The Supreme Court of Illinois, shown in the Weymouth Kirkland Courtroom, after hearing argument of two cases on its regular calendar

For the past five years Illinois trial and appellate courts have held regular sessions in the Weymouth Kirkland Courtroom at the Law School. This year these court proceedings were closely integrated with the first-year program of legal research and writing. The favorable response to this and other developments in the research and writing program has prompted this report.

The inclusion of court proceedings in the curriculum of a law school is a significant innovation in modern legal education. In England law students were once urged to give "diligent and constant attendance upon the courts of justice...." Today a popular English text for law students omits any mention of the value of court attendance for the prospective lawyer. In America stu-
students once learned law as understudies in the office and courtroom. Today legal education has been ruled for over fifty years by Langdell's case method, which "was intended to exclude the traditional methods of learning law by work in a lawyer's office, or attendance upon the proceedings of courts of justice." This antipathy toward court attendance is still influential even where the case method is weakening. So it is that the modern American law student, bidden to immerse himself in the law, is like the child in the nursery rhyme: privileged to go out to swim but warned away from the water.

Jerome Frank advocated the use of court proceedings to educate young lawyers in his 1932 report to the Alumni Advisory Board of the University of Chicago Law School. The initial steps were taken years later, under the leadership of a Dean who was just beginning his studies at the Law School the year Frank's report was submitted. It was typical of Dean (as he then was) Edward H. Levi that he made a spectacular improvement upon the earlier suggestion. Frank wanted to take the students and teachers to the courts. With the generous assistance of the supporters of the Courtroom and the remarkable cooperation of the Judiciary and the Bar, Levi brought the courts to the School.

The educational value of the court proceedings at the Law School is not limited to those students who will practice in the trial and appellate courts. The highest value of the proceedings is probably as an introduction to the judicial process. First-hand observation of the work of trial and appellate courts should give a student a sense of reality about the legal process that will enrich his study of the case materials that are still the staples of legal education. Since the court sessions are of important introductory value, it is the first-year students who are most strongly urged to attend them.

For teaching purposes the court sessions have been integrated with the first-year legal research and writing program. The purpose of this program, which was begun at the Law School in 1937, was to introduce the beginning student to skills and techniques necessary for the study and practice of law. Since 1948, when Professor Harry Kalven's article reported on the Law School's decade of experimentation with this tutorial work for entering students, many other law schools have adopted similar programs of individual training in research and exposition.

The Chicago program is conducted by the Harry A. Bigelow Teaching Fellows, under the supervision of a permanent member of the faculty. The principal emphasis is on individual work by the student and on individualized supervision, assistance and evaluation by the Bigelow Fellows. In each successive assignment the students and their instructors work toward a common objective, but in most cases the teaching Fellows have wide latitude in the choice of problems to serve those objectives. The Fellows also have discretion in the means used to assist their students and to evaluate and improve their work, but the emphasis has always been on individual attention to the student's own particular problems. The current program has not changed that emphasis, but it has incorporated new ways of introducing students to legal research and new assignments designed to increase what the students would learn from the court sessions.

The entering student's first assignment, which he received the first or second day of school in the Autumn Quarter, was designed to introduce him to the exposition of legal materials. It consisted of two statutes and seven court opinions from a single jurisdiction, together with a related problem. After studying these materials the student was required to prepare a memorandum on their meaning and effect with reference to the problem posed. The class sessions in the course on Elements of the Law, which began with an intensive consideration of how to read a case, were the student's principal help during this abrupt and sometimes painful introduction to legal materials.

Three weeks after school began the student had completed his first assignment, had at least one lengthy interview with his tutor and was ready for his introduction to legal research. Although it is undoubtedly true that a student will best learn how to use a library by using it, his initial efforts can be furthered by some formal instruction. A lecture on the library is probably too vague and tedious to be of much value. Instruction in the materials and techniques of legal research will be more effective if it is illustrated and if it is given within the framework of law the students have learned in their initial weeks of study.

This year the research phase was introduced by showing students approximately fifty colored slides taken in
the law library. Together with the accompanying explanation, these slides illustrated the basic tools and techniques of legal research (e.g., annotated statutes and reports, digests, indices to legal periodicals, encyclopedias, etc.) that a lawyer would use to locate and evaluate the cases and statutes the students had discussed in their first assignment. This hour-long visual presentation was supplemented by a written "Guide to Basic Research Tools and to the Library." Following this basic introduction to legal research the students were given small problems on which they did the research and prepared written memoranda.

After employing the basic research tools in this manner, the first-year class met for a review session in which they saw two films on legal research prepared by publishers of legal materials. The showing of these films, which are thought to be most effective when viewed by students who have already made some use of the materials portrayed, concluded the formal instruction on legal research.

The third assignment of the Autumn Quarter was designed to prepare the students to realize the maximum benefit from their attendance at the first court session, a jury trial. It also gave additional practice in legal research. First, the students completed a reading assignment on the technique of preparation for trial, with special emphasis on the preparation and function of the trial brief. The written assignment consisted of a partial outline of the "law" section of a trial brief, including some thirty or forty legal questions that might arise concerning voir dire questions, admissibility of evidence, jury instructions, etc. It required the student to complete research and submit a memorandum on one or more points in each of these areas. This gave each student some familiarity with several typical legal issues prior to the trial. So that they would also be familiar with the pleadings and disputed issues of fact, each student received a copy of the complaint and answer and was asked to pinpoint the factual issues to be resolved at the trial.

On November 19 and 20, 1963, the first-year class attended the jury trial in the Weymouth Kirkland Courtroom. The Honorable Jacob M. Braude (JD'20) of the Circuit Court of Cook County presided. The case, an action for personal injuries, had been selected by Judge Braude from his regular calendar with the agreement of clients and counsel. It proved ideal for instructional purposes.

The trial lasted two days, from selection of the jury through setting of instructions (an in chambers proceeding viewed by the students), closing arguments and rendition of the verdict (for defendant). Students saw the examination and cross-examination of witnesses, introduction of documentary evidence, use of demonstrative evidence, use and impeachment of expert testimony, several arguments at the bench over the attempted introduction or exclusion of evidence, and the use of depositions as evidence and for impeachment. After the jury had been discharged, Judge Braude conducted a brief question-answer session for the students.

The students' interest and performance in this first court assignment and their enthusiasm for the proceeding itself was even more intense than expected. The whole experience seemed to bear out Jerome Frank's observation that the difference between learning law in the exciting context of live cases and that way of learning to which students are now restricted in the schools "is like the difference between kissing a girl and reading a treatise on osculation." At any event, student tenacity in holding counsel and questioning them informally long
after the rest of the participants had left the courtroom suggested that informal sessions with counsel following the proceeding should be an indispensable part of a court assignment.

The Winter Quarter began with a dual assignment. First, the students were required to rewrite a short (2-3 page) excerpt from an obscure portion of a memorandum submitted by one of their fellow students in the second assignment. The objective of this exercise was to impress the student again with the need for clarity and brevity in legal exposition and to develop his willingness and ability to achieve those objectives by rewriting. The second portion of the assignment gave the student a complicated set of facts and challenged him to identify and do research on the relevant legal issues and submit a memorandum.

The last of the research exercises in the program was the “quickie” research exercise. This assignment tested the student’s ability to take oral directions, to do rapid and effective research under time-pressure, and to give clear oral and written reports of his research findings. In short, it duplicated conditions and assignments encountered from time to time in most law offices. The exercise began when a student reported to his tutor by appointment, and was given (orally) a small research assignment. Two hours later the student returned to report and discuss his findings. After a brief interview (10-15 minutes) with his tutor, the student had four more hours to complete any additional research he deemed necessary and to prepare and submit a short written memorandum on the assigned subject.

The time pressure involved in this assignment had some unexpected dividends. The Fellows reported that the memoranda of some students whose writing had previously tended to be excessively wordy became commendably terse. Some students stated that the assignment taught them where they had been wasting time in research. Most students seemed to have zest for the exercise because it was thought to involve techniques and time limitations similar to those to be encountered in practice.

The remaining assignment in the Winter Quarter introduced the students to the handling of facts and cases in legal argument. This assignment was an ideal one to coordinate with the session of the Illinois Appellate Court at the Law School.

About three weeks before the court session the students completed a reading assignment on methods and techniques of legal argument. The selections included discussions by Llewellyn, Medina and Wiener on stating the question, presenting the facts, and employing or attempting to distinguish cases in argument. Since advocacy lends itself well to teaching by example, particularly where the student is thoroughly familiar with the subject being argued, these formal descriptions were supplemented with briefs prepared and filed in a real case that involved issues identical to those the students had discussed in their first assignment. Because of their familiarity with the subject matter in these sample briefs the students could more critically appraise and benefit from the attorneys’ handling of the facts and law.

After completing these readings, the student was given a problem drawn from one of the cases to be argued before the Appellate Court. Each student received approximately 50 pages from the Abstract of Record, including the complaint, jury verdict, judgment, post-trial motions, and large portions of the testimony of witnesses for both sides. This case was an action by a fourteen-year old boy against a railroad for injuries received while he was “flipping” (riding) a freight car near a children’s playground in the city of Chicago. The student’s assignment was to write statements of facts and questions presented suitable for inclusion in the briefs of (a) plaintiff-appellee, and (b) defendant-appellant. In addition, the student also received copies of the opinions in three principal cases discussed in the briefs of counsel. For this part of the assignment he was required to prepare two case-briefs of each of the three cases, one brief drawn so as to emphasize and the other drawn so as to minimize the authoritative value of the case. After submitting his case briefs and his version of the statements of facts and questions presented each student received a copy of the briefs filed in the case. Thus, he could study the argument (particularly the argument from the three selected cases) and the statements of facts tendered by experienced counsel. This prior study not only aroused interest but also enhanced the benefit students could derive from the oral argument.

The Appellate Court of Illinois heard arguments on three cases in the Weymouth Kirkland Courtroom on February 18, 1964. The Court for this session consisted of Presiding Justice Joseph Burke, Justice Hugo Friend (JD’08), and Justice James Bryant (JD’20). After argu-
ment in the case under study counsel met with the first-year students and subjected themselves to an hour of questions relating to their conduct of the case. The students’ questions revealed a thorough knowledge of the case (more than half of the class signified that they had visited the scene of the accident before the argument) and, according to counsel, a surprising degree of sophistication about the techniques the lawyers had employed at trial and on appeal. It should be added that counsel, Cornelius P. Callahan, Jr., and Louis G. Davidson, were extremely helpful and informative to the students.

This session with counsel, and the similar (though more formal) session Judge Braude conducted at the Law School after the jury trial in the Autumn Quarter, reaffirmed what Edward Levi called “the Anglo-American tradition . . . that judges and lawyers are also teachers.”

The legal research and writing program concluded with two assignments in the Spring Quarter. One of these assignments was a conventional moot court exercise, which gave the student his first experience in writing a brief and arguing a case. Using a real record in a reported case, the student prepared written briefs and delivered an oral argument before a panel of judges consisting of the Bigelow Fellows, other faculty members, and students in the second and third-year moot court program. Other students were of course assigned to brief and argue the opposite side of the case. The selection of suitable cases for first-year moot courts is not easy, but the jury case tried at the Law School in the Autumn Quarter was a natural choice. This year some of the moot court participants were required to argue an appeal of this case or variations of this case. Students so assigned had the unusual opportunity of following a real case from pleadings through verdict to appeal (albeit moot appeal) and to study and work with the written record in a case tried in their presence.

The culmination of the year’s work in legal research and writing was the assignment coordinated with a case heard at the Law School by the Illinois Supreme Court (Mr. Chief Justice Ray I. Klingbiel, Mr. Justice Joseph E. Daily, Mr. Justice Harry B. Hershey (JD’11), Mr. Justice Byron O. House, Mr. Justice Walter V. Schaefer (JD’28), Mr. Justice Roy J. Solfisburg, and Mr. Justice Robert C. Underwood).

Prior to the Supreme Court session the students received and studied copies of the briefs filed in one of the cases being argued, an appeal from a conviction for selling obscene books in violation of a Chicago ordinance. The student’s assignment was to put himself hypothetically in the position of the judge, to attend the oral argument, and to write a judicial opinion disposing of the case and resolving the questions raised. Thanks to counsels’ willingness to participate in another lengthy session following the formal argument, the student-judges even had an opportunity to question the lawyers about their briefs, their arguments and their legal theories. In this session the students learned at first-hand the value of oral argument to a judge who must prepare an opinion. When completed, the student opinions, like all of the other assignments in the program, were graded by the tutors and discussed individually with the student authors.

With the completion of this exercise, the first-year student had participated in most of the important phases of the trial and appellate process. In the course of his first year he had instruction and practice in legal research and writing, including preparation of memoranda and briefs, and in oral argument. In addition, he had been a

The Honorable Jacob M. Braude, JD’20, Judge of the Circuit Court of Cook County, takes his place on the bench as a session of the jury trial held in the Kirkland Courtroom is about to begin.

A portion of the audience, largely student, which heard Louis G. Davidson argue before the Illinois Appellate Court in the Kirkland Courtroom.
During a recess in the jury trial, students cross-examine Leo K. Wykell, of the Illinois Bar, counsel for the plaintiff and the day-to-day operations of one of our most distinguished state courts.

It will not merely be a one-way street between the law school and these other segments of our profession. Benefits will flow to and from each of them. Each can pass on to the others its own strengths, and receive support from them where strength is needed. It will provide the best opportunity in America for an integrated approach to the many problems that confront all of us in the administration of Justice.

FOOTNOTES

1 The Legal Research and Writing Program comprises five of the 48 quarter hours in the first-year curriculum. By way of comparison, Torts and Criminal Law are six hours each; Contracts and Property are eight and nine, respectively.

2 Simpson, Reflections on the Study of the Law, 31 (4th Ed. 1765); Williams, Study and Practice of the Law, 126 (1823).


4 Centennial History of Harvard Law School, 231 (1918). "Experience has shown," the account continues, "that he [Langdell] was right in believing that such training was not a necessary part of legal education."
Out of approximately 600 students questioned at Harvard in 1937 only ten had ever been in a courtroom and none reported being urged by their professors to attend trials. Similar responses were reported at Yale and Columbia in 1946. Frank, A Plea for Lawyer-Schools, 56 Yale L. J. 1303, 1311 (1947).

6 "Law students should be given the opportunity to see legal operations. Their study of cases should be supplemented by frequent visits, accompanied by law teachers, to both trial and appellate courts." Frank, Why Not a Clinical Lawyer-School? 81 Univ. Pa. L. Rev. 907, 916 (1935). (Italics in original.) Also see article cited in note 5.

7 This development was presaged in Dean Levi's September 18, 1951 address to the ABA's Section of Legal Education and Admissions to the Bar: "There has been closer cooperation also with the Judiciary. Law schools in cooperation with local judges are making an effort to see to it that students attend trials and appellate arguments before they graduate. The cases ought to be carefully selected for this purpose and the student acquainted with the problem ahead of time. In this connection it might be suggested that judges, with the consent of the parties, might have some cases actually tried in the law school building. This would give explicit recognition to the Anglo-American tradition, as exhibited in the Year Books, that judges and lawyers are also teachers." Levi, Four Talks on Legal Education, 20 (1952). Also see Levi, Legal Education: A Ten Year's Perspective, 42 Chi. Bar. Rec. 218, 220–21 (1960).


9 The Bigelow Fellows for the 1963–64 year were Michael Lester, A.B., Oxford, 1962 (Senior Teaching Fellow); William J. Church, LL.B., Cambridge, 1963; Richard S. Ewing, LL.B., New York University School of Law, 1962; C. Michael Fleisch, LL.B., University of London, 1963. The valuable contributions of these Teaching Fellows in the planning, development, and evaluation of the program are gratefully acknowledged.


11 The 1963–64 program has been under the supervision of Dallin H. Oaks in consultation with a faculty committee of which Professor Bernard D. Melzer has been chairman.

12 This idea was borrowed from Geoffrey C. Hazard, Jr., Professor of Law, The University of California; Professor of Law, The University of Chicago, effective July 1, 1964.

13 West Publishing Co., "Where Law and Practice Meet" (film); Shepard's Citations, "How To Use Shepard's Citations" (filmstrip).


15 Calvin Williams, a minor, by Matie Williams v. Chicago Housing Authority, Circuit Court of Cook County, No. 57C-12170. The attorney for plaintiff was Leo K. Wyckel; attorney for defendant was William Butler.

16 Frank, supra note 5, at 1317.

17 Since the students were under considerable pressure during this six-hour period, it was of course imperative that no two students were working on a similar problem or even (so far as avoidable) with the same books.

18 American National Bank and Trust Co. v. The Pennsylvania Railroad Co., Illinois Appellate Court, No. 4921. The attorney for appellants was Cornelius P. Callahan, Jr.; attorney for appellee was Louis G. Davidson.

19 See note 7.

20 City of Chicago v. Charles Kinmel, Illinois Supreme Court, No. 37958. The attorney for appellants was Howard T. Savage (JD’45); attorney for appellee was Robert J. Collins.

Four New Appointments

RONALD H. COASE, an economist who is a leading international authority on public policy and the governmental regulation of industries, has been appointed Professor of Economics in the Law School and the Graduate School of Business, effective September 1, 1964. He is currently Professor of Economics at the University of Virginia.

Coase also will become co-editor, with Aaron Director, Professor of Economics in the Law School, of The Journal of Law and Economics, published by the Law School.

The appointment was announced by Edward H. Levi, Provost of the University, who said:

"In practice, law and business are rarely separated; but in academic affairs, they too frequently are examined as disparate concerns. Professor Coase brings together two spheres of inquiry which belong together for both instructional and research purposes. He follows in the tradition joining economics and law established at the University by the late Henry Simons."

Coase joined the faculty of the University of Virginia in 1958. From 1951 to 1958 he was a member of the faculty of the University of Buffalo. From 1935 to 1951 he was a member of the faculty of the London School of Economics.

During World War II, from 1941 to 1946, he served as statistician and later Chief Statistician of the Central Statistical Office, Offices of the War Cabinet. From 1945 to 1946 he was Acting British Director of Statistics and Intelligence, Combined Production and Recourses Board, and the Representative of the Central Statistical Office in Washington.


He received the degree of Doctor of Science in Economics from the London School of Economics.

NORVAL RAMSDEN MORRIS, internationally renowned criminologist and authority on criminal law, has been appointed Professor of Law, effective Autumn, 1964.

His appointment was announced by Edward H. Levi, Provost of The University of Chicago.

Morris since 1962 has been Director, Asia and Far East Institute for the Prevention of Crime and Treatment of Offenders, an agency of the United Nations. The Institute was established to train personnel and conduct studies and research in the field of the prevention of crime and the treatment of offenders as well as in the prevention of juvenile delinquency and treatment of juvenile delinquents.

Prior to assuming the directorship of this Institute, Morris was Dean of the Faculty of Law and Bonthon
Professor of Law at the University of Adelaide, Adelaide, Australia.

Dean Neal has commented:
"Mr. Morris has what is probably an unmatched knowledge of correctional practices and problems throughout the world. He extends the range of research and teaching interests of the Law School's distinguished faculty to the social and legal questions of crime in many cultures and countries other than the United States."

"Mr. Morris' interests complement those of Francis A. Allen, recently appointed a University Professor on the faculty of both the Law School and the University's School of Social Service Administration.

"Allen has concentrated on domestic aspects of criminal law while Morris has devoted himself to this field of concern abroad. However, Morris' work at the University of Chicago will be directed to criminal law and criminological research on American as well as foreign problems.

"The combination of these two men provides the University with unparalleled strength in the field of criminal law."

Morris was born in Auckland, New Zealand, October 1, 1923, but as a child, he moved with his family to Australia.

He received an LL.B. (1946) and an LL.M. (1947) from the University of Melbourne. He received a Ph.D. in criminology from the University of London in 1949.

He has held positions at the University of Melbourne, the University of London, Harvard Law School, New York University, and the University of Utah.

He has written extensively in the field of criminal law. One of his works, The Habitual Criminal (London, 1951), remains the outstanding discussion of British efforts to respond to the problem of the recidivist.

Other Australian and international organizations dealing with the problems of criminal law, on which he has served include: Rapporteur, first section, Third International Congress on Criminology (1955), Australian member of the International Editorial Board of "Excerpta Criminologica," 1960. Member, Social Science Research Council of Australia, 1960. Morris is married and the father of three children.

Geoffrey C. Hazard, Jr., an authority on civil procedure and judicial administration, has been appointed Professor of Law, effective July 1. He is now a Professor of Law at the University of California at Berkeley.

Hazard received his B.A. from Swarthmore College in 1953 and his LL.B. from Columbia University in 1954.

He served as Deputy Legislative Counsel for the State of Oregon from 1956 to 1957. He served as Executive Secretary of the Oregon Legislative Interim Committee on Judicial Administration from 1957 to 1958. He joined the faculty of the University of California in 1958.

He is the author of "Research in Civil Procedure" (1963), one of a series of surveys on research in the field of law commissioned by the Walter E. Meyer Research Institute of Law. He is also the author of Pleading and Procedure, State and Federal, (1962) with David W. Louisell. Hazard has produced a film used by law students, entitled "Instruction in Trial Technique."

Hazard and his wife are the parents of two sons and a daughter. He was born in Cleveland in 1929.

Grant Gilmore, currently William K. Townsend Professor of Law at the Yale Law School, has accepted a permanent appointment to the Law School Faculty beginning in 1965. The early years of Mr. Gilmore's career were somewhat unusual for a law teacher. He received his B.A. from Yale, in 1931, and his Ph.D. in Romance Languages, also from Yale, in 1936: he then taught French at Yale College until 1940, when he decided to enter law school. He was graduated from Yale Law School in 1942, with the LL.B. degree.

He practiced from 1942 to 1944 with Milbank, Tweed, Hope and Hadley, in New York City, and then was in military service until 1946. In that year Mr. Gilmore joined the faculty of the Yale Law School, where he has remained until the present time. He has served as Visiting Professor at the University of California at Berkeley, Columbia, Harvard, and the University of Chicago Law School.

Mr. Gilmore is the author of numerous articles, and co-author, with Charles L. Black, Jr., of a treatise, The Law of Admiralty, which has become the standard work in the field. He was Associate Reporter for Article 9 of the Uniform Commercial Code, and is currently working on a book dealing with secured transactions and personal property under that article. His principal fields are contracts, admiralty, commercial transactions, and negotiable instruments.

Mrs. Gilmore is a practicing psychiatrist. They have a son and a daughter.

Trial Moot Court

The Hinton Moot Court Committee, chaired during the current academic year by Robert V. Johnson, of Chicago, A.B., Kalamazoo College, conducts the Hinton Competition, an appellate moot court competition operated as an extra-curricular activity for second and third year students. (All students brief and argue one moot court case as part of the first year Tutorial Program.)

This year, an experimental moot court trial was added to the program. A jury, composed of undergraduate students, was selected at a voir dire presided over by Louis
G. Davidson, of the Chicago Bar. The case was tried on February 6, 1964, in the Weymouth Kirkland Courtroom, with the Honorable Richard B. Austin, JD'26, Judge of the United States District Court for the Northern District of Illinois, presiding.

The case, People of the State of Illinois v. Ronald Kolins, in which defendant was accused of manslaughter, involved the use of expert medical testimony, which was presented by students in The University of Chicago School of Medicine.

Samalya Dodek, of Washington, D.C., A.B., Wellesley College, and Michael A. Feit, of Paterson, N.J., A.B., Syracuse University, appeared for the People, with Albert Hofeld, of Evanston, Ill., A.B., Harvard University, and Nicholas Monsour, of Pittsburgh, A.B., Bowdoin College, for the defendant. Arrangements for the trial were under the direction of James Krasnoo, of Brighton, Mass., A.B., Harvard University.

During the Trial Moot Court, Nicholas Monsour, A.B., Bowdoin College, addresses the jury, composed of undergraduate students in the University.

Counsel confer with the Court, before the Moot Trial begins. Left to right: Michael A. Feit, A.B., Syracuse University; Samalya S. Dodek, A.B., Wellesley College; the Honorable Richard B. Austin, JD'26, Judge of the U.S. District Court; Nicholas Monsour, A.B., Bowdoin College; Albert Hofeld, A.B., Harvard University, and James Krasnoo, A.B., Harvard University.

The Court of the Union
or
Julius Caesar Revised

By PHILIP B. KURLAND
Professor of Law, The University of Chicago Law School

The paper which follows was delivered at a conference, held at the Law School of the University of Notre Dame on February 29. It will appear in a forthcoming issue of the Notre Dame Lawyer, and appears here with the permission of the Editors of that journal and of the author.

Dean O'Meara's subpoena was greeted by honest protests from me that I had nothing to contribute to the "Great Debate" over the proposed constitutional amendments that are the subject of today's conference. The Dean, apparently of the belief that suffering might help this audience toward moral regeneration, suggested that I come anyway. I proceed then to prove my proposition and to test his hypothesis.

I have chosen as a title for this small effort: "Julius Caesar Revised." "Revised" because, unlike Mark Antony, I have been invited here not to bury Caesar but to praise him. Our Caesar, the Supreme Court, unlike Shakespeare's Julius, does not call for a funeral oration, because the warnings of lions in the streets—instead of under the throne—were timely heeded as well as sounded. Caesar was thus able to rally his friends to fend off the death strokes that the conspirators would have inflicted. The conspiratorial leaders were the members of the Council of State Governments. The daggers they proposed to use were the chief justices of the various high courts, to whom they would entrust, under the resounding label of "The Court of the Union," the power to review judgments of the Supreme Court of the United States whenever that tribunal dared to inhibit the power of the states. It should be made clear that the chief justices of the states would be the instruments of the crime and not its perpetrators. You will recall that when these chief justices spoke through their collective voice, the Conference of Chief Justices, in condemnation of some of the transgressions of the Supreme Court, they asked only that the physician heal himself. They did not propose any organic changes, however little they liked the Court's work. Their report stated:

... when we turn to the specific field of the effect of judicial decisions on federal-state relationships we come at once to the question as to where power should lie to give the ultimate interpretation to the Constitution and to the laws made in pursuance thereof under the authority of the United States. By necessity and by almost universal common consent, these ultimate powers are regarded as being vested in the Supreme Court of the United States. Any other allocation of such power would seem to lead to chaos.

Even in the absence of Caesar's murder, however, it is possible to pose the issue raised by Brutus: whether our
Caesar has been unduly ambitious and grasping of power? And implicit in this question is a second: if Caesar's ambitions do constitute a threat to the republic, is assassination the appropriate method for dealing with that threat?

The second question is easier of answer than the first. Whether Caesar be guilty or not, it would seem patently clear that his murder, as proposed, must be resisted. Its consequences could only be costly and destructive civil conflict resulting in the creation of a new Caesar in the place of the old one; a new Caesar not nearly so well-equipped to perform the task nor even so benevolent as Julius himself.

It is probably because of the obvious absurdity of the method chosen for limiting the Supreme Court's powers that there is today even more unanimity in opposition to the proposal than existed when Caesar was last attacked—not by the current self-styled patricians, but by the plebeians under the leadership of Franklin Delano Roosevelt. For then it was only the conservatives that came to the defense of the Court; the liberals were prepared to destroy it. Today, as Professor Charles Black has made clear, even if in rather patronizing tones, the conservatives are solidly lined up in defense of an institution many of whose decisions are repugnant to them. The conservatives would seem to be concerned with the preservation of the institution; the liberals with the preservation of the benefits that the current Court has awarded them. For the latter the contents of Caesar's will appears to make the difference.

It would seem, therefore, that only those close to the lunatic fringe, the Bircher's and the White Citizens Councils and others of their ilk, are prepared to support the purported court-of-the-union plan. Even in the Council of State Governments the proposed amendment was supported by a majority of only one vote. The few legislatures that have voted in support of this amendment are those normally concerned with their war on Robin Hood and similarly dangerous radicals. I do not mean to suggest that the Court is not in danger of being restrained. But I do think that the proposed method of destruction is not a very real threat unless this country is already closer to Gibbon's Rome than to Caesar's.

On the other hand, to say that the plan for a Court of the Union is an absurdity is not to answer the question whether Caesar suffers from an excess of ambitions. The Great Debate called for by the Chief Justice at the American Law Institute meeting last May has not really concerned itself with this problem. The Great Debate has taken the form of rhetorical forays. Each side argues that the proposed limitation on the powers of the Court would result in the removal of national power and the enhancement of the power of the states. The forces of Cassius and Brutus argue that this is a desirable result because the dispersal of government power is the only means of assuring that individual liberty will not be trodden under the tyrannous boots of socialist egalitarianism. Antony contends that the adoption of the proposal would be to return us to a fragmented confederation impotent to carry on the duties of government in the world of the twentieth century. Roosevelt's words about a "horse and buggy era" are this time used in defense of the Court. With all due respect, I submit that the essential question remains unanswered. The Talmud tells us that ambition destroys its possessor. Does the Court's behavior invite its own destruction?

In what ways is it charged that this Caesar seeks for power that does not belong to him? Some such assertions can be rejected as the charges of disappointed suitors. But there are others that cannot be so readily dismissed on the ground of the malice of claimant. Allow me to itemize a few of the latter together with some supporting testimony:

Item: The Court has unreasonably infringed on the authority committed by the Constitution to other branches of the Government.

Listen to one of the recent witnesses:

The claim for judicial relief in this case strikes at one of the fundamental doctrines of our system of government, the separation of powers. In upholding the claim, the Court attempts to effect reforms in a field which the Constitution, as plainly as can be, has committed exclusively to the political process. This Court, no less than all other branches of the Government, is bound by the Constitution. The Constitution does not confer on the Court blanket authority to step into every situation where the political branch may have fallen short. The stability of this institution ultimately depends not only upon its being alert to keep the other branches of government within constitutional bounds but equally upon recognition of the limitations on the Court's own functions in the constitutional system.

This is not the charge of a Georgia legislator. These are the words of Mrs. Justice Harlan, spoken as recently as last February 17, in Wesberry v. Sanders. The Supreme Court has severely and unnecessarily limited the power of the states to enforce their criminal laws.

Thus one recent critic had this to say:

The rights of the States to develop and enforce their own judicial procedures, consistent with the Fourteenth Amendment, have long been recognized as essential to the concept of a healthy federalism. Those rights are today attenuated if not obliterated in the name of a victory for the "struggle for personal liberty." But the Constitution comprehends another struggle of equal importance and places on [the Supreme Court] the burden of maintaining it—the struggle for law and order. I regret that the Court does not often recognize that each defeat in that struggle chips away inexorably at the base of that very personal liberty which it seeks to protect. One is reminded of the exclamation of Pyrrhus: "One more such victory . . . . , and we are utterly undone."

This, I should tell you, is not the Conference of Chief Justices complaining about the abuses of federal habeas corpus practices; it is Mr. Justice Clark expressing his dissatisfaction in Fay v. Noia.
Item: The Court has revived the evils of "substantive due process," the cardinal sin committed by the Hughes Court, and the one that almost brought about its destruction. Here another expert witness has said:

Finally, I deem this application of "cruel and unusual punishment" so novel that I suspect the Court was hard put to find a way to ascribe to the Framers of the Constitution the result reached today rather than to its own notions of ordered liberty. If this case involved economic regulation, the present Court's allergy to substantive due process would surely save the statute and prevent the Court from imposing its own philosophical predilections upon state legislatures or Congress. I fail to see why the Court deems it more appropriate to write into the Constitution its own abstract notions of how best to handle the narcotics problem, for it obviously cannot match either the States or Congress in expert understanding.

This is the hand as well as the voice of Mr. Justice White in Robinson v. California. Item: The Court has usurped the powers of the national legislature in rewriting statutes to express its own policy rather than executing the decisions made by the branch of government charged with that responsibility. Listen to two deponents whose right to speak to such an issue is not ordinarily challenged.

What the Court appears to have done is to create not simply a duty of inspection, but an absolute duty to discovery of all defects; in short, it has made the B & O the insurer of the conditions of all premises and equipment, whether its own or others, upon which its employees may work. This is wholly salutary principle of compensation for industrial injury incorporated by workmen's compensation statutes, but it is not the one created by the F.E.L.A., which premises liability upon negligence of the employing railroad. It is my view that, as a matter of policy, employees such as the petitioner, who are injured in the course of their employment, should be entitled to prompt and adequate compensation regardless of the employer's negligence and free from traditional common-law rules limiting recovery. But Congress has elected a different test of liability which, until changed, courts are obliged to apply.

No, those are not the words of Mr. Justice Frankfurter, but those of his successor, Mr. Justice Goldberg, in Shenker v. Baltimore & Ohio R. Co. Item: The Court writes or rewrites law for the purpose of conferring benefits on Negroes that it would not afford to others.

I offer here some testimony endorsed by Justices Harlan, Clark, and Stewart, in N.A.A.C.P. v. Button. No member of this Court would disagree that the validity of state action claimed to infringe rights assured by the Fourteenth Amendment is to be judged by the same basic constitutional standard whether or not racial problems are involved. No worse setback could befall the great principles established by Brown v. Board of Education, 347 U.S. 483, than to give fair-minded persons reasons to think otherwise. With all respect, I believe that the striking down of this Virginia statute cannot be squared with accepted constitutional doctrine in the domain of state regulatory power over the legal profession.

Item: The Court disregards precedents at will without offering adequate reasons for change. Mr. Justice Brennan puts his charge in short compass in Pan American Airways v. United States:

The root error, as I see it, in the Court's decision is that it works an extraordinary and unwarranted departure from the settled principles by which the antitrust and regulatory regimes of law are accommodated to each other.

Item: The Court uses its judgments not only to resolve the case before it but to prepare advisory opinions or worse, advisory opinions that do not advise. The testimony here includes the following:

The Court has done little more today than to supply new phrases—imprecise in scope and uncertain in meaning—for the habeas corpus vocabulary for District Court judges. And because they purport to establish mandatory requirements rather than guidelines, the tests elaborated in the Court's opinion run the serious risk of becoming talismanic phrases, the mechanistic invocation of which will alone determine whether or not a hearing is to be had.

More fundamentally, the enunciation of an elaborate set of standards governing habeas corpus hearings is in no sense required, or even invited, in order to decide the case . . . and the many pages of the Court's opinion which set these standards forth cannot, therefore, be justified even in terms of the normal function of dictum. The reasons for the rule against advisory opinions which purport to decide questions not actually in issue are too well established to need repeating at this late date. . . .

This is not the plea by academic followers of Herbert Wechsler for principled decisions nor even an argument by Wechsler's opponents for ad hoc resolutions. It is the view of Mr. Justice Stewart in Townsend v. Sain. Item: Not unrelated to the charge just specified is the proposition that the Court seeks out constitutional problems when it could very well rest judgment on less lofty grounds.

Here is the Chief Justice himself speaking in Communist Party v. Subversive Activities Control Board:

. . . I do not believe that strongly felt convictions on constitutional questions or a desire to shorten the course of this litigation justifies the Court in resolving any of the constitutional questions presented so long as the record makes manifest, as I think it does, the existence of non-constitutional questions upon which this phase of the proceedings should be adjudicated. . . . I do not think that the Court's action can be justified.

Item: The Court has unduly circumscribed the Congressional power of investigation.

The testimony I offer here is not that of the chairman of the House Un-American Affairs Committee nor that
of the Birch Society. It derives from Mr. Justice White's opinion in *Gibson v. Florida Investigation Committee*:

The net effect of the Court's decision is, of course, to insulate from effective legislation the time-proven skills of the Communist Party in subverting and eventually controlling legitimate organizations. Until such a group, chosen as an object of Communist Party action, has been effectively reduced to vassalage, legislative bodies may seek no information from the organization under attack by duty-bound Communists. When the job has been done and the legislative committee can prove it, then has the hollow privilege of recording another victory for the Communist Party, which both Congress and this Court have found to be an organization under the direction of a foreign power, dedicated to the overthrow of the Government if necessary by force and violence.

*Item:* I will close the list with the repeated charge that the Due Process Clause of the Fourteenth Amendment as applied by the Court consists only of the "evanescent standards" of each judge's notions of "natural law." The charge is most strongly supported by the opinions of Mr. Justice Black in *Adamson v. California* and *Rochin v. California,* to which I commend you.

I close the catalogue not because it is exhausted. These constitute but a small part of Brutus's indictment and an even smaller proportion of the witnesses prepared to testify to the Court's grasp for power. These witnesses are impressive, however, for they are not enemies of the Court but part of it. Moreover, their depositions may be garnered simply by thumbing the pages of the recent volumes of the United States Reports, which is exactly the way that my partial catalogue was created.

Let me make clear that this testimony does not prove Caesar's guilt, but only demonstrates that these charges cannot be dismissed out of hand. The fact that they are endorsed by such irresponsible groups as would support the proposed constitutional amendment does not add to their validity. But neither does such support invalidate them.

What then of Antony's defenses of Caesar?

First is the proposition that our Caesar has done no more than perform the duties with which he is charged. We have it from no less eminent an authority than Paul Freund that the Court has not exceeded its functions and he defines them thus:

First of all, the Court has a responsibility to maintain the constitutional order, the distribution of public power and the limitation on that power. . . .

A second great mission of the Court is to maintain a common market of continental extent against state barriers or state trade preferences. . . .

In the third place, there falls to the Court a vital role in the preservation of an open society, whose government is to remain both responsive and responsible. . . . Responsive government requires freedom of expression; responsible government demands fairness of representation.

And so, Professor Freund suggests, the Court has done no more than its duty and he predicts that we shall be grateful to it.

The future is not likely to bring a lessening of governmental intervention in our personal concerns. And as science advances into outer and inner space—the far reaches of the galaxy and the deep recesses of the mind—a greater control becomes possible over our genetic and our psychic constitutions, we may have reason to be thankful that some limits are set by our legal constitution. We may have reason to be grateful that we are being equipped with legal controls, with decent procedures, with access to the centers of decision-making, and participation in our secular destiny, for our days and for the days we shall not see.

It is not clear to me that the second defense is really different from the first. Here we are met with the proposition that the Court, politically the least responsible branch of government, has proved itself to be morally the most responsible. In short, the Court has acted because the other branches of government state and national have failed to act. And a parade of horrors would not be imaginary that marched before us the abuses that the community has rained on the Negro; the evils of McCarthyism and the continued restrictions on freedom of thought committed by the national legislature; the refusal of the states and the nation to make it possible for the voices of the disenfranchised to be heard, either by preventing groups from voting, or by mechanisms for continued control of the legislature by the politically entrenched, including gerrymandering, and subordination of majority rule by the filibuster and committee control of Congress; the police tactics that violate the most treasured rights of the human personality, police tactics that we have all condemned when exercised by the Nazis and the Communists. This list, too, may be extended almost to infinity. There can be little doubt that the other branches of government have failed in meeting some of their essential obligations to provide constitutional government.

The third defense is that which I have labelled the defense of Caesar's will. It is put most frankly and tersely by Professor John Roche in this way:

As a participant in American society in 1963—somewhat removed from the abstract world of democratic political theory—I am delighted when the Supreme Court takes action against "bad" policy on whatever constitutional basis it can establish or invent. In short, I accept Aristotle's dictum that the essence of political tragedy is to the good to be opposed in the name of the perfect. Thus, while I wish with Professors Wechsler and Kurland, *inter alios,* that Supreme Court Justices could proceed on the same principles as British judges, it does not unsettle or irritate me when they behave like Americans. Had I been a member of the Court in 1954, I would unhesitatingly have supported the constitutional death sentence on racial segregation, even though it seems to me that in a properly ordered democratic society this should be a task for the legislature. To paraphrase St. Augustine, in this world one must take his breaks where he finds them.

There then are the pleadings. I do not pretend to a capacity to decide the case. It certainly isn't ripe for summary judgment or judgment on the pleadings. I am fearful only that if the case goes to issue in this manner,
the result will be chaos whichever side prevails. For, like Judge Learned Hand, I am apprehensive that if nothing protects our democracy and freedom except the bulwarks that the Court can erect, we are doomed to failure. Thus, I would answer the question that purports to be mooted today, whether the court-of-the-union amendment should be promulgated, in the words of that great judge:  

And so, to sum up, I believe that for by far the greater part of their work it is a condition upon the success of our system that the judges should be independent; and I do not believe that their independence should be impaired because of their constitutional function. But the price of this immunity, I insist, is that they should not have the last word in those basic conflicts of "right and wrong—between whose endless jar justice resides." You may ask then what will become of the fundamental principles of equity and fair play which our constitutions enshrine; and whether I seriously believe that unsupported they will serve merely as counsels of moderation. I do not think that anyone can say what will be left of those principles; I do not know whether they will serve only as counsels; but this much I think I do know—that a society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.

I find then that I have come neither to praise nor to bury Caesar. I should only remind those who would destroy Caesar of the self-destruction to which the noble Brutus was brought; nor can the Antonys among us—who would use Caesar for their own ends—rejoice at his ultimate fate. For Caesar himself, I should borrow the advice given Cromwell by Wolsey: "I charge thee, flying away ambition: By that sin fell the angels."

FOOTNOTES

16 Id. at 7.
17 Roche, The Expatriation Cases: "Breathes There the Man With Soul So Dead . . . ?" 1963 Supreme Court Review, 325, 326 n. 4.

Welcome from the University

By Glen A. Lloyd, JD'23

The following remarks were delivered by Mr. Lloyd at the Dedication of the William Clarke Mason Wing and the William Nelson Cromwell Library, both new additions to the American Bar Center. The Center, national headquarters of the profession, is located on the University of Chicago campus, immediately adjacent to the Law Buildings. Mr. Lloyd is a member, and former Chairman, of the Board of Trustees of the University, and a past president of the Law Alumni Association. The talk below is reprinted from the American Bar Association Journal, Volume 49, Number 10, (October, 1963), with the permission of the Editors of the Journal and of the author.

Nine years ago the University of Chicago was highly honored by the establishment of the American Bar Center on the Midway. Today it is again honored by this dedication and what lies behind—it and that is the remarkable development of the center during nine short years. From the university's point of view, the relationship has been fruitful and promising.

This university had a purposeful and dramatic origin a little over seventy years ago. Its progress has been much like its origin. It has been blessed with good fortune from the beginning. Your arrival as a distinguished neighbor was one of these blessings. I am now convinced that we shall soon share another. It will be the successful completion of the "Famous Professional Mile" from Cottage Grove to Stony Island between 60th and 61st Streets, under what is commonly called the South Campus Plan.

We welcome you not only as a good neighbor, which you are, but more importantly because certain extraordinary opportunities lie before us working together, which do not lie before either of us working alone.

It would like to mention two areas of human concern in which this cooperation may prove especially useful.

Conditions under which we all must live are changing so rapidly that only new thinking and perhaps new ties between dependable institutions can provide the knowledge, the strength and the wise decisions which will assure the success of our national and international programs.

The American Bar Association and its related institutions have not only an unusual but perhaps the only direct, systematic and continuous line of communication with a vast number of the people who are daily making many, if not most, of these decisions. I refer specifically to men and women with legal training who are in the active practice of the law, to judges at all levels in the judicial system, to legislators, both state and federal, and to those thousands who are in policy-making positions with corporations and other private institutions.

It is suggested that the mutual enrichment from our new relationship may, as time goes on, provide the essential ingredients—practical and intellectual—for creating
the ideas and the motivation which, if made a part of this decision-making process, will move us toward a more just society.

Then too, it is no cliché to say that the whole world lives in the shadow of a possible war which would be utterly destructive. Everyone asks: Is there a way to avoid it? This, of course, no one knows.

But there is one possible alternative—perhaps only one, and that is through an enlightened and intensified use of a revitalized rule of law for world peace. This will require an upgrading of the conventional concept of justice through law by combining it with the best intellectual attributes, especially in the fields of the social sciences and the humanities.

The American Bar Association has already made this approach more than mere oratory or a thin hope by starting this revitalization. It has done so through sponsorship this summer of the first World Conference on World Peace through Law, held at Athens, Greece. Legally trained representatives from over 100 countries, under the skillful guidance of a former President of the Association, approved a Declaration of General Principles, a Lawyer's Global Work Program, the establishment of the World Peace through Law Center, a "World Law Day" and a "World Law Year."

Thus the Association, through its Special Committee on World Peace through Law, has set in motion a movement among the legally trained people of the world which, if developed in an atmosphere of objectivity, determination and intelligence may ultimately provide a workable alternative to nuclear war. In any event, if it does not, I ask you: What will? It may be an unconventional and strong statement to say that this hope lies beyond any combination of forces, political or otherwise, which does not rest solidly upon a foundation created by an intimate relationship between the best attributes of the rule of law and those of our great centers of learning—a new relationship of the kind well under way here in Chicago.

The University of Chicago in a dark hour in 1941 reluctantly welcomed the almost impossible task of quickly unlocking the final secrets of nuclear fission. It would seem highly appropriate for it now to welcome the opportunity of being one of a team devoted to improving the quality of justice in our own nation and developing a system for peaceful settlement of differences between nations. This it does enthusiastically.

The University of Chicago, therefore, for these reasons and in support of these opportunities welcomes you not just for this afternoon—but forever.

The Board of Editors of the University of Chicago Law Review, for 1963-64. Standing, left to right: Michael H. Shapiro, A.B., A.M., University of California, Los Angeles; Gerald M. Penner, A.B., University of Michigan; Richard L. Chesney, A.B., University of California, Berkeley; William H. Goodman, A.B., University of Chicago; George B. Javaras, S.B., Northwestern University; Bruce L. Engel, A.B., Reed College; Robert J. Vollen, A.B., University of Michigan; and Charles A. Heckman, A.B., Brown University. Seated, left to right: Michael G. Wolfson, A.B., University of Chicago; Harold L. Henderson, A.B., University of Chicago; Lillian K. Vincent, A.B., Swarthmore College; William A. Wineberg, Jr., A.B., Stanford University, Editor-in-Chief; and Edmund W. Kitch, A.B., Yale University.
The Eighth Freund Lecture

The Right Honorable Sir Kenneth Diplock, Lord Justice of the Court of Appeal, delivered the Eighth Ernst Freund Lecture. The Lecture was established in honor of one of the most distinguished members of the Law Faculty, who served as Professor of Law from the founding of the School in 1903 until his death in 1933. Plans are now under way for an appropriate observance of the centennial of Ernst Freund’s birth. A description of those plans and an appreciation of Professor Freund’s contribution to American law and legal education will appear in the next issue of the Record.

William John Kenneth Diplock went to the Middle Temple from University College, Oxford, and became a Barrister in 1932. He was Secretary to the Master of the Rolls from 1939 until 1948, except for service in the RAF during 1941-45. He took silk in 1948, was Recorder of Oxford University from 1951 until 1956, and in the latter year served as Master of the Bench of the Middle Temple, was appointed a Judge of the High Court of Justice, Queen’s Bench Division, and was knighted. In 1960 and 1961 he served as a Judge of the Restrictive Practices Court (President in 1961) and in 1961 was appointed a Lord Justice of Appeal. Lord Justice Diplock was made an honorary Fellow of University College, Oxford, in 1958, and for the past twelve years has been a member of the Lord Chancellor’s Law Reform Committee. The topic of his Freund Lecture was “Anti-Trust and the Judicial Process.”

Three Distinguished Alumni

Roswell F. Magill, JD’20, practiced in Chicago upon graduation, and during the years 1921–23 served as a member of the Faculty of the Law School. For the next two years Mr. Magill was first special attorney and then chief attorney of the U.S. Treasury Department. He became a member of the faculty of the Columbia University Law School in 1924 and remained so for twenty-eight years. He returned to the Treasury Department on two later occasions, as Assistant to the Secretary, in 1933–34, and as Undersecretary of the Treasury in 1937–38. In 1943 Mr. Magill became a partner in the New York law firm of Gravath, Swaine and Moore, an association which continued until the time of his death. He was the author or co-author of some eight books and many periodical articles, principally in the field of Federal taxation. He served at various times as a Governor of the New York Stock Exchange, adviser to the Cuban Treasury, Chairman of the Connecticut Tax Survey Commission, Chairman of the Tax Foundation and director of the Macy and Guggenheim Foundations. Mrs. Katherine Magill, who survives him, was also a graduate of the School in the Class of 1920.

Forest D. Sieffkin, JD’19, was a former Vice-President and General Counsel of the International Harvester Company. Following his graduation, he practiced for four years in Wichita, Kansas, and then spent two years as a special attorney with the Bureau of Internal Revenue, in Washington. In 1925–27 he practiced with the Chicago firm of KixMiller and Baar, leaving to serve for two years on the U.S. Board of Tax Appeals. He joined Harvester in 1929, and remained with that company, having been appointed Vice-President and General Coun-

Professor Leon Lipson, of the Yale Law School, speaking to the student body on “Coercion to Virtue in the Soviet Union—Non-Courts and Im.Police.” His talk was the first of a new series, held at 11:30 A.M., and intended exclusively for students.
sel in 1946, until his retirement in 1957. From that date until his death, Mr. Sieffkin was counsel to the Chicago firm of Cummings and Wyman. He served as Consultant on Special Projects to the Executive Office of the President in 1956-58, for fourteen years as President of the Village of Glencoe, in which he made his home, and was a valued member of the Visiting Committee of the Law School.

In the London Times, last October, the following obituary appeared:

LOUIS H. SILVER, who has died after a painful illness borne with characteristically impatient fortitude, had been for many years a prominent hotel-owner in Chicago; graduating to this exacting profession from the practice of law and having taken his first degree in engineering. In this country, as in his own, he was recognized as one of the most puissant book-collectors of our time. And by his friends he was cherished for his lively imagination, his generous impulses, and his extraordinary vitality. Whether talking politics, describing some complex manoeuvres in pursuit of an incunabula, or laying down the law on any subject under the sun, Silver was always in motion—his eyes flashing, his smile mischievous, his hair animated by some private wind-machine.

In his earlier years of book-collecting Silver preferred the role of lone wolf; shying away from the convivial fraternities with which American bibliophily abounds, shunning publicity, prosecuting his ambitious designs in masterful secrecy, admiring only a chosen few to the intimacies of his increasingly remarkable collection of English literary first editions, incunabulae, Renaissance and early Continental books, fine bindings, and (more recently) master drawings. In later years—he was only 61 when he died—he allowed some of the light to emerge from under the bushel. He became a trustee of the Newberry Library, a fellow of the Morgan Library, a member of the Grolier Club. He gave a notable collection of rare scientific books to the University of Chicago. He exhibited a selection of his own treasures to the astonished eyes of the young ladies of Smith College, where one of his daughters was graduating. It would be absurd to say that he mellowed (he himself would have scorned the very idea). But, like a robust burgundy, he matured—and he was still maturing.

As a collector, Silver was an astute tactician; bold, swift, pernickacious, prudent, discriminating. He not only loved his books, he studied them; and he shared with his devoted wife a relish for any bibliographical problems they presented. Above all, he had a wonderful eye for quality. His untimely death, besides extinguishing a fire before which his many friends delighted to warm their hands, has also removed a singular ornament from the world of international connoisseurship.

The Times could not know what alumni and other friends of the Law School know very well, the deep devotion to the School which Louis Silver demonstrated over the years, and the irreplaceable gap he leaves in its innermost circle of friends. A member of the Class of 1928, Mr. Silver was a member of the Board of Directors of the Law Alumni Association. Mr. Silver leaves a tangible memorial in the Louis H. Silver Special Collections Room of the Law Library, and a widespread and intangible memorial in the memory of his friends and his School.

The Conservative Fellow Traveler

By MALCOLM P. SHARP

Professor of Law, The University of Chicago Law School

This is a talk given under the auspices of the Conservative Club of the University of Wisconsin Law School. It is reprinted from the University of Chicago Law Review, Volume 30, Number 4, Summer, 1963, with the permission of the Editors of the Review and of the author.

It is good of you to permit me to talk under this ambiguous title. Since the title is plainly an egotistical one, I may as well be a little personal about it for a moment. Since 1950, and particularly from 1950 until 1957, I have been in and identified with three so-called left-wing cases: George Anastaplo's bar admission case; the Rosenberg and Sobell case; and the proceeding by the Attorney General to list the National Lawyers Guild, in which, for a change, I was on the winning side. I am still concerned about George Anastaplo and in efforts to secure the parole of Morton Sobell. I may have occasion to refer to these cases in the course of our discussion, but in the mean time, I want to indicate that I am regarded by some as the last of the fellow travelers, in the sense of those who were so misguided as to use their energies in behalf of the interests of the Communist Party.

In a second sense, I am also a fellow traveler. My economic views, such as they are, are conservative. I have made it a point not to know whether my friends on the left were Communists or not, but I have been able to recognize them as central planners and I have had a fine time arguing with them about central planning. You will find my most reactionary statements about my economics in speeches made as President of the National Lawyers Guild, which were published in the Lawyers Guild Review. In spite of this devotion to what I took to be their general principles, my conservative liberal economist friends at the University of Chicago, though doubtless appreciating my good points, have quietly complained that I was somewhat muddle-headed in my economics. For this reason, I suppose I should be called at the most a fellow traveler of theirs.

In a third more fundamental sense, I am a perennial fellow traveler. You really need this warning in preparation for listening to my talk. The only vices I do not have are the gambling instinct and the instinct of the partisan. In hiking with Mr. Wilber Katz in the Rockies I made a famous observation, which you may have heard. Recognizing that we occasionally got lost and did not end up at our destination, I said that I rejoice in a flexible sense of objectives. I suppose this has something to do with my nonpartisan and fellow traveler instincts.

When your spokesman wrote me, I had been reading about the Vatican Council, particularly the excellent articles signed by Xavier Rynne in the New Yorker. I
indicated in my response that I could not certainly call myself a conservative when tested by what I understand to be Cardinal Ottaviani’s standards. He is the one who views with alarm, for example, proposals to use the vernacular more extensively in the Mass. I indicated that I might hope to qualify according to the standards of Cardinal Bea, who welcomes extended use of the vernacular. He also apparently considers it possible for Catholics to organize a way of thinking about the universe which would be consistent not only with the views of Protestants, but with the views of adherents of other religions as well, and perhaps even with the views of those who have no religion.

Oddly enough, I shall want to return to this illustration for other reasons, but in the mean time I want to call attention simply to the difficulty about using the word “conservative.” In 1933, enthusiastic New Dealers sometimes spoke of individualists, particularly businessmen, as “medieval” in their outlook. Nevertheless, it was plain to many of us then that the syndicalism and guild socialism which contributed to the vogue of central planning at the time were themselves, for better or worse, as a strictly historical matter, more medieval in their approach to society than the opposed views which were being vigorously expressed by many businessmen. In this respect, the New Deal was far more conservative than Wall Street, or at any rate LaSalle Street, but no one talked that way at the time.

Then there are those conservative Chinese Stalinists that we read about, who are resisting the deviationist ideas of Mr. Khrushchev. On the other hand, there are, or were, the French Radical Socialists, who are neither radical nor socialist, but conservative and liberal in the true or nineteenth-century sense of liberal. Their choice of a name which indicates the opposite is one of many indications of the ambivalence and paradox which govern human affairs, and particularly the affairs of politics. Everyone is conservative, and everyone is non-conservative, in the sense that he wants to get rid of some things in society which he does not like.

It is tempting to appropriate the word conservative for everything that one thinks of as good. What could be better than to save and what worse than to destroy? In a way the point is a good one, and needs to be remembered. In another way, it destroys controversy and inhibits growth, which is itself a factor in conservation. The question is what one wants to conserve and what one wants to change.

That brings us to another pair, liberty and authority, freedom and control. No one in his right mind would want to do without either, and yet here again some choice is necessary.

“Liberal,” in the nineteenth century, came to mean a minimum of control by human groups, particularly the state. Yet in those same New Deal days of which we have spoken, liberal came to mean exactly the opposite. It came to represent the position of people who thought that the powers of individuals, and so in a sense their liberties, could be enhanced by rather sweeping arrangements for help from the state.

There is another use of liberal, in a sense still unfamiliar to us, but familiar in Europe and not unrelated to some of the things that psychiatrists tell us. The free person is the well organized person, who is free among other things from unrecognized “compulsions.”

I myself have come more and more to use “liberal” and “free” in the nineteenth-century sense, and to think of myself as “conservative” in the sense that I believe in conserving the kind of freedom which controls the ideas of “luberal” in the nineteenth-century sense of the word.

I have had the good fortune to be associated with two groups which seem to me to have adhered to, to have expressed and to have implemented this kind of liberalism. I refer you to the LaFollette Progressives in Wisconsin, whose sound ideas have survived the accidental circumstances which occasioned their political difficulties, and to the University of Chicago liberal economists. If you are dissatisfied, as I assume and hope you will be, with my own statement of position, you can read the University of Chicago economists and read about the Wisconsin Progressives.

With these warnings and observations, I turn to my own statement of position. The conservative liberal, like most other people, but to a particular extent, cherishes four institutions: Religion, the family, property and the state.

I have already indicated that, as you know, the church today has its problems. There is not only the tension between Cardinal Ottaviani and Cardinal Bea. There is the tension between Catholic and Protestant, Christian and non-Christian, Fundamentalist and Modernist, believer and atheist, with the campus parallel tension between the Humanities and the Sciences.

For anyone who has seen something of Catholic doctrine, and admired it without adhering to it, the problems of the Vatican Council have a singular interest. The conservative by the nature of his position has a considerable degree of confidence and pleasure in the universe, including his own society. The abstract God of the Greeks and the thirteenth-century Catholic philosophers may be, for the modern, the feature of the universe which is associated with confidence and pleasure.

But what do we do with the medieval “soul”? Magnificent as he is in his treatment of the unknown nature of God, St. Thomas fails dismally in his attempt to translate Plato’s poetry into a rather cut and dried account of the human soul. If immortality is to be used at all in modern discourse, it must be in quite a different sense from that of the medieval church, though in a sense not wholly unrelated to its earlier one. There is the recogni-
tion that Remembrance of Things Past is not only timeless but related to superpersonal phenomena, for example, pleasure. There is the super-personal interest in life which leads an elderly atheist like Bertrand Russell to conduct a courageous campaign against what he conceives to be a threat of death to the species. There is the similar faith in life which appears in Dr. Zhivago's struggles with the inclement social circumstances of the Russian Revolution. There is Julian Huxley's faith in a tendency of the physical universe, with its countless worlds, to give rise to life. There is the confidence in the value of the human experience which may be independent of impending or ultimate destruction of all the living matter about which we know.

It is out of such materials that any church, however ancient, is likely to organize a scheme of things which is consistent with the cosmology which science, whether we approve—as I do—or disapprove, is showing us. It is perhaps not so much the world pictures of religion and science which require reconciliation, as their methods. Methods which are inconsistent with those of science are not likely to persist in either religion or science.

It is, of course, not only the cosmos, including the soul, with which the church is concerned. It is concerned also with society, and particularly with society's values. Cardinal Bea says the primary objective of Pope John is "pastoral": The manifestation in human relationships of the "love and kindness" which are the values of Christianity.

In the Sermon on the Mount, these values are expressed with startling paradox. Nonviolence consists not only in refraining from fighting back; it consists also in not litigating. "If a man sue thee at the law to take away thy coat, let him have thy cloak also." These are the words of a Greek text perhaps reporting an Aramaic oral tradition, but it is hard to gloss them over. We plainly do not believe them as they are spoken, or take them seriously, or we would be leaving law schools, both students and teachers, at once.

We know that the radical paradox in some passages of Christian teaching has been put into serviceable form by the development of medieval and modern ethics. There may be virtues in the monastic life, or something like it. In the world of daily life, human values are promoted and strife and hostility minimized, by the conservative institutions of the family and property, protected by the state.

We may stay a little with the next conservative institution, the family, before passing to the topics which are today more commonly subjects of controversy between those calling themselves conservatives and others. Your generation knows at least as well as mine that changes have been taking place in our attitudes toward the family. It is said that there has been for some generations an increasing freedom in sexual relationships. The various meanings of freedom may well be remembered in this connection. There is a kind of freedom which includes opportunity for the great range of sadistic phenomena, from rape to jealousy, which may be associated with sex. There is, on the other hand, the kind of freedom which today facilitates early marriage among students, or the creation of informal associations which apparently in your generation have often a certain stability, though they are not organized as marriages. There is included here opportunity for a free expression of affection, which is said to be, in your generation, increasingly the test for relationships between the sexes.

The kinds of freedom suggested by such observations may still be inconsistent with another kind of freedom, which is appropriate for the great conservative life preserving functions of marriage. This is the freedom to form the kind of stable associations appropriate for the biological and economic functions of rearing and educating children. The conservative is bound to be confident in the ability of succeeding generations to carry on these functions.

One of the many new factors in the relationships between the sexes is the increasing availability of planned parenthood. The opportunities of planned parenthood produce problems about the family itself. They also produce new opportunities for dealing effectively with the most critical internal social and economic problems of the society. The family thus leads us to the theme of property, and to the controversial topics about which conservatives and others argue.

Here, however, I must remind you again of my fellow traveler propensities. If I am a conservative at all, and you must judge of that, I am one who considers both Republicans and Democrats quite often dangerous radicals.

The conservative concerned with the related topics of poverty and property should, I suggest, consider anyone who in authority contributes to the neglect of the Malthusian warning, the most dangerous of radicals, at least after the Russians and the Chinese. The Malthusian Revolution may prove in the long run a greater threat to the institutions cherished by the conservative, or anyone else for that matter, than the Communist Revolution. Moreover, if one is reluctant to think in such an apocalyptic fashion, it certainly remains true that for some sections of the world's populations, for example, Brazilian, Indian, Chinese, Mississippi or west side Chicago, Malthus affords a means of economic diagnosis and so of cure which is as important as anything the conservative can think about when he is concerned with internal problems.

One of the distinguished members of our Chicago group of liberal philosophers and economists is Professor Abram Harris, a philosopher and economist, and a Negro. Two or three years ago, we talked together as he
was preparing a series of lectures on classical economic theory and its modern uses for delivery at a Negro institution, Morehouse College in Atlanta. As we talked, and discussed his observations of population problems on the neighboring west side, the form of his final lecture gradually evolved.

When he came back, he reported in such a way that I concluded his final lecture was a success. It was on Malthus with reference to the Negro. In the question hour afterwards, he reported that there had been a lively discussion of planned parenthood and population control. In response to a question from one young woman, he had said, "If you have fifteen children, you will have trouble improving your status." This was doubtless a rough appeal to self-interest on the part of a group with special hungers for status, but it referred in context to the general trend of the discussion.

He went back a few months later, and talked with some of his sociologist friends at Morehouse. One of them, apparently representing the views of others, said, "You are expecting too much of people. They will have to be given money."

There are indications that the problem of poverty is for the first time about to become a center of attention in the United States. The books reviewed by Dwight MacDonald and his own generally excellent review in the January 19, 1963 New Yorker, seem to be an indication of a new kind of interest in the subject. In Illinois problems of relief are more and more the center of general attention as they occasion on the whole more and more public debate and controversy.

There are two principal themes in the discussion. One is that poor and rich alike are interested in the self-respect of the poor and their ability to take care of themselves. Large numbers of our Chicago poor, many of them Negroes and some fresh from the South, are learning to read and write as a first step in equipping themselves for work in an urban society. Encouragement, or at least opportunity, for planned parenthood is one element in the development of self-respect and self-reliance on the part of the poor, and encouragement to planned parenthood on the part of those on relief is currently one of our major local issues in Illinois.

The other theme is that our expenditures for all sorts of social welfare purposes might well be reconsidered in the light of the needs of the poor. Professor Milton Friedman, who is the most articulate spokesman for our liberal economists at Chicago, estimates that if about one-half of our expenditures for social welfare, local, state and national, were used annually in the form of negative income taxes, that is money payments, to those who are really poor, there would be a considerable improvement in their condition. His estimate is in fact that this sum would make it possible to raise the incomes of the members of the lowest one-fifth of income recipients to a point where they would all receive an equal minimum. This would apparently be something in the neighborhood of 4,000 dollars for a standard family of three. His point is, of course, that our preoccupation with other classifications than that of the poor, for example farmers or laboring men, has led us to make contributions to their welfare which are not proportionate to the degree of their poverty. In some cases, for example that of the farmers, considerable resources are devoted to improving the income of large numbers who would in any case have more than the average per capita income of the community as a whole.

The two elements in what may be an emerging policy, self-reliance on the one hand and more money for the poor on the other, may be reconciled in all sorts of ways, which I will leave it to you to think about. Care for the indigent has been a familiar policy of all modern conservatives. It is not so much that the really poor threaten revolution, as at the present they surely do not. It is rather that a hard heart is not characteristic of the true conservative. On the contrary, I think it could be argued that the conservative liberal is by and large less hard-hearted than the collectivist radical. In any case, the conservative is likely to have a strong distaste for misery and
squalor and a strong impulse toward building a society which he can view with satisfaction.

Accordingly, I am a little surprised at what has happened in Illinois to at least one Republican leader, who might have been expected to support the hypothesis I have just suggested, but who seems to contradict it. At the last election, I voted for a number of Republicans, particularly three who were associated in some of the newspaper discussions with Mr. Charles Percy of Bell & Howell, who may prove the Illinois parallel to Mr. Romney and Mr. Scranton. Particularly, I voted for Mr. William Scott for State Treasurer.

Unless I learn something to correct my present impression, I shall not vote for him again. Though the issues are not quite that simple, my view is that he has shown himself a dangerous radical in declining to support a leading businessman, Mr. Arnold Marenont, this time a Democrat, in what promised to be an effective program for actively encouraging the exercise of family planning by women on relief. As I say, the issues are complicated, and the program at issue involves use of state funds in ways which might be objectionable, except that the whole effort is one to remove social and legal obstacles to family planning on the part of the poorest members of the community, and the ones whose children are likely to be born under the most miserable of circumstances and with the most ominous futures. You will see that I consider Mr. Scott a far more dangerous radical than Mr. Gus Hall of the Communist Party, since Mr. Scott is promoting an internal revolution which seriously threatens us, not now perhaps with disorder, but with growing neighborhoods of misery.

One may ask, if one is interested in Mr. Milton Friedman’s proposal, what would happen if it should be carried further? An equal division of disposable income would give statistical families of three some 6,000 dollars a year at current levels of population and income. That would eliminate the two lower groups with which Mr. Dwight MacDonald particularly concerns himself, those with family incomes of 4,000 dollars or less and those with family incomes between 6,000 and 4,000 dollars. This would, of course, be communism in a familiar general sense.

Suppose for the moment that such a situation could be maintained without any effect on standards of living or employment, of course a questionable assumption. What would be the effect on the poor? It would, of course, be good in some obvious ways. But would it be good on balance? Social workers tell us that a sense of dependency is bad not only for the productivity, but for the happiness of the poor. We have learned that the over-protected child is likely to experience frustration, defeat and unhappiness. There was a time when one heard of farmers receiving agricultural adjustment checks and angrily chasing the person who brought them off the farm. From the point of view of the softhearted conservative, this is the first answer, and I think an appropriate one, to all the appeals for egalitarian equality which can be made by a thoughtful Communist. The second answer is, of course, that our original assumption is an unrealistic one.

What would be likely to happen to standards of living and employment can be imagined if one tries to imagine the kind of industrial depression which would be created by such a hypothetical division of income.

It is not the poor who have been the principal concern of Marx or Plato or indeed of most modern, more or less radical, collectivists. The simple poor were a subject of scorn by Marx, and it is the farmer and laborer, particularly the organized laborer, who are likely to be the favorites of contemporary political reform. There are many illustrations which result from these differences of approach. The Negro illustrates many things in our society, and we may return to him for an illustration.

The lowest per capita income in the country is in Mississippi, and our most miserable slums are our rural slums, not our urban ones. Just the other evening I had a vivid illustration of these observations in talking with a social worker friend, who is the wife of a leading corporation lawyer in our city. She spoke of an old Negro lady, fresh from a marginal farm somewhere in Missouri, who was having a miserable time adjusting in our west side urban slums near the University. In the midst of her troubles, this old lady was asked if she did not want to go back to the Missouri farm. With all the emphasis she could command she said, “No!” She had not had enough to eat there, or anything else, and she preferred to live in the most squalid part of our metropolis, with all its contrasts.

What happens when minimum wages are imposed in the South, or a union wage scale well above the minimum level, is seen in a community where there is a meat packing establishment, a textile mill or a steel mill. An obstacle is, of course, imposed on the movement which would otherwise take place from farm to city. I spent some time in 1933 working with a representative of the textile industry whose mills were in Rhode Island, developing the plans for narrowing differentials which were put into effect by the NRA. My mill owner friend was an honest and, as the saying went, statesmanlike leader who disliked poverty, and wanted to check its appearance in his Rhode Island community. Nevertheless, his position required him to recognize that he was preventing the really poor in the South from exercising their choice to move from the farms where income was worse to the manufacturing centers where they would receive more, meager though it might be. My understanding is that the packing house workers in recent negotiations have been modest and conservative in making their inevitable demands for raising southern wages and narrowing the differential in their industry, because of the con-
siderations to which I have drawn attention. On the other hand, the steel workers have eliminated their differential, and thus made Birmingham less available as a haven for the poor farmers of the surrounding area.

I need hardly say that the effect of such restrictions will vary with conditions of employment and prosperity, but I think there can be no doubt that a significant obstacle to improvement in the condition of farmers is imposed by relatively high wage scales in cities. Historians of the New Deal speak with enthusiasm of the gains for labor made in the thirties. This was, I believe, the first time in our history when real wages stayed steady during a recovery from depression, when money wages, that is, kept pace with rising prices. The historians are too likely to forget the persistence of mass unemployment until 1939, when it may be that the improvement which took place was due to economic influences connected with the onset of the European war.

These are reminders of the extent to which, often at the expense of the seriously poor, farmer and laborer have been the favorites of reformers, radicals and collectivists. Lest the tone should sound too denunciatory, I hasten to say that those latter groups composed a large section of the population, perhaps even including me, during the thirties; and that the difference is perhaps more one of time and of experience than of individual wisdom.

However that may be, real wages both here and abroad
are, of course, at the highest point in history, and at present the Marxist prophecy of increasing misery in capitalist society appears to have been answered negatively. Another Marxist prophecy, the prophecy of increasing monopolization, has been quite as clearly disposed of. When I was a boy, we used to lie awake worrying about the anthracite monopoly. Where is it now? When I first met the aviation industry in 1918, there was very little aluminum anywhere about. The aluminum industry, which not so long ago was our front page monopoly and which perhaps has benefited by steps to increase competition within the industry, has made its way by competing with other materials performing identical functions. We read today that Alcoa and the United States Steel Corporation are competing on products to make better cans, and neither Alcoa nor the Steel Corporation ("The Corporation") has now anything like the position which the public attributed to it a few short years ago. The one threatening case of industrial monopoly, the automobile industry, is no longer an exhibit for Marxists, since Mr. Romney and the Europeans have brought it back to normal.

Our critical controversial issues today are no longer issues of protecting farmer and labor monopolies or accepting what turns out to be a nonexistent trend toward enterprise monopoly. The principal contemporary internal economic problem for conservatives, after poverty, is the problem of subsidy and spending.

Transportation is the industry which has the longest history of subsidy. The bankruptcy of publicly aided canals and toll roads was responsible for the appearance in many western constitutions, including the Wisconsin constitution, of prohibitions against or restrictions on state borrowing and so state spending. The western railroads were favored with land grants. The automobile industry was partly the creature of public roads.

I recall in this connection one incident in the course of some modest brain trusting I did for Governor Philip LaFollette in preparation for his first administration in 1931. Though I had no special connection with this project, I sat with a group of farmer legislators who were planning what was then an innovation, a gasoline tax by which the users of roads could pay for them. One of the legislators said with great feeling, "I voted for the first paved road in Wisconsin, and I wish my arm had been cut off."

This particular subsidy has been to a considerable extent corrected, but its effects linger. We are finding that we must now pay not only for roads but for competing forms of transportation which they have almost superseded, the transit systems and railroads which serve large cities.

The farmer's subsidies may be thought of as means to soften the consequences of the technological changes which are requiring and effecting an inevitable move from country to city. So far as unions are responsible for them, the union wage scales are, of course, a form of taxation and subsidy, and the costs occasioned by union proposals to alleviate the hardships resulting from technological change may be compared with agricultural adjustment payments.

The most interesting forms of public payment are now, however, of another sort. Urban development is still a small item in our national budget, but it is an instructive one, and its enthusiasts say that it will take 125 billion dollars to do the job which they envisage. This will be much more than our agricultural program has cost since the War,¹ and much more than the moon shot for which we are expecting to pay about 30 billion dollars. All these items are, however, still modest in comparison with our payments to the industries which supply us with weapons and the forces which use them.

Besides poverty, and not so clearly related to it as some think, these public expenditures produce the second of the two great internal social and economic problems for the modern conservative. Mr. Kennedy is no doubt a conservative individual. He is a Catholic and a man of wealth, and he does not appear to have the demagogic talents and impulses which have distinguished some of our reforming presidents. I would like to use demagogic in an almost colorless sense in this context, and I use it only because I cannot think of a better word. But by the test of his inclination to make public finance the means of vast economic change, Mr. Kennedy is this time the dangerous radical. Looking forward a little, I may say that I shall find him on balance, when foreign policy is taken into account, a less dangerous radical than either Mr. Rockefeller or Mr. Goldwater, so I urge you not to get ahead of me in putting me in one party or the other.

I live in an area which is a subject of urban redevelopment. I am to be for a week or two more in a solid apartment building about to be demolished to make a school playground addition which the Chicago Board of Education, comparing it with teachers and buildings, does not urgently want. For me the problems of urban development have thus a peculiar fascination.

¹An observer of the argument from analogy knows that for every similarity between objects or abstractions there is always one difference, and quite often there are many more. One difference between our farm program and urban renewal is that it is not expected that any of the buildings built or improved by urban renewal will be put into bins. The most responsible proponents of urban renewal expect that the major part of its costs will be financed by private investment. Some apparently contemplate much higher costs than those mentioned here, and some apparently advocate various amounts of expenditure regardless of the availability of private investment. It will be observed that contemplated expenditures are in any event much lower than corresponding figures for military expenditures, especially if these include payments on account of past wars. Urban renewal might be used as one means of alleviating anxiety, whether reasonable or—as I think—unreasonable, about the possible economic effects of cuts in expenditures for military purposes. More important, it might be used to draw our attention to the pleasures of spending for means of life rather than for means of destruction.
Considered even abstractly, they would require a pretty extended treatment. Saving a great university like the University of Chicago may seem to anyone brought up in Madison a suitable use of public funds. But when one leaves a university neighborhood or a hospital or a public building neighborhood, and goes, for example, to our near north side, the problems become troublesome indeed. We are, among other things, zoning against slums, in fact as things stand today particularly Negro slums, while facilitating living for middle and upper income Negroes and whites alike. We are using public funds derived ultimately from those who pay sales and income taxes, including the lower income groups who pay twenty per cent of federal personal income taxes, to pay for expenses incurred in building middle and upper income housing. Those with incomes below the average belong in a group whose taxes as a whole are regressive when measured by income. In principle these taxes might be the first to be reduced by any decrease in public spending. We may be simply chasing the slums around the city, as one phrase has it, or pushing them back to Mississippi and Birmingham. We may also be stimulating house and apartment building beyond the limits which free private choices would set.

Particularly if one thinks of the $125 billion dollars, the problem becomes pretty big for our present discussion. We may take something a little simpler like the moon trip. Here the concise observations of Mr. Warren Weaver, an Old University of Wisconsin mathematician and now a Rockefeller Foundation executive, may serve to jog our imaginations. Writing in the Saturday Review of last August 4th, Mr. Weaver summed the matter up in a few concise paragraphs, including the following:

It has been forecast that it may cost $30 billion to “put a man on the moon.” But how much is $30 billion: It is sobering to think of an alternative set of projects that might be financed with this sum. We could: give a 10 per cent raise in salary, over a ten-year period, to every teacher in the United States, from kindergarten through universities, in both public and private institutions (about $9.8 billion); give $10 million each to 200 of the best smaller colleges ($2 billion); finance seven-year fellowships (freshman through Ph.D.) at $4,000 per person per year for 50,000 new scientists and engineers ($1.4 billion); contribute $200 million each toward the creation of ten new medical schools ($2 billion); build and largely endow complete universities, with medical, engineering, and agricultural faculties for all fifty-three of the nations which have been added to the United Nations since its original founding ($13.2 billion); create three more permanent Rockefeller Foundations ($1.5 billion); and still have $100 million left over to popularize science.

Whether you are primarily concerned with national welfare, international prestige, or science, weigh these alternatives against a man on the moon.

Urban development, the moon shot and the procurement and use of weapons are precursors and moderate intimations of the problems which we should face in what we vaguely think of as a socialized American economy. The prospect has a certain grandeur. It may be supposed that the integrity, ability, industry and care of the human being are sufficient to insure the operation of such a society. Even so, would it not be better to leave us more and more of the dollars we earn?

The word “better” reminds us that bit by bit, we have been developing materials for checking the evaluative judgment which has been implicit in much that has been said. It may now appear that the liberty of the nineteenth-century liberal, the maximum possible freedom from group control, is consistent with and conducive to the development of the other freedoms. It is likely to enhance the self-respect and self-reliance of poor and rich alike, and so increase the wealth which promotes freedom as power. The conservative liberal’s freedom from group control is a necessary, if not indeed a sufficient, condition for the development of the organized person, who is free for example from compulsions, in the sense of the psychoanalyst and the Stoic alike. It may even appear that we have disposed of the supposed tensions between liberty and security, and between liberty and “equality” in its most useful sense.

Before we pass to the state, one observation—perhaps in the nature of a footnote—should be made about property and our economic problems. There are some economic problems with respect to which a judgment of feasibility, as amoral as a judgment about the operation of the Skybolt missile, is of considerable importance. People who seem to me to have the best credentials as conservative liberals differ about the consequences of the proposed tax cut which is now so critical an economic issue in public discussion. Some of my friends with good qualifications both as conservative liberals and as specialists, think the tax cut cannot, except perhaps by means of incantation, produce either the good or the bad effects which are prophesied. If, as seems to be expected, our Government operations are financed in place of the taxes
by an equivalent amount of borrowing from the general public, there is no reason, at least in economic circumstances like those of the present, why the change should add or subtract a nickel to or from the supply of money available for the nation's business. This is in the first instance a question of means rather than end.

Some of my conservative liberal friends who have this view about what may be called the mechanics of the problem, advocate the tax reduction on the ground that it is likely to encourage people to want more tax reduction and so eventually a reduction of Government spending. Others, and I confess in my amateur way I am inclined to agree with them, are opposed to the tax reduction, partly because its good effects can be produced only by a kind of deception, and partly because it is likely to take our minds off the objections to public spending.

One group of conservative liberals thinks our money should be frankly made by a well-controlled printing press and that we should cease to have what little regard we still show for gold. They think our society is capable of writing rules for the printing press, which will save us from the kind of inflation which we have seen, for example, in many Latin American countries. They think the printing press is generally in control now, but in concealed control, not subject to rules, and subject to irrational and accidental checks by our occasional concern for gold.

Other conservative liberals, and I am inclined to agree with them, have an old fashioned attachment to the slight regard which we do indeed pay to gold. Those of this opinion recognize that an excessive regard for gold could lead us into a deep depression, and that before that happens, we had better turn to the controlled printing press solution. We hope no such emergency will arise, and we are confident that here again a Marxist prophecy, of inevitable and constantly deepening depressions, is
being answered. Here we may indeed not be so sure as we are about some of the other Marxist prophecies, and we may be prepared for critical new solutions in any impending serious decline in employment and production.

This brings us to the state. Besides the questions of social and economic liberty with which we have been concerned, there is the persistent tension between freedom of communication and order, to which our society has given a conservative liberal solution. It is true that our Constitution, properly read, seems to indicate that the solution is for voters and their representatives and not the courts. It is also true that from 1948 to 1957, and particularly from 1950 to 1954, both voters and their representatives committed striking and instructive violations of our tradition. In doing so, they gave a rather moderate exhibition of what life in a Fascist state has been like and what life in a Communist state must also be like.

My friend, George Anastaplo, who refused to answer bar admission committee questions about his politics, is in fact the staunchest anti-Communist I know. He has never been any sort of a Collectivist in his economic thinking. He was a bomber navigator during World War II, and at the time of his first bar admission proceedings in 1951 he insisted that I conceal a remark of his to the effect that he would like to keep his reserve commission because he felt committed to fight, in case war came, against the Soviet Union.

By an amusing coincidence, he was put out of the Soviet Union in the course of a European trip in the summer of 1960. He had been photographing and talking with two other Americans and an English girl, who were themselves being arrested for taking pictures and distributing our State Department exchange magazine. The Russian police picked him up, took his film, and sent him out of the country. He has written amusingly about it. Among other things, he said, "My impression was that the police major conducting the investigation, which turned out to be a 'trial,' was not accustomed to forthrightness on the part of accused persons: the proceedings opened with my refusal to hand over my camera for removal of the film until I had received from them a statement of their legal justification for such a request; the major had the expression of one who was watching a strange creature from another world."

The similarity between the Russian police and the Character and Fitness Committee of the Chicago Bar must strike a detached observer. Nevertheless, Mr. Anastaplo has always been more impressed with the difference. In this same account of his arrest in Russia, he observes that the only literature he left behind was a copy of his closing argument to the Committee, printed in the Lawyers Guild Review, which he gave to a young man with whom he was talking. "I added a dedicatory inscription, 'To a Russian: On how free men contend.'"

Not only in the Anastaplo case, but also in the tragic Sobell case, I think some who have criticized what they took to be the penalization of opinion in a time of stress, have been among the strongest of anti-Communists. The Anastaplo case and the Sobell case are remnants of the McCarthy period, the period surrounding the Korean War, when in my judgment the conservative liberal position required resistance to the spirit of the times, respectfully represented though it was in such organizations as our bar associations.

It should be observed that Mr. Anastaplo remains convinced of the advantages of travel in Russia, and of communication between Russians and others. His views are expressed in the following letter published in The London Observer, August 14, 1960:

**EXPelled**

Sir, I should like, as a recent visitor to the Soviet Union, to take issue with Mr. John Wain's suggestion that Western tourists provide that country with "unpaid propaganda work when they get home." Almost invariably the fellow tourists with whom my wife, children and I exchanged impressions at the end of each day shared our serious reservations about the dirty, uncomfortable, restricted and monotonously tasteless life the Russian people seem to have had imposed upon them. The tourists with whom we came in contact most were young people using the camping facilities we lived in outside Minsk, Smolensk and Moscow.

Visits by tourists provide a valuable source of information for both the West and Russians. The eagerness of Soviet citizens to talk to and question visitors reflects their interest in the outside world. I should like to urge increased contacts of the kind that only tourists can make. I say this despite the fact I was expelled from the Soviet Union last month, midpoint in a two-week visit, for having presumed first, to photograph and then to attempt to counsel three American and English students detained (and subsequently expelled) for allegedly distributing copies of the United States State Department exchange magazine, Amerika, on a Moscow street.

George Anastaplo,
Lecturer in the Liberal Arts
University of Chicago
For the moment, and it is to be hoped for some time ahead, this particular problem has receded considerably in public importance. Nevertheless, when we think of what the cold war is about, we may usefully remember it.

One thing that the cold war is about is the preservation of our social and economic organization against the threat of demoralization, depression or physical destruction at the hands of Russian and perhaps Chinese Communists. When we say that we would not like to be "red" and would perhaps even prefer to be dead, we have in mind such social and economic demoralization as is pictured by Pasternak in Dr. Zhivago, particularly in vivid descriptive passages dealing with life in Russia in the time of Lenin. We have in mind also a situation in which in the time of Khrushchev, Pasternak was able to publish his novel only by stealth, and was prevented from receiving his Nobel Prize. Faulkner, though he was attacked by citizens of his state, was not prevented even by Mississippi from receiving his prize; and though the Russian action has a kind of parallel, as an example of pure or ideal tyranny, in the Anastaplo case, we have seen also that, as George Anastaplo reminds us, his own circumstances here were vastly different from those of Mr. Pasternak in Russia.

Like the values involved in our economic liberties, the values involved here are worth reflection and analysis. We shall have to leave them as they stand with the reminder that, if I am right, such labels as conservative when used by an excited community may be misleading. The true conservative was in my opinion not an admirer of McCarthy in the United States, Franco in Spain, Mussolini in Italy, Hitler in Germany, any more than of Khrushchev in Russia or Mao in China.

The most critical problem of the state today is plainly the problem of the cold war. It is a problem not only for each individual country, but for that perhaps emerging consciousness of association which may contain materials for something like a world state.

What is the position of the conservative liberal here? I should say at the outset that since 1959 I have described my own position as that of a pacifist, and a believer in unilateral disarmament. I am not quite a systematic pacifist, for that would make me a philosophical anarchist. While I sometimes call myself an anarchist, particularly in left wing circles, I am perhaps more accurately described, at least so far as the present discussion has gone, as a Republican. So far as my pacifism goes, I have had the greatest difficulty in associating myself with other pacifists, a difficulty of a sort which I have never before experienced. Given our present policy, I find it impossible to criticize segments of it, like coolheaded vigilance over spies and saboteurs, coolheaded preparation of shelters, tests, plans for limited warfare, plans for controlled thermonuclear warfare, the satellite program so far as it may have military significance, and particular weapons pro-

grams. My belief in unilateral disarmament is in decisive but negotiated action, not the kind of piecemeal steps which in the best practical judgment available would tend to invite attack.

You will see that my position is a Utopian one, and so far as I know with virtually no agreement on the part of any practical person in the United States. I state it partly to enable you to discount the more down to earth judgment to which I am now proceeding. In my view, there are practically no leading western statesmen who take what I should call a sound conservative liberal position on these problems. I will suggest indeed that there are only two, Eisenhower and De Gaulle.

I invite your attention to President Eisenhower's foreign policy, which in my judgment was the only rational foreign policy which any American president has practiced since 1917. Until May of 1960, it seemed possible that it would be successful. I think that under the influences that were in control in the Eisenhower administration, it might eventually have recovered and succeeded even after the U-2 episode. I consider Mr. Khrushchev's reaction to the U-2 episode to be his worst failure, whatever his reasons, in his conduct of foreign policy. It was a critical example of the effect which overexcitement about routine espionage or reconnaissance may produce, in some circumstances, on international relations.

Today De Gaulle is the leading symbol of the view, which he is thought to entertain still, that Russia should be brought back into the western world. He has combined ingeniously his devotion to French glory and prestige with vigorous action to remove the liabilities of the French African empire, and with what appears to be quiet, though ambivalent acceptance of Russian power.

It seems to me that this is the appropriate practical conservative liberal position. Whatever may be said about financial support for the family farm or the redeveloped city, a conservative liberal should be ready to go to great extremes to prevent the demolition of farms and cities alike. If Mr. Herman Kahn is read carefully, that leading and very thoughtful student of thermonuclear war is not as confident as he at first sounds that our farms and country towns would survive a 1968 thermonuclear war any better than our cities. So good a conservative as Pope Pius XII, not by any means a pacifist, has unqualifiedly condemned a war of annihilation by modern weapons. It need hardly be said that the Sermon on the Mount can be read to the same effect.

Tested by these standards, we have no conservative liberal political leaders now in active political life in the United States. Mr. Goldwater and Mr. Rockefeller together with the New York Senators who are renewing the threat of war with Russia over Cuba, are by this test dangerous radicals. Conserving the life of the human species or the life of human inhabitants of the northern hemisphere, or the life of the United States, or even the
achievements of civilization, seems an appropriate conservative objective. Compared with General Eisenhower or General De Gaulle, Mr. Kennedy and his advisors may seem to be radicals, but compared with Mr. Goldwater and Mr. Rockefeller, they seem to be conservative. While maintaining a deterrent, they appear determined to minimize the present chances of destruction of the human life on which the continued actual existence of human value depends.

You will see what I mean by the phrase “fellow traveler.” I have exposed myself to your critical view in my attitude toward the various institutions which are inevitably cherished by anyone who may be called in any sense a conservative, that means by us all. The conservative attitude is an indispensable part of the human makeup, just as is the attitude which recognizes the need for superseding some old ways and replacing them by new. I have rashly touched on nearly all possible subjects. If the discussion is of any use to you, it must be not in affording you adequately supported proposals, but in indicating what in my opinion, at any rate, are the subjects deserving emphasis in the thought of conservatives, and in suggesting approaches to these subjects.

Two Notable Conferences

Earlier in the academic year, the Law School co-sponsored two conferences on timely topics. The first, on “Religious Freedom and Public Affairs” was arranged in cooperation with the National Conference of Christians and Jews. After an informal opening dinner, featuring welcoming remarks from Dean Phil C. Neal and Dr. Lewis Webster Jones, President of the National Conference, the first session devoted itself to a discussion of a paper on “The Implications of the Supreme Court Decisions Dealing with Religious Practices in the Public Schools,” by Jefferson B. Fordham, Dean and Professor of Law, the University of Pennsylvania Law School. The session was chaired by Philip B. Kurland, Professor of Law, The University of Chicago Law School. Commentators were William J. Butler, Esq., of the New York Bar, and Paul G. Kauper, Professor of Law, the University of Michigan Law School.

The second session was chaired by the Reverend Robert F. Drinan, S.J., Dean and Professor of Law, Boston College Law School. The basic paper, on “The Problem of Standing To Sue,” was presented by Kenneth C. Davis, John P. Wilson Professor of Law at The University of Chicago Law School. Commenting were John deJ. Pemberton, of the American Civil Liberties Union and Robert E. Rodes, Jr., Associate Professor of Law, University of Notre Dame Law School. At the third session, the only one open to the public, the Honorable Abraham A. Ribicoff, J.D., United States Senator from Connecticut, spoke on “School Financing and the Religious Controversy.”

The final day of the conference opened with a discussion of “The Constitutional Status of Public Funds for Church-Related Schools,” by Harry W. Jones, Cardozo Professor of Jurisprudence at Columbia University, and Visiting Professor of Law at the University of Chicago. Commentators were William Ball, of the Pennsylvania Bar, and Boris I. Bittker, Southmayd Professor of Law, Yale Law School. Chairman of the session was Wilber G. Katz, Professor of Law, the University of Wisconsin Law School. The concluding session, presided over by Theodore Leskes, of the American Jewish Committee, heard a principal paper on “Litigation as a Method of Handling Conflicts Concerned with Religion and Education in a Pluralistic Society,” by Rabbi Arthur Gilbert, of the National Conference of Christians and Jews. Commentators were Milton R. Konvitz, Professor of Law, Cornell Law School, and Jack W. Peltason, Dean of the College of Arts and Sciences of the University of Illinois.

“Discrimination and the Law” was the subject of the second conference, jointly sponsored by the Law School and the Anti-Defamation League of B’nai B’rith. The conference opened with a paper on discrimination in employment, by Vern Countryman, of Harvard Law
The Conference on Discrimination and the Law, in session in the Weymouth Kirkland Courtroom. Facing the camera, left to right, are Alexander M. Bickel, Professor of Law, Yale Law School, Phil C. Neal, Dean and Professor of Law, The University of Chicago Law School, presiding, and John Kaplan, Associate Professor of Law, Northwestern University.

School, with critiques offered by William R. Ming, Jr., JD'33, of the Chicago Bar and Jerre S. Williams, Professor of Law, the University of Texas. Dean Erwin Griswold, of Harvard Law School, presided. The second session was devoted to a paper on discrimination in public accommodations by Alexander M. Bickel, Professor of Law, Yale Law School, and critiques by William Coleman, of the Philadelphia Bar, and Professor John Kaplan, Northwestern University Law School. Phil C. Neal, Dean of the Law School of the University of Chicago, presided.

The principal paper of the third session, chaired by Dean Jacob Hyman, of the University of Buffalo School of Law, was devoted to discrimination in public accommodations; the author, Thomas P. Lewis, Professor of Law at the University of Kentucky and Visiting Professor at the University of Washington. Jo Desha Lucas, Professor of Law, The University of Chicago Law School, and the Reverend Robert F. Drinan, S.J., Dean and Professor of Law, Boston College Law School, offered the critiques.

Jefferson B. Fordham, Dean and Professor of Law, the University of Pennsylvania Law School, presided over the final session, which dealt with discrimination in housing. The central paper was presented by Harold Horowitz, Office of the General Counsel, Department of Health, Education, and Welfare; critiques were given by Norman Dorsen, Professor of Law at New York University, and Francis A. Allen, University Professor, The University of Chicago Law School.
Still Uneasy

The Uneasy Case for Progressive Taxation, by Professor Walter J. Blum and Harry Kalven, Jr., of the Law Faculty, was published in 1953 by the University of Chicago Press, and has already become a classic in its field. A few months ago, it was reprinted in the University of Chicago Press's paperback series, Phoenix Books, with a lengthy new introduction. With the permission of the authors and the Press, the first three sections of that introduction are here reprinted.

1

Some years ago we engaged in a program to gain empirical knowledge relating to the progression question. The University of Chicago Law School had undertaken a series of projects in what was called law and behavioral science in an effort to apply the research techniques of the social sciences to the study of legal problems and institutions. As part of this program, we started to explore the community sense of justice as it related to the tax burden. The key method of inquiry was that of the large-scale public opinion survey, and at the core of the study was the objective of assessing popular attitudes toward progressive taxation.1 For a variety of reasons the study was never completed, but the experience with it provides a refreshing stimulus to further reflection about progression.

We were determined to probe how deeply the public was committed to progression and on what basis. From the start, our social science colleagues had warned that, except in time of actual emergency, no public issue is really salient in popular thought. Nevertheless we were sanguine: the federal income tax was one law with which virtually everyone had direct contact, high surtax rates had been a prominent feature of the law for almost a generation, and, if there was any vitality at all to the notion of a community sense of justice as a foundation for law,2 it should appear in considering the blunt issue of how the tax burden in fairness ought to be allocated among individuals.

Pilot operations indicated that our expectations were clearly in error. Tax questions generally were of little interest to the public, and among tax questions the issue of distributing the tax burden ranked near the bottom. Even when we had reconciled ourselves to the absence of any conscious opinion and had turned to search for "latent sentiments," our efforts were almost completely frustrated. The precise difficulties are worth emphasizing here. Except for a relatively small elite, the very notion of a progressive tax proved to be beyond grasp. By and large people could understand the concept of the wealthy paying more in tax than the less wealthy, but they did not comprehend the idea of the wealthy paying more than a proportionately greater tax than the less wealthy. Proportionate and progressive rate schedules simply were not seen as involving a choice of principles. This same mathematical barrier probably accounted for another difficulty. It is our impression that most people were interested only in the level of their own taxes and not in the ratio of that level to the tax burden on others with different incomes.

In probing as deeply as we could for the reason why the few who did understand the progression principle thought the rich should pay more, we were unable to find anything other than simple, unanalyzed ability-to-pay notions. There was virtually no associating taxes with economic incentives or purchasing power—or with envy or hostility to the rich or with concern over economic inequality.

There was one other clue from the study that seemed rich in political implications. People, it appeared, would distribute a tax increase differently than a tax reduction. They thought it most fair to handle an increase by putting relatively larger burdens on the rich, but, in the case of a reduction, they thought it most fair to give relatively more of the benefit to the less wealthy rather than return to the tax distribution that had prevailed before the increase. In any change in total taxes, either up or down, the popular view of fairness would tend to make the rate structure more progressive.

The Uneasy Case was an effort to explore what might be called the intellectual case for progression. In making the empirical tax study, our aim was to lay the results of a public opinion survey alongside the original essay. To the faintest degree, an interesting contrast emerged from the pilot work: the public, unlike a few intellectuals, virtually never thinks of the progressive tax as an instrument for reducing economic inequality. But more basic is the fact that the progression issue is so far beyond the reach of public opinion that it is futile and misleading to talk here of comparing expert opinion and public opinion.

This massive absence of any public opinion, except among the elite, adds a new puzzle to the political history of progression. In the essay we had noted that the intellectual arguments in support of progression all came well after progression had become a political fact.3 It could be inferred that the intellectuals were following the public rather than leading it and were seeking to find a rational basis for a strong but unarticulated popular sentiment.4 The sources of the political development, which ten years ago we found to be obscure, now seem to be more mysterious than ever. It is hard to believe that the tiny public sentiment which we were able to unearth could ever have been strong enough to produce the political fact of progression.

2

One of the most notable recent developments on the world scene has been the emergence of the new nations. As the leaders of these countries have turned to the older
states for counsel, the economic problems of underdeveloped countries have become widely discussed. High among these problems has been tax policy. The literature on tax policy for underdeveloped countries provides a second novel vantage point for reflecting again on progressive taxation.

Observers generally agree that there are a number of characteristics common to most of the underdeveloped countries.

First, there is an extremely wide discrepancy in wealth and income between a relatively small high income group and a majority of the population whose income borders on subsistence. Second, the high income group is the focus, or more accurately the essence, of whatever political or economic stability exists. This group, tracing its wealth and position to large landholdings, tends to dominate the social, political, and economic structures of the nation. Finally, there is an ardent desire to be considered a modern progressive nation with political autonomy.8

Under these conditions, the development of tax policy is caught in a sharp cross fire. On the one side there is a strong need to preserve economic incentives and not to alienate the economic elite who are a key source of stability. On the other side there is a strong desire to utilize sharply progressive taxes.

Two sources of this momentum toward progression are of special interest. There is the wish to emulate what is considered to be the moral style of advanced countries, and a distinctly progressive tax structure is viewed as a mark of a civilized country. As one observer has put it: "Progressive income taxation is desired simply because it is regarded as one of the symbols of modern government."9 There is, as another source, an emphasis the bluntness of which may be startling to those conditioned to the tradition of American political discussion. Official statements of policy in underdeveloped countries are explicitly phrased in terms of redistributing wealth or income. It is made clear that the attraction of progression for these countries is that it will mitigate economic inequalities. An Indian Commission reporting on tax policy a few years back listed as the first main criterion of a tax system: "... the incidence of a tax system and its suitability for reducing inequality of income and wealth, viz., the distribution of the burden of taxation and its redistributive effects and possibilities."10 The commission went on to observe:

We can no longer afford to leave the problem of equality to the automatic functioning of economic and social forces. ... The demand that the instrument of taxation should be used as a means of bringing about a redistribution of income, more in consonance with social justice, cannot be kept in abeyance.*

But these spokesmen are equally explicit in recognizing the conflict between objectives. Nowhere are the tensions between the equitarian aspirations and the disincentive effects of progression seen more vividly. The variety of responses to this conflict could almost have been predicted. At one extreme is the view that progression is compatible only with a mature economy; in the words of one observer, "extensive reliance on income taxes or other ability to pay measures is a social and economic luxury which the lesser developed nations of the world cannot yet afford."11 The advice which follows is to separate the political and economic objectives by offering little more than lip service to progression so as to satisfy the required political rhetoric. At the opposite pole is the conclusion of a United Nations Technical Assistance Report: "Redistributive finance appears to offer greater gains and involve less cost to underdeveloped than to developed economies."12 This view proceeds not only from a willingness to have the government perform the main role in capital formation but also from the premise that, given the structure of underdeveloped economies, the major disincentives will fall on rentiers rather than on entrepreneurs. In between these extremes is the hopeful position voiced by the Indian Commission: "Ways and means, therefore, must be devised to insure simultaneous progress in both directions, viz., of greater production and of better distribution."13 The expectation apparently is that it will be possible to build into a progressive tax structure a set of exceptions and qualifications which will maintain the necessary incentives for specific economic functions without destroying its redistributive potential.14

Thus, although the relevant conditions in underdeveloped countries would seem to be dramatically different from circumstances in the United States, the progression issue, when transplanted, is no less uneasy. But the grossness of the inequalities of wealth and income and the depth of poverty in those countries cause a marked difference in the prevailing rhetoric.15

3

Ten years ago we were puzzled as to why Henry Simons’ bluntness had not had more impact on the tone of discussions in the United States. Writing in the late thirties, he exasperatedly asserted that the whole superstructure of sacrifice and ability-to-pay theorizing was simply nonsense and that the case for progression was no more and no less than the case for mitigating “unlovely” economic inequality.16 One then would have thought that the cat had been let out of the bag forever and would have predicted that discussion of progression would never be the same after this outburst of candor.

On reviewing the recent literature on the redistributive aspects of progression, we note some interesting changes in emphasis, but on the whole the approach to redistribution by those favoring progression17 is still curious. The most obvious change is the diminished appetite for justifying progression on the basis of sacrifice analysis and its many subleties.18 What is particularly noteworthy is that in virtually surrendering sacrifice analysis,
with its postulate of declining marginal utility of money, the defenders of progress have not followed the path of Simons. Instead, they are willing to acknowledge redistribution as relevant but are unwilling to rest the case for progression on it. Typical of such contemporary commentators is Roy Blough. After saying that sacrifice, faculty, and even benefit theories “point to progression, but only in a rather moderate degree,” he argues that the current tax rate “involve also at least a degree of skepticism that the distribution of income is demonstrably the best one.” And having so modestly indorsed the egalitarian rationale for progression, he adds the further qualification that the “attitude that has chiefly been involved” is not that of “deliberately using tax and expenditure measures to reduce the incomes of people because these are deemed to be too high” but rather that of “looking around for the best place to impose taxes that have to be levied on someone.”

Another recent commentator, Louis Eisenstein, is likewise chary in dealing with progression and economic equality. He moves rapidly through three positions. Initially, he sees as a special weakness of sacrifice or ability-to-pay theories that their claim to neutrality is an illusion since in fact taxes have effects on the distribution of wealth and income. Accordingly, he finds inescapable the proposition of Simons that “it is only sensible to face the question as to what kinds of effects are desirable.” A few pages later, however, he tells us that “though we still have progression, it is no longer prudent to say in so many words that the primary purpose of the graduated rates is to diminish the economic differences that characterize our economy.” Next, he asserts that whether prudent or not there would be no point in confronting the equality question directly inasmuch as there is no way of answering the question, “If the rates are to mitigate inequalities of wealth, how drastic should they be in pursuit of this objective?” And he adds, “Everyone who meditates on such problems will respond in the light of his own views on equality.”

A different resolution of the equality issue is put forward by Harold Groves. In his words, he wishes to find a position which affords “a detour around the futile snarls of the classical case” of sacrifice theory and “the pure value judgments of the Simons-Taussig school.” He rejects sacrifice theory because it does not persuade and he rejects the egalitarian value judgment because it is “debate closing.” As a solution, following the line of argument developed by Elmer Fagan, he urges placing the case on the total effects of progression. In setting tax policy, he would have us interested in

what progressive taxation will do to serve or disserve such widely accepted national objectives as an increase in per capita real income, minimum economic fluctuations, a workable tax system producing adequate revenue, political stability under representative government, international independence or security, elimination of extreme want, and perhaps mitigation of social disorders, such as crime, divorce, mental illness and the like. Tax alternatives, in short, should be weighed “not in terms of the personal but rather the social significance of income.” On this view, the distribution of income becomes only one among many factors to be considered in appraising progression; in Groves’s phrase, it is treated “as an intermediate means rather than an end.”

The positions taken by Blough, Eisenstein, and Groves, although quite distinct from each other, leave a common impression. The whole issue of redistribution is muted and is handled with gentility. Even with the props of sacrifice theory substantially removed, there is still a strong pull away from resting the case for progression squarely on doing something about economic inequalities. This, however, seems not so much due now to a default in candor. Rather it appears to arise from two other sources. First, there is a sense of despair over arguing the case for progression on grounds of a subjective judgment about what degree of inequality is disturbing in our society. Second, there is a disinclination to treat economic inequality in contemporary America as a very serious social problem. Eisenstein has recently put his finger on the point: “The usual liberal approach today is that if we can promote economic growth, if we can have a larger pie, all segments of society will necessarily have larger shares of that pie and we won’t have to worry about redistribution of income anymore.” This strikes us as a shrewd insight into the changing scene, and one which has been noted by others. But while it may explain why current writing does not re-echo the intensity of Simons, it more than ever leaves the intellectual case for progression in the obscurantist’s vein.

FOOTNOTES

1 We examined the problems and the promise of public opinion surveys in Blum & Kalven, The Art of Opinion Research: A Lawyer’s Appraisal of an Emerging Science, 24 U. Chi. L. Rev. 1 (1956).

In referring to impressions we gained from the early phases of the empirical study, we risk overstatement. The study was put into the field only in a most preliminary way and on a very small scale, with no effort to utilize proper sampling techniques.

2 The most extensive recent effort to relate public opinion and the community sense of justice to legal rules is Cohen, Robson & Bates, Parental Authority: The Community and the Law (1958). For a critical comment on the study see Kalven, Book Review, 14 Rutgers L. Rev. 843 (1960).

3 See text, pp. 11–14 infra.

4 For some speculations on the role of the intellectuals on roughly comparable public issues, see Hayek, The Intellectuals and Socialism, 16 U. Chi. L. Rev. 417 (1949).


6 Ibid.
In discussions of economic aspects of tax policy in the United States, the progression issue continues to appear with some frequency. Three have been numerous assertions to the effect that a more progressive tax structure, as compared to a less progressive one yielding the same amount of tax revenue, would contribute significantly to bringing about or maintaining a high level of employment of resources. Although this position sometimes seems to be a rationalization for a deeper conviction that heavier taxes should be placed upon the wealthy and lighter taxes on the less wealthy, it also seems to have genuine adherents. It appears to turn on the propositions that the budget of the federal government should be in balance (or at a minimum deficit) over a period of time; that a dollar of tax taken from the less wealthy will reduce total private demand more than a dollar taken from the rich, because the latter generally save a larger percentage of their incomes than the former; and that there is a tendency for investment demands to fall short of savings at the level of income at full employment. Reasoning from these propositions, one arrives at the conclusion that the government can alter total demand by means outside the tax system through monetary operations. Moreover, for the type of analysis being offered, there is no need to stay within the premise that the budget must remain in balance (or at a minimum deficit); it is at least conceivable that, under some circumstances, total demand can be augmented by running a deficit (or a larger deficit) for a limited period. Further, we know too little about savings patterns and propensities to assume that a move to decrease the after-tax income of the wealthy and to increase the after-tax income of the less wealthy the same amount would change the overall ratio of savings to income. See Stein, Stimulation of Consumption or Investment through Tax Policy, in Joint Committee on the Economic Report, in 84th Cong. 1st Sess., Federal Tax Policy for Economic Growth and Stability 245 (Nov. 9, 1955). See also Samuelson, The New Look in Tax and Fiscal Policy, id. at 233, 234, who concludes: "A community can have full employment, and at the same time have the rate of capital formation at the less wants, and can accomplish all this compatibly with the degree of income-redistributing taxation it ethically desires." Compare Rolph, Equity Versus Efficiency in Federal Tax Policy, 40 Am. Econ. Rev. 394 (1950).

There is recent evidence that the savings-income ratio in our society has been fairly constant throughout a very wide range of incomes over a long time. Friedman, A Theory of the Consumption Function (1957). If this proposition turns out to be generally correct, it would undermine the argument that progressive taxation impairs economic growth by reducing aggregate savings. It would also pose a problem for those who seek to step up the rate of our economic growth. If over time the propensity to save is fairly constant among various income levels, a program to augment growth would seem to require that increased attention be paid to incentives and to the "investment climate." As to the impact of progression on incentives, see text, pp. 21–28 infra.

14 The Simons remark is quoted in the essay at 72 infra; the original passage is found in Simons, Personal Income Taxation 18–19 (1938).


Taxation apart, attention continues to be paid to the subject of economic inequality itself. Of particular interest are Oliver, A Critique of Socioeconomic Goals (1954); Lampman, Recent Thoughts on Equalitarianism, 71 Q. J. Econ. 234 (1957).
A Very Special Gift

Elsewhere in this issue of the Record, it is reported that the Tenth Annual Law School Fund Campaign achieved a new record of $101,500. Part of this total came from an unusual source.

Miss Carol Loeb is an undergraduate student at Northwestern University; she is also the daughter of Jack Loeb, JD '37. One of the significant components of the Tenth Fund Campaign was the special 25th Anniversary Gift of the Class of 1937.

Miss Loeb, in honor of the 50th Birthday of her father, made a generous contribution to the Anniversary Gift of his Class. Her mother, Mrs. Jack W. Loeb joined in this gift, which inspired other members of Mr. Loeb's class to participate also.

It has long been true that the School's Annual Fund Campaigns have had the support of friends of the School who did not happen to be alumni. The School is especially appreciative of Miss and Mrs. Loeb's unusual gesture.

Ad Astra...

The National Legal Aid and Defender Association has awarded the Arthur von Briesen Medal for 1963 to Professor Francis A. Allen, of the University of Chicago Law School. The award is presented periodically to those who have provided distinguished leadership in Legal Aid and Defender Work. It was established in 1961, and was awarded posthumously to Charles Evans Hughes, Elihu Root and William Howard Taft. The following year, the Medal was presented to Orison S. Marden, distinguished member of the New York Bar and member of the Law School Visiting Committee. The citation to Professor Allen read, in part:

Legal historians may place the 1963 Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice next to Justice and the Poor, by Reginald Heber Smith, Legal Aid in the United States, by the late Emery A. Brownell, and Equal Justice for the Accused, as a landmark in the development of Legal Aid and Defender services for those unable to employ private lawyers. Francis Allen, Professor of Law at the University of Chicago, served as chairman of the committee and is primarily responsible for a persuasive Report which constitutes a convincing and objective treatise on the right to counsel, present practices, and the need for adequate defense counsel by indigent persons accused of crime in the federal courts. The recommendations in the Report served as the basis for the Criminal Justice Act of 1963, now pending in the Congress, and constitutes one of the most important developments in the program for defense of the indigent in the federal courts in this generation.

Soia Mentschikoff, Professor of Law, was a member of the United States delegation to a conference on international sales, held at the Hague in early April. Miss Mentschikoff was also selected to deliver the Addison Harris Memorial Lecture at Indiana University School of Law. Her topic was "The Common Law Tradition: The Uniform Commercial Code."

Max Rheinstein, Max Pam Professor of Comparative Law, is spending the early part of the Spring Quarter as NATO Professor at the University of Brussels; he will then serve the remainder of the quarter as a member of the International Faculty for the Study of Comparative Law, at the University of Strasbourg.

Alfred de Grazia, Editor and Publisher of the American Behavioral Scientist, and Charles L. Ruttenberg, a graduate student in political science at New York University, recently conducted a survey of innovators in the study of the legal process. In the course of this survey they polled 120 scholars thought by them to have "either pioneered in the study of the legal process by using new methods and outlooks from the social and behavioral sciences, or developed significant new directions for legal research by opening up new fields or by promoting important new concepts." (Quotation from article reporting their findings, "Innovators in the Study of the Legal Process," American Behavioral Scientist, Volume 7, Number 4, December, 1963, page 48.) Each of these scholars was asked to rate the other 119 on a scale ranging from 9, signifying a very high opinion of a man's significance as an innovator, to 1, for a very low opinion. The result was that Professor Harry Kalven, Jr., of the Law School, received the highest rating awarded.

The Commonwealth Fellows for 1963-64, left to right: Daniel D. Prentice, LL.B., Queen's University, Belfast; Salomone Picciotto, B.A., Oxford; and Jacob I. Fajgenbaum, LL.B., University of Melbourne.
Corporation Law and Securities Regulation

By Stanley A. Kaplan
Professor of Law, The University of Chicago Law School

A talk before the Corporation Law Committee of the Chicago Bar Association, reprinted here from The Business Lawyer, Volume 18, Number 3, April, 1963, with the kind permission of the publication and the author.

The attention of this committee—and of many corporation lawyers—in the study or practice of what has been called "corporation law" has been focused almost exclusively upon state corporation statutes. The field of securities regulation is still regarded by many lawyers as a somewhat esoteric specialty concerned with the sale of new securities issues and regulation of stock exchange practices. The impact of securities regulation upon corporation law and practice and the effective taking-over, by securities regulations, of substantial areas that were previously considered the private domain of so-called "corporation law" has been too little recognized. A comparison of two modern casebooks, Baker & Cary on Corporations and Jennings and Marsh on Securities Regulation makes this point nicely. The Corporation casebook contains a substantial segment of material on proxy regulations of the Securities and Exchange Commission under the Securities Exchange Act, on the short-swing profit restrictions of Section 16(b) of the Securities Exchange Act and on fiduciary concepts and fraud prohibitions under rule 10b-5 issued pursuant to the Securities Exchange Act. The potential effect of rule 10b-5 in connection with fiduciary relations in corporate affairs (where a purchase or sale of securities is involved) and upon control over the internal affairs of corporations is indicated by the Commission's statement that "the Securities Acts may be said to have generated a wholly new and far reaching body of federal corporation law." The chairman of the Commission has also stated that "counsel must be aware of the rights and duties created by this jurisprudence and must appreciate its applicability to a two-man corporation as well as to A.T.&T. In all probability, this federal influence will expand rather than contract."

Thus the Corporation Law casebook recognizes the entry, in substantial significance and weight, of federal securities regulation into "corporation law." Correspondingly, in the Securities Regulation casebook, the preface states that material with respect to Section 16(b) of the Securities Exchange Act of 1934 relating to insiders' short-swing profits and with respect to proxy regulations under the same Act belongs in corporation law for consideration and therefore is not included in the Securities Regulation casebook. However, materials and cases related to rule 10b-5 are accorded a major place in the Securities Regulation casebook, just as they are in the Corporation Law casebook, thereby recognizing that this material is equally applicable to both fields. It is necessary for the corporation lawyer to follow the development of securities regulation insofar as it affects traditional areas of corporation law and to regard the rules, regulations, statutes and the administrative practices in the field of federal and state securities law as significant new sources of "corporation law."

In states such as Illinois, Delaware and New York, and states which have adopted the Model Business Corporation Act, the basic theory of the statutes, in effect, is to set up enabling provisions to permit a corporation to act with considerable freedom, to forbid only certain egregious improprieties and to require only certain specified shareholder protections. Certain additional protective devices and arrangements have been imposed by the courts through fiduciary analogies and their application to corporate relationships. The trend in these corporation statutes and the decisions thereunder has generally been toward greater corporate flexibility and the reduction of restrictions and restraints; whether this is good or bad can be debated, but the existence of this tendency must be admitted.

The state securities or "blue-sky" laws were originally designed to prevent sale of securities on the basis of inadequate or fraudulent information or under terms of sale which would make their sale inequitable. The language of many statutes is broad enough to allow the administrator of the state blue-sky laws to deny a permit to sell securities within the state either (a) if the securities, or their price, is not fair, just and equitable or (b) if the sale of the securities is inequitable or fraudulent, or would tend to work a fraud. As blue-sky commission activity has, with the passage of time, become more rooted in our economic and legal structure, state commissions have begun to prohibit or restrict the sale of securities upon the finding that the sale is fraudulent or tends to work a fraud, if any significant aspect of the corporation's internal relationships violate the commission's standards of propriety. For example, if option warrants are granted to underwriters or if certain kinds of options are granted to officers or employees of the issuer, the existence or granting of such options is regarded as constituting a fraud or tending to create a fraud, even though there may be full disclosure of such options together with adequate disclosure of the possible impact by way of dilution upon exercise. Certain kinds of mal-distribution of voting rights may be similarly treated. Thus as the restrictions and restraints under corporation...
statutes tend to be reduced, restrictions and restraints imposed through the state blue-sky laws are in the process of expanding.

Some commentators contend that the proper function of blue-sky laws is to supplement, amplify and repair the laxness of corporation laws. California has done so, in effect, and many other state blue-sky securities commissioners are beginning to veer toward the same philosophy, either by avowed action or by indirectness.

Primarily through the expansion and application of rule 10b-5, as indicated by the Cady Roberts & Co. decision by the Securities and Exchange Commission, and by such court decisions as the Kardon case, a new presence, namely the federal securities laws, has been brought into the field of corporation law and a whole new set of standards and restraints have been imposed. Similarly, the proxy requirements of Section 14 and the short-swing insider profit rules of Section 16(b) of the Securities Exchange Act of 1934 have intervened directly in corporate activities and have created a new set of rules and requirements.

In addition to witnessing the advent of important new sources of corporation law, several interesting cross-currents and divergent movements in the corporate field are also discernible. At the same time there has been a reduction of restrictions and restraints in the corporation statutes, there has been an expansion and extension of restrictions and restraints in corporate rulings outside the statutes themselves. This latter expansion is taking place

(1) through the growth of fiduciary concepts,

(i) partly through the S. E. C.’s enforcement of the acts administered by it,

(ii) partly through court decisions, and

(iii) partly through the adoption of S. E. C. and trust fiduciary standards by courts, lawyers and businessmen, through analogy and example, even where such S. E. C. or trust fiduciary standards are not mandatorily applicable, and

(2) through the expansion of activities by the state blue-sky commissioners in limiting offerings within their own states by imposing “corrective” requirements and by prohibiting actions permitted by the corporation acts under which the issuers are organized.

Corporation law is no longer only the law found in the corporation act to which a corporation is subject and the decisions thereunder; it must include the rules and regulations of the Securities and Exchange Commission, court decisions under the acts administered by the S. E. C. and also the rules and regulations of the state blue-sky commissioners of the various financial centers in which a corporation’s securities may now, or later, be presented for sale.

In the case of the small company whose securities will never be sold to the public, the “corrective” effect of blue-sky laws will never be felt; in the case of the small or medium sized company whose securities will be presented to the public in a small offering in a limited area, the extent of such “corrective” effect will depend on the views and attitudes of the securities commissioners in the particular area involved; in the case of a nation-wide offering this “corrective” effect will cumulate all restraints imposed by any states whose business importance makes it mandatory that registration or qualification of the securities issued be effected therein.

Several further observations occur from those just stated. First, the so-called “corrective” effect of blue-sky laws in supplementing corporation laws has no effect on the small, closed corporation whose securities will not be sold to the public; correspondingly it has its greatest remedial effect upon companies whose securities are going to be offered widely to the public. This is suggestive of another trend in corporation law, namely, the trend toward providing different standards and rules for closed corporations as contrasted with publicly held corporations. It could well be argued that such “corrective” controls as the blue-sky laws afford should properly be limited to companies whose stock is offered to the public but should not apply to the closed corporation, where the general public is not involved. Second, this so-called “corrective” effect is infrequent, haphazard and fortuitous, because it is imposed only when securities offerings are made, which is very infrequent in almost all companies. Third, this so-called “corrective” effect is inapplicable (even with respect to large companies whose securities are offered to the public) where the corporate action, which would have been forbidden had it been taken prior to public sale of the securities, is instead taken subsequent to the public sale and after the state blue-sky laws are no longer applicable. An example is a subsequent amendment to the charter to modify a preferred stock right.

(This assumes that the action in question was not planned


"... Another method which has not been given the recognition which it deserves is that of using the state securities acts or "blue-sky" laws as instruments of corporate regulation. The chief interest of the state in these matters is that of protecting its shareholders against unfair and inequitable share structure loaded in favor of promoters and managers. The time to check these arrangements is when the corporation proposes to issue or sell securities. Even a lax corporation statute may be strengthened by a strong "blue-sky" law, and a more regulatory corporation statute can be buttressed by a fair but effective state securities statute. In this connection, it is important to consider the various types of blue-sky laws and their strengths and deficiencies as instruments for providing a greater measure of protection for shareholders against potential management abuses."


before sale of the securities which would raise a problem of non-disclosure.) This kind of impropriety or unfairness, after sale of the securities, is controlled by California, which requires administrative approval of all such actions, but in other states it is left to the corporation act itself and to the courts. It would be possible for blue-sky commissioners in other states to deal with the possibility of such future unfairness by requiring, as a condition prerequisite to blue-sky registration, that the corporation shall commit itself to a series of stipulations as to future conduct. This of course emphasizes the fact that what is really being done is to impose a supplemental corporation act, by administrative fiat. Such action appears to me to raise the question of avoiding or undermining customary democratic legislative process. Many blue-sky commissioners are operating either under vague statutes which do not clearly give them all of the powers which they are actually exercising or which do not fix any meaningful standards for the exercise of such powers as are granted. Consequently extensive regulatory control is being exercised over the securities which may be offered to the public and over corporate practice by officials whose views cannot, as a practical matter, be reviewed by any court or appellate agency and who are undertaking to exercise powers which are either ambiguously granted to them or in some cases are arguably not conferred upon them at all. In the exercise of such powers they are in effect amplifying or expanding state corporation acts, by rules or by ad hoc determinations which are never considered by the legislative body which enacted such corporation acts. In many cases, such rulings remain unpublished or are not submitted to public scrutiny so that the building of a body of general doctrine and the ability of the Bar to comment upon such doctrine is impeded. When corporate practice is so controlled and so directed, by governmental action, it seems appropriate that such action should be done openly, publicly and in customary legislative fashion, with public hearings and open consideration.

If it is desired to authorize the supplementing of corporation acts, perhaps it would be best to do so directly, clearly and intentionally. If it is desired to distinguish between public and private corporations, perhaps it would be best to do so consciously and explicitly, in an appropriate manner, by official corporation act amendment. If it is desired to authorize the use of securities acts for the purpose of promulgating and enforcing regulation which is ancillary or supplementary to the corporation act, probably it would be best to discuss such matters in the legislature and, expressly and clearly, to enact provisions for such practices, after customary public legislative consideration. Although I personally look with a good deal of sympathy upon the adoption of such a system, I also personally feel that the integrity of the democratic process indicates that such a system should be authorized and adopted in the customary and formal fashion for decision of such matters, that is, by express legislative enactment after public scrutiny, hearing and legislative action. I don't think that such a system—or even a federal law of corporations—should just grow "like Topsy" or should develop and ramify from language in a statute which may not have been intentionally directed to such an end, though it is agreeably susceptible of such interpretation. The corporation statutes, which purport to provide for specific permissible and impermissible structures and procedures, have a primary and important purpose. In most instances, securities acts are directed at different practices and other purposes; where a securities act, such as the Securities Exchange Act of 1934, is expressly directed at such problems as insider short-swing trading prohibitions or proxy regulations it is quite explicit, direct and circumscribed. Unless it is quite clearly the public legislative decision to commit the promulgation of "corporation" rulings to the hands of a securities agency, state or federal, then there is much reason to doubt the wisdom of allowing such action to be taken in an indirect manner, disconnected from corporation statutes, however beneficent, wise or desirable the actual rulings may be.

I do not want, by these remarks, to imply any personal disagreement with the specific results of various securities rulings by either federal or state agencies. I usually find myself a strong supporter of such rulings. I do, however, want to call attention to the fact that the field of securities regulation is now providing important new sources of law in the area of traditional corporation law and also to raise the question of the legal and political desirability of the present manner of promulgating such new "corporation" law.

The Honorable Hugo M. Friend, JD'08, the Honorable Joseph Burke, presiding, and the Honorable James R. Bryant, JD'20, about to hear argument in the first of three cases heard in the Kirkland Courtroom in February.
The Appellate Court

The previous issue of the Record reported the visit to the Weymouth Kirkland Courtroom of the Circuit Court of Cook County, on which occasion the Honorable Jacob M. Braude, JD'20, presided over a jury trial from the regular calendar of his Court.

On February 18, Division II of the First District of the Illinois Appellate Court heard three cases from its regular calendar in the Kirkland Courtroom. The Court was composed of the Honorable Joseph Burke, presiding, the Honorable Hugo M. Friend, JD'08, and the Honorable James R. Bryant, JD'20. Professor Oaks' article on the Tutorial Program, page 1 of this issue of the Record, describes in detail the manner in which these court visits are related to the School's curriculum.

Justice Burke responds to Dean Neal's words of welcome at a Law School luncheon for Court and counsel following the Appellate Court session.

Louis G. Davidson, Esq., of the Illinois Bar, argues before the Illinois Appellate Court at the session of Court held at the Law School in February. On the Bench, left to right: The Honorable Hugo M. Friend, The Honorable Joseph Burke, presiding, and the Honorable James R. Bryant, JD'20.
Into Six Figures

The Tenth Annual Law School Fund Campaign, which was concluded last autumn, resulted in total contributions of $101,500, the first such campaign to reach the $100,000 figure. On January 30, 1964, a luncheon was held in Chicago to express the appreciation of the Alumni Association for the success of that Campaign, and to discuss the prospects and needs of the future. Specially honored guests were the alumni judges in metropolitan Chicago, of whom there are eighteen, and Charles W. Boand, JD'33 and J. L. Fox, JD'47, Chairman and Co-Chairman of the Tenth Campaign.

The meeting, presided over by Jerome S. Weiss, JD'30, President of the Law Alumni Association, heard Dean Phil C. Neal express his appreciation for the achievements of the past, outline the principal sources of the School's current great strength, and discuss some of the problems, financial and otherwise, which he foresees for the future. J. Gordon Henry, JD'41, General Chairman of the Eleventh Annual Campaign, announced the appointment of Arnold I. Shure, JD'29, as Special Gifts Chairman, and discussed the steps necessary for reaching this year's goal, which is $125,000.
Seminar in Business and Ethics

During the Winter Quarter, 1964, three seminar meetings were held in the furtherance of the program with respect to Law, Ethics and Business Practices which is conducted by the Law School with the assistance of the New World Foundation. Additional activities in connection with this program are planned for the Spring Quarter and will be announced in due course.

The seminar meetings during the Winter Quarter began with a half-hour statement by the leader of the seminar, followed by questioning by student participants, for periods which ranged from an hour and a half to two hours and a half. The Winter Quarter meetings were well attended and the questioning was lively and spirited. The speaker at the first session was Mr. Gustave L. Levy, a senior partner of the New York investment banking firm of Goldman, Sachs and Company. Mr. Levy is a director of numerous corporations, has had extensive experience in the securities industry, is a member of the board of governors of the New York Stock Exchange and was chairman of the Levy Committee which played a recent and important role in the reorganization of the American Stock Exchange and which issued the so-called “Levy report” concerning such reorganization. Mr. Levy discussed and answered questions regarding ethical problems in the investment banking business, particularly with respect to activities of specialists and to disciplinary proceedings by stock exchanges as reflected in the work of his committee. He also expressed his views on the subject of “self-regulation” against the background of the recommendations of the SEC’s Special Study of the Securities Markets and the legislation with respect thereto presently pending in the Congress of the United States.

The second meeting of the seminar was addressed by Mr. Milton A. Cohen of Chicago who was director of the SEC’s Special Study of the Securities Markets. Mr. Cohen was formerly head of the public utilities division of the Securities and Exchange Commission and has for more than a decade been a prominent practitioner in the private practice of law in Chicago. In 1961 he accepted the directorship of the Special Study and shepherded it through to its conclusion and to the promulgation of its widely discussed report. Mr. Cohen discussed the subject of self-regulation in the securities industry and responded to questions about many aspects of his report.

The third meeting was led by Mr. Milton V. Freeman of the firm of Arnold, Fortas & Porter of Washington, D.C. Mr. Freeman was formerly associate solicitor of the Securities and Exchange Commission until he joined his present firm in 1946. Mr. Freeman has had extensive practice and experience with various governmental agencies and has been involved in significant litigation in the fields of administrative law and of civil liberties. Mr. Freeman discussed the subject of “Governmental Publicity and Individual Rights,” and explored the possible conflicts between the use of publicity by administrative agencies with respect to pending or projected proceedings as it impinges upon the desirability of protecting the individual against injury by improper or improvident publicity, particularly in situations in which mere public announcement is in itself an actual punishment. He considered among other things the possibility of indemnification for injury thereby occasioned, qualifications upon the absolute privilege now granted to governmental officers from libel actions and the desirability of statutory restrictions or administrative restraints upon public pronouncements of accusation prior to the conclusion of hearings.

These discussion seminars have been extremely valuable and provocative and have given the student an opportunity for direct contact with and intensive questioning of prominent persons from outside the academic sphere and in many instances from nonlegal areas. These speakers have provided expert information and experiential data with respect to problems involving that difficult area where ethics and law touch, and where standards of ethics may be elevated by the law or where developing standards of ethics may be in the process of creating law.

The program is under the direction of Professor Stanley A. Kaplan, of the Law Faculty.
Dean Neal opens the Law School's luncheon for current and former members of the Faculty, and alumni who are law teachers, held in Los Angeles in December, during the Annual Meeting of the Association of American Law Schools.

And Now, Louvain

"Honoratus van Waeyenberg, Episcopus Gilbensiis, Episcopus auxiliarius Mechliniensis-Bruxellensis, Rector Magnificus Universitatis Catholicae in oppido Lovaniensi, Omnibus praesentes litteras inspecturis salutem . . . . . Nos, pro potestate Nobis facta et Facultate Iuris assentiens, eundem Eximum Virum Maximilianum Rheinstein, Doctorem Iuris honoris causa creavimus et reuntiavimus."

For the benefit of any laymen into whose hands this publication may fall, the words above are taken from the statement made by the Rector of the University of Louvain, in awarding to Max Rheinstein, Max Pam Professor of Comparative Law at the University of Chicago Law School, the honorary degree of Doctor of Law. The award, made on February 2, 1964, followed similar recognition from Stockholm and Basle. In presenting Professor Rheinstein for the degree, Professor Collin, of the Law Faculty of the University of Louvain, made the following statement:

Professor Max Rheinstein was born in 1899 at Bad Kreuznach (Germany). In 1924 he obtained a degree of doctor utriusque juris at the University of Munich where, in the same year, he was appointed Assistant. During that period he also helped Professor Ernst Rabel in the organization of the Kaiser Wilhelm (now the Max Planck) Institute of Foreign and International Private Law; in that famous Institute's series, he published his first important treatise: an exhaustive and outstanding comparison between the Anglo-American and the German laws on Contracts.

In 1931 he was appointed Privat-Dozent at the University of Berlin. The political circumstances prevailing in Germany before the war, forced Professor Rheinstein to emigrate to the United States in 1933 where, thanks to his extensive knowledge and his remarkable capacity to adapt himself, he became familiar with the Anglo-American legal system in an incredibly short period of time. In 1935 he was already appointed Associate Professor and thereafter Professor at one of the most famous law schools in the United States: the Law School of the University of Chicago.

As a doctor utriusque juris, and being acquainted with the major continental, as well as with the Anglo-American legal systems, Professor Rheinstein is one of those exceptional lawyers whose knowledge is not bounded by national or even continental frontiers. In the fields which have his preference, such as Family law, the law of Decedents' Estates, International Private Law and Jurisprudence, he uses the Comparative Law method in a remarkable way.

In each of the said fields and also in Sociology, he published numerous treaties and articles which made him one of the leading scholars in the United States and abroad. His educational method is also marked by his breadth of vision: the European logical and doctrinal approach combined with Anglo-American pragmatism make his teaching systematic, exhaustive but, nevertheless, concrete and realistic. This explains why Professor Rheinstein has been invited several times as a visiting professor, by such famous Institutions as the Universities of Puerto Rico, Wisconsin, Michigan, Louisiana State, Frankfurt, Cambridge and Tokio and the International Faculties of Luxemburg and Strasbourg.

He is doctor honoris causa of the Universities of Stockholm and Basle and Honorary Professor of the University of Freiburg (Germany). He is a member of the International Academy of Comparative Law and of numerous American and European Law Associations.

The Faculty of Law of our Alma Mater would be very honoured if his Excellency Monsignor the Rector Magnificus would agree to appoint Professor Dr. Max Rheinstein as Doctor Honoris Causa of the Faculty of Law.

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