During the first year, a major portion of the student's working time will be spent in intensive and systematic study of the private law of France or Germany. The French or German system has been the model for the legal systems of Belgium, the Netherlands, Italy, Portugal, Spain and Latin America, of Austria, Switzerland, Japan and Turkey. Moreover, study of either system facilitates an approach to the private law systems of the Nordic countries and the majority of the countries of Eastern Europe, Southeast Asia and the Arab world. In any given year one or the other of the two parent systems will be emphasized.

The work of the second year will be carried on in the foreign country for which the student has been prepared. Before the student goes abroad, arrangements will have been made for his continued guidance and supervision by a qualified adviser in the country chosen. The adviser, in cooperation with The University of Chicago Law School, will prepare for the student an appropriate plan of studies, will supervise his work, and will be available through the year for consultation and advice. In suitable cases, provision may be made for practical training in a law office, a government agency, or a business firm.

Five young graduates of the School, all of whom received the J.D. in June, 1962, spent the academic year 1962-63 at the Law School studying French law. They are now completing the program with a year of work abroad. David P. Earle III and Harold S. Russell are at the University of Paris, Bruce D. Campbell and Robert Starr are at the University of Aix-en-Provence, and Michael J. Kindred is a student at the University of Grenoble.

During the current academic year, five more students will begin the program with the study of German law at the Law School. They are Tipton Blish, J.D., University of Chicago Law School, 1963; George P. Fletcher, J.D., University of Chicago Law School, 1963; Robert J. Marousek, J.D., Northwestern University, 1958; Walker D. Miller, LL.B., University of Colorado, 1963, and John G. Roach, LL.B., Washington University, 1963.

As mentioned earlier, many foreign lawyers come to the Law School for study of the American system. During the current quarter, the following are registered:

Mihajlo M. Acimovic, Yugoslavia; Michael O. Adesanya, Nigeria; Mahdi M. Ahmed, The Sudan; Artemio C. Baxa, Philippines; Anne-Marie Bechê, France; Jacob Fajgenbaum, Australia; Heinz Hausheer, Switzerland; Martin Hitz, Switzerland; Mechthild Immenkotter, West Germany; Zenitsu Ishimura, Japan; Hudson Jamiesh, South Africa; Michael Landrand, France; Jan Marwede, West Germany; Calliope Nomikou, Greece; Kwame Opoku, Ghana; Robert P. Pace, South Africa; Hans P. Peyer, Switzerland; Salomone Piccotto, England; David D. Prentice, Northern Ireland; Risto J. Seppalainen, Finland; Kurt A. Schaffrath, West Germany; Jurg Schnegelsberg, West Germany; Heikki Simola, Finland; Armin Strub, West Germany; and Tiziano Treu, Italy.

Poverty and Criminal Justice

More than two years ago, Professor Francis A. Allen was appointed Chairman of the Attorney General's Committee on Poverty and the Administration of Criminal Justice. The report of that Committee, submitted in February of this year, states: "The mandate given the committee was a broad one. The committee was instructed to study the system of federal criminal justice with the purpose of identifying problems faced by persons of limited means charged with federal crimes and problems created for the system of federal justice by the presence of such persons in its courts. The Committee was also asked to present to the Department of Justice a series of recommendations for the solution or amelioration of problems so identified."

Other members of the Committee were John Bodner, Jr., of the Washington firm of Howrey, Simon, Baker and Murchison. Mr. Bodner was a Bigelow Teaching Fellow at the Law School in 1953-54; Joseph Goldstein, Professor of Law at Yale; John F. Grady, of Snyder, Clarke, Dalziel, Holmquist and Johnson, Waukegan, Illinois; the Honorable Walter E. Hoffman, U.S. District Judge for the Eastern District of Virginia; James M. Marsh, of LaBrum and Doak, Philadelphia; George Nye, of the California Bar; Herbert Packer, Professor of Law at Stanford; and the Honorable Walter V. Schaefner, Justice of the Supreme Court of Illinois and a graduate of the Law School who is currently serving as Chairman of its Visiting Committee.

The report of the Committee grouped its extensive investigations under the three major headings of (1) The Provision of "Adequate Representation," (2) Bail and Pre-Trial Release, and (3) Access to Appellate Review.

A major result of the work of the Committee has been the Criminal Justice Act of 1963. This bill, drafted in cooperation with the Department of Justice, embodies the principal recommendations of the Committee with respect to the problem of adequate representation. At this writing, the bill has been passed by the Senate and is awaiting action in the House of Representatives. Substantial changes in the internal administration of the Department of Justice have come about as a result of the Committee's recommendations, and further action in the bail and pre-trial release area is expected.
New Publications

Among the many publications of the members of the Faculty during the academic year 1962-63, there were four which might be of unusual interest to readers of the Record.

The Uneasy Case for Progressive Taxation, by Professors Walter J. Blum and Harry Kalven, Jr. of the Law Faculty, has for a decade been a landmark in its field. The University of Chicago Press has recently published a new edition of this notable book, which has been made available both in hard covers and in the Press's paperback Phoenix Book Series. There is a new introduction of such general interest that a substantial excerpt from it will be reprinted in the next issue of the Record.

During the Winter Quarter of 1962 the Law School sponsored a Conference on Church and State. The papers delivered at that Conference, together with two additional papers especially written for this purpose, have been published by the University of Chicago Press under the title The Wall between Church and State. Professor Dallin Oaks of the Law School Faculty was the editor. The contents include “The Future of the Wall” by Robert M. Hutchins, President, Fund for the Republic; “A Protestant View—An Argument for Separation” by the Reverend Harold E. Fey, Editor, Christian Century; “A Catholic View—Toward a More Perfect Union Regarding the American Civil Liberty of Religion” by William Gorman, of the Center for the Study of Democratic Institutions; “The Constitutionality of Public Aid to Parochial Schools” by the Reverend Robert F. Drinan, S.J., Dean and Professor of Law, Boston College Law School; “The Constitutionality of Tax Exemptions for Religious Activities” by Paul G. Kauper, Professor of Law, University of Michigan; and “Constitutional Problems of Utilizing a Religious Factor in Adoptions and Placement of Children” by Monrad G. Paulsen, Professor of Law, Columbia University. In addition, the book includes a paper on the “Unconstitutionality of Public Aid to Parochial Schools” by Murray A. Gordon, of the New York Bar, and a discussion of the “School Prayer Cases” by Philip B. Kurland, Professor of Law, at the University of Chicago; both of the latter papers were written for this publication.

The Winter Quarter also saw the publication of Professor Allison Dunham's study entitled “The Method, Process and Frequency of Wealth Transmission at Death,” Volume 30, Number 2, The University of Chicago Law Review, Winter, 1963; also available as Number 14, of the University of Chicago Law School's Reprint and Pamphlet Series. This study of the transmission of wealth at death is one of the undertakings made possible at this Law School by the Ford Foundation's grant for research into Law and the Behavioral Sciences.

“Split Trials and Time Saving: A Statistical Analysis,” was published in the Harvard Law Review, Volume 76, Number 8, 1963, and is also available as #15 in the Law School's Reprint and Pamphlet Series. The article is the work of Professor Hans Zeisel of the Law Faculty, and Thomas Callahan, J.D. '63, who acted as a research assistant on the Jury Project even prior to his entrance in the Law School. This investigation, which was an offshoot of the Law School's work on the Jury System and Court Congestion, was made possible in large part by the Walter E. Meyer Research Institute of Law. The scope and importance of the work is suggested by the opening paragraph, which reads as follows: “In 1959 the United States District Court for the Northern District of Illinois adopted a rule permitting separate trials of liability and damage issues in civil cases. At the request of the court the authors have conducted an investigation to determine the extent to which time is saved through use of the separation device. They use a variety of converging statistical approaches to arrive at the conclusion that in personal injury jury trial cases about twenty per cent of trial time may be saved. They then consider the possible ways that separation might lengthen trial time, and conclude that these will not offset the time saving to any degree.”