Fall 9-1-1967

Law School Record, vol. 15, no. 2 (Autumn 1967)

Law School Record Editors

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On Statutory Obsolescence

By Grant Gilmore
Harry A. Bigelow Professor of Law
The University of Chicago Law School

The paper which follows was the John R. Coen Lecture, delivered at the University of Colorado School of Law on April 27, 1967. It was first published in 39 University of Colorado Law Review 461, and is reprinted here with the kind permission of that publication and of the author.

With the enactment of the Uniform Commercial Code in all states except Louisiana, the problem of how we are going to live with the Code, so-called, over the next half century becomes worth thinking about. To help us with our thinking we have, fortunately, the accumulated experience of living with the Code’s predecessors during the last half century.

It is true that the conditions of the first general codification of commercial law, which followed 1900, were by no means the same as the conditions of the second general codification—that is, the Code. In the intervening half century our legal system had suffered, or at all events undergone, fundamental change. We had traveled a considerable distance along the road which has led us from what was conceived as essentially a common law system, somewhat eroded by statutes, to what we have come to think of as essentially a statutory system in which the few remaining common law enclaves are no doubt destined to be gradually absorbed. Our attitudes toward statutes, as well as our ideas about drafting style, had notably changed. The 1950 codification was, then, a quite different animal from the 1900 codification. Admitting that, there is still profit to be derived from a consideration of the adventures and misadventures, most of them unexpected, which our first batch of codifying statutes experienced during their half-century on, as we say, the books.

A preliminary problem is why what we call “commercial law” was the subject matter of the first large scale experiment in codification in this country, as well

(Continued on page 29)

Significant Individual Participation:
The New Challenge in American Government

By The Honorable Elliot L. Richardson
Attorney General of Massachusetts

The C. R. Musser Lecture, delivered at The University of Chicago Law School on April 26, 1967.

Only yesterday, well within the memories of those of us fortunate enough to have achieved the congenial plateau of middle age, this nation was engaged in a struggle to meet the most basic demands of the general welfare. The stubborn maladies of prolonged depression and massive unemployment had called forth a bewildering variety of governmental remedies, some restorative, some merely palliative, some ultimately to be prophylactic. In part, the struggle involved the resistance of substantial portions of the body politic to accepting any medicine at all. In due course, at any rate, the depression ended and war brought a return to full employment. And gradually over the next two decades there developed a broad-based acceptance of the social measures borrowed and improvised during the depression years. Toward the end of this period some among us, it is true, still saw such programs

(Continued on page 37)
Harry A. Bigelow

By Sheldon Tefft
James Parker Hall Professor of Law
The University of Chicago Law School

The Bigelow Professorship is named for Harry Augustus Bigelow, whose generous bequest has made it possible for the Board of Trustees to add another much-needed professorship to the Faculty of the Law School. Mr. Bigelow was the youngest of that small group of lawyers that William Rainey Harper brought to Chicago early in the twentieth century to establish its Law School. The School was only one year old when Mr. Bigelow joined the Faculty. He was then under thirty years of age and had been out of law school slightly more than four years. His experience as a teacher consisted of one semester as a part-time instructor in criminal law.

A native of Norwood, Massachusetts, Mr. Bigelow was a graduate of Harvard College, Class of 1896, where he had been elected to Phi Beta Kappa, and of the Harvard Law School, Class of 1899, where he had been an editor of the Harvard Law Review. After a brief period as a law clerk in a conveyancing office in Boston and as a part-time instructor in Criminal Law at Harvard, he had removed to Honolulu where he spent three very active years as a junior member of the Bar of the Hawaiian Islands. In January, 1904, Acting Dean Joseph H. Beale, Jr., who was then on leave from Harvard to help organize the new law school in the west, persuaded Mr. Bigelow to abandon the practice and join the Faculty at Chicago. There he spent the remainder of his life and for nearly half a century was an active member of the Law School Faculty.

The combination of an extremely acute analytical mind, unusual facility of lucid, succinct, lively presentation and a wide range of interests made Mr. Bigelow exceptionally well-qualified to teach. Within a short time he achieved and merited the reputation of being a most brilliant and gifted teacher. To sit in his classes was an experience highly prized by the students who developed a deep affection for him in spite of the terrifying intellectual chastisement which he frequently meted to those whose recitations were confused or slipshod. His reputation as a teacher and scholar was enhanced by the publication of his casebooks on The Law of Personal Property and The Law of Rights in Land. These soon became standard classroom materials and extended his influence to include a large proportion of the students in American law schools.

Though Mr. Bigelow was a superb master of the case method of instruction, he early recognized that in some areas it was so cumbersome and time-consuming as to be ineffective. Furthermore, his experience indicated that investigations of legal questions that were limited to the materials in the law reports were often sterile. At a

Gilmore Appointed to Bigelow Chair

The School takes great pleasure in announcing that the President of the University has designated Professor Grant Gilmore as the first Harry A. Bigelow Professor of Law.

Born in Boston in 1910, Grant Gilmore received an A.B. in 1931, and a Ph.D. in Romance Languages in 1936, both from Yale University. Following three years as a teacher of French at Yale, he entered the Yale Law School, and was awarded the LL.B. in 1942. He practiced law in New York City, and served in the Office of the General Counsel of the Navy Department, before returning to New Haven to begin his career in law teaching and legal scholarship.

Professor Gilmore taught at Yale for nineteen years, before becoming a member of the Faculty of the University of Chicago Law School in 1965. During that period he was a Visiting Professor at Berkeley, Chicago, Columbia and Harvard, and at the Salzburg Seminar in American Studies.

In 1966, as previously noted in the Record, Professor Gilmore received the James Barr Ames Prize for his two volume work, Security Interests in Personal Property. He is also the author, with Charles Black, of The Law of Admiralty.

We call to the reader's attention Professor Sheldon Tefft's admirable memoir of Dean Bigelow, which appears nearby.

time when it was fashionable to believe that textbooks in the hands of students were pernicious, he published his Introduction to the Law of Real Property, a brief historical introduction that has proved to be an invaluable tool for the student of the modern land law.

Mr. Bigelow realized that an effective understanding of law frequently requires the study of subjects that, traditionally, have been excluded from law schools. Under his leadership the curriculum at Chicago was expanded to include subjects such as accounting, economics and psychology. He also encouraged the faculty to pioneer in the development of a program of tutorial instruction that has greatly enriched the training that the school affords its students and has been widely copied by American law schools.

When the American Law Institute was organized, Mr. Bigelow rendered distinguished assistance with the preparation of the Restatement of the Conflict of Laws and the Restatement of the Law of Property of which he was, originally, the Reporter. After the untimely death of James Parker Hall in 1928, the University selected Mr. Bigelow as second Dean of the Law School. He was also designated as the first John P. Wilson Professor.

In 1933 Mr. Bigelow was appointed Trustee in Bank-
Two Distinguished Lectureships

The Henry Simons Lecture was established in honor of the late Henry Simons, who was the distinguished predecessor of Aaron Director and Ronald Coase as Professor of Economics in the Law School. As such, the lectureship is both a personal tribute to an eminent man, and a symbol of the School's continuing, deep-seated interest in the interrelationship of economics and the law. In May, 1967, the Henry Simons Lecture was delivered by Milton Friedman, Paul Snowden Russell Distinguished Service Professor of Economics, The University of Chicago. Professor Friedman's lecture, on "The Monetary Theory and Policy of Henry Simons," appears in The Journal of Law and Economics, Volume X, Page 1, (1967).

If law and economics are sister disciplines, the relationship of law and government may be closer to a long-standing marriage. It was in recognition of the continuing concern of the law with problems of government that the C. R. Musser lecture was established by the General Service Foundation, in honor of a distinguished citizen with a deep interest in this range of problems. The Lectureship is reserved to one who holds, or has held, high-ranking position in public service. In the academic year just past, the Musser Lecture was given by the Honorable Elliot L. Richardson, currently Attorney General, and formerly Lieutenant Governor of Massachusetts. Attorney General Richardson's Musser Lecture appears elsewhere in this issue of the Record.
Forthcoming Conferences

For more than fifteen years, the Law School has sponsored a series of Conferences on areas of special interest in the law. Two such Conferences are scheduled for the Winter Quarter, 1968.

The first of these conferences is not really a Law School activity at all. Like the Conference on Consumer Credit and the Poor, held in 1965-66, and the Conference on the Landlord-Tenant Relationship, held last year, this Conference on Public Employees will be planned and run entirely by students of the Law School. It will focus on, but not be confined to, problems of unionization of public employees. A detailed program will be available in the near future. The Conference will be held on February 2 and 3, 1968.

A Conference tentatively titled "Privacy, Policy and the Law" will take place on February 23 and 24, 1968. Speakers and topics will include:

"A Sociological View of Privacy." EDWARD SHILS, Professor of Sociology and of Social Thought, The University of Chicago; Fellow of Kings College, Cambridge University.

"Constitutional Dimensions of Privacy in the United States." LOUIS HENKIN, Hamilton Fish Professor of International Law and Diplomacy, Columbia University.

"A Legal Map for Privacy." MARC A. FRANKLIN, Professor of Law, Stanford University.

"The Computer as a Threat to Privacy." ARTHUR MILLER, Professor of Law, University of Michigan.

"Technology and Privacy." ALAN F. WESTIN, Professor of Public Law and Government, Columbia University; Author of Privacy and Freedom (1967).

"Privacy and the Welfare Recipient." ROBERT J. LEVY, Professor of Law, University of Minnesota.

"Privacy and Taxation." MITCHELL ROGOVIN, Assistant Attorney General of the United States, Tax Division.


"Privacy and the Census." PHILIP M. HAUSER, Professor of Sociology, The University of Chicago; formerly Acting Director, U.S. Census Bureau.

"Privacy and the White House." PIERRE SALINGER, Vice President, Continental Airlines; formerly Press Secretary to the President of the United States.

"A Policy for Privacy." A Panel Discussion by BRUNO BETTELHEIM, Stella M. Rowley Professor of Education, Professor of Psychology and Psychiatry, and Principal of the Sonia Shankman Orthogenic School, The University of Chicago; WALTER J. BLUM, Professor of Law, The University of Chicago; GERHARD CASPER, Associate Professor of Law, The University of Chicago; HARRY KALVEN, Jr., Professor of Law, The University of Chicago; and Professor WESTIN.

It should be noted that this program is still somewhat tentative, and minor changes may therefore occur.

Levi President-Elect

It is most unlikely that any reader of this publication is still unaware of the selection of Edward H. Levi as President-Elect of The University of Chicago. The Record wishes, nevertheless, to express the great pleasure of Law Faculty and students in this selection and to extend our congratulations to Mr. Levi and to the University's Board of Trustees.

A native Hyde Parker, Mr. Levi received his Ph.B. in 1932, and J.D. in 1935, both from The University of Chicago. He was later a Sterling Fellow at Yale, where he earned the J.S.D. in 1938. Eleven years later, the University of Michigan awarded him an honorary LL.D.

He joined the Law Faculty in 1936, and is still an active member, having taught a Seminar in Jurisprudence in the academic year 1966-67. He served as Dean of the Law School from 1950 until 1962, when he became Provost of the University. During a substantial portion of his tenure as Provost, Mr. Levi was also Acting Dean of the College, and as such, presided over a basic reorganization of its structure and curriculum.

Mr. Levi has served in a wide variety of governmental posts, including Special Assistant to the U.S. Attorney General; First Assistant, War Division, Department of Justice; First Assistant, Antitrust Division, Department of Justice; and Counsel, Subcommittee on Monopoly Power of the Judiciary Committee of the House. He was also counsel to the Federation of Atomic Scientists during the drafting of the U.S. Atomic Energy Act.

He has served as a member of the Board of the Social Science Research Council, as a member of the Ford Foundation-sponsored committee to examine the future role of the University of Pittsburgh and as a member of the Citizens Commission on Graduate Medical Education, at the invitation of the American Medical Association. He is currently a member of the Board of Directors of the International Legal Center, a trustee of the Institute for Psychoanalysis and a fellow of the American Bar Foundation and of the American Academy of Arts and Sciences. In addition, he is a member of the Council of the American Law Institute and chairman of the Council on Education for Professional Responsibility.

His published works include An Introduction to Legal Reasoning (1948), Four Talks on Legal Education (1952), and numerous articles and monographs.

Mr. Levi will take office as President of The University in October, 1968, upon the retirement of the incumbent, George Wells Beadle. Amongst all the adulatory statements elicited by his election, two, of one sentence each, seem to this writer most appropriate. Lawrence A. Kimp­ton, Chancellor of the University from 1951 until 1960, said: "Mr. Levi is the very best possible choice for the new President of the University." An unidentified Faculty colleague described him as "the most extraordinary man on this most extraordinary campus."
Honoring Two Distinguished Friends

As the reader may recall, the imminent retirement of the Honorable Tom C. Clark, Associate Justice of the United States Supreme Court, and the appointment of his son, Ramsey Clark, JD'51, to be Attorney General of the United States, were announced simultaneously in Washington last spring. Mr. Justice Clark has for many years been one of the most active and valuable members of the Law School Visiting Committee. He has also served as Chairman of the distinguished committee which selects the recipients of the School's Mechem Scholarships. The Attorney General has always been close to, and greatly interested in, his Law School, having served several terms on the Board of Directors of the Law Alumni Association.

As an indication of the respect and affection which the School and its alumni feel for these gentlemen, the Alumni Club of Metropolitan Washington held a reception in their honor last May. Almost two hundred people, including both alumni and non-alumni friends and admirers of the Clarks, attended. George Miron, JD'56, President of the Washington Club, did a splendid job with the arrangements.

Of the Constitution and Professor Kurland

Professor Philip B. Kurland has been appointed Chief Consultant to the new Subcommittee on Separation of Powers of the United States Senate. In announcing the appointment, Senator Sam J. Ervin, Jr., Subcommittee Chairman, said: "Professor Kurland is one of the greatest authorities on the United States Constitution that America has ever known. He is not only a scholar in the traditional sense of knowing court decisions and their trends. He is also a brilliant legal technician, an eloquent writer and one of those rare men who know the language, the intent, and the history of the Constitution. His appointment ensures a responsible and productive investigation."

Professor Kurland has been a member of the Law Faculty for fourteen years. He is the editor of The Supreme Court Review, and author or editor of Jurisdiction of the Supreme Court of the United States (1951); Mr. Justice (1956; 2d ed. 1964); Religion and the Law: Of Church and State and the Supreme Court (1962); Frankfurter, Of Law and Life and Other Things that Matter (1965); The Great Charter (1965; 2d ed. 1966); and The Supreme Court and the Constitution (1965).
The Uses of Sociology in the Professions: The Law

By Hans Zeisel
Professor of Law and Sociology
The University of Chicago Law School

The paper which follows is a chapter from The Uses of Sociology, edited by Paul F. Lazarsfeld, William H. Sewall, and Harold L. Wilensky, which is expected to appear at about the same time as this issue of the Record. It is copyrighted, 1967, by Basic Books, Inc., by whose kind permission Professor Zeisel's chapter appears here.

The law, from one view, is a continuous process of synthesizing facts and rules, with new facts at times engendering new rules. The process takes place wherever law is made: in the legislatures, in the administrative agencies, and in the courts.

The facts reach these lawmakers in a variety of forms. The primary source is still the witness who reports on his own, private experience. Occasionally, however, facts are presented as cumulative knowledge, systematically gathered through surveys and most recently also through experiments, methods that are part of the tool chest of the social sciences.

The survey as a source of facts for the law predates modern social science by centuries and constitutes in fact one of its major historical roots. But it is only in recent years that the law has begun to use research operations conducted with technical rigor. The uses the law has made of such systematic investigations differ widely, from simple citation in a brief or opinion to being the decisive ground for a judgment or a legal reform. The great majority of the studies that come before the law raise only private issues, assisting courts and agencies in individual litigation. They may be surveys of the quality of contracted goods, of the geographic range from which a drive-in theater draws its clientele, of the commercial effects of a merger, or of the socioeconomic structure of the jurors in a certain community. But although such studies are at times gems of technical perfection and ingenuity, they will not be discussed here. Their variety is too great, and they seldom reach the higher courts, hence they seldom affect legal rule making; and they have been sufficiently discussed elsewhere.

The studies we shall discuss here deal with more general problems: with substantive rules of law, with procedural rules, or with institutions that are a mixture of both. Some of these studies are broad surveys of a legal institution without more specific focus; they enter the stream of legal resolution only slowly, as but one of the many sources that shape the law. Other studies, in contrast, are designed to illuminate if not to resolve one narrow, crucial issue; these investigations—sometimes they are controlled experiments—are bound to affect the

Annual Alumni Day

For the past three years, the University of Chicago Law School Alumni Association has sponsored an annual Alumni Day. Held at the Law School, the Alumni Day is designed to insure that the School's graduates are kept fully informed of its progress and problems, and to bring them into close personal contact with Faculty and students. Alumni attending include the officers and directors of the Alumni Association, and representatives of local and regional alumni groups throughout the country.

The Third Annual Alumni Day was scheduled for May 5, 1967, in order to coincide with the Special Convocation in Celebration of the 75th Anniversary of the University. Visiting alumni attended the Convocation in the morning, then lunched with the Dean and with law students.

In the afternoon, they heard a discussion of recent Supreme Court cases by Professors Harry Kalven, Jr., and Philip B. Kurland. This was followed by a report on special educational programs outside the formal academic curriculum, by Professor Dallin H. Oaks. The quarterly Board Meeting then took place.

The day was concluded with cocktails and dinner with the Law Faculty, and attendance at the Third Henry Simons Lecture.

At the same gathering, Professor Stanley A. Kaplan, JD'33, Mildred J. Giese, of Chicago, Daniel Fogel, President of the Los Angeles Law Alumni, and Milton Shadur, of Chicago, all three members of the Class of 1949.

Alumni, students and Faculty met in Burton Lounge prior to lunch on Alumni Day. Visible above are, left to right, Professor Harry Kalven, Jr., JD'38, Richard H. Levin, JD'37, Mrs. Roberta Ramo, JD'67, and David L. James, JD'60, representing the New York Law Alumni.
The Alumni and the School

The program of Law Alumni meetings throughout the country continues to be vigorous and varied. In June, Professor Dallin H. Oaks, JD'57, spoke at an alumni luncheon held in connection with the Annual Meeting of the Illinois State Bar Association, in Peoria; Assistant Dean James M. Ratcliffe, JD'50, presided.

Professor Allison Dunham was the principal speaker at the University of Chicago Law School Alumni Luncheon held during the Annual Meeting of the American Bar Association in Honolulu in August, with Dean Ratcliffe again presiding.

In September, Harry A. Bigelow Professor Grant Gilmore and Dean Ratcliffe rode circuit on the Pacific Coast. Professor Gilmore was the principal speaker at a meeting in Monterey, California, arranged by John N. Shephard, JD'41, during the Annual Meeting of the State Bar of California. Later in the week, Professor Gilmore was the guest of honor at a breakfast held as part of the Annual Meeting of the Oregon State Bar Association, in Seaside, Oregon. Leon Gabinet, JD'54, President of the Portland Alumni Club, and John C. McLean, JD'51, arranged for this colorful event.

It was followed by a luncheon gathering of the School’s Seattle alumni, organized by Gene B. Brandzel, JD'61, President of the Puget Sound Alumni Club.

By the time this is printed, Professor Philip B. Kurland will have appeared as the featured speaker at a luncheon meeting of the Alumni Club of Metropolitan Washington, D.C., under the auspices of George Miron, JD'56, President, and Richard B. Berryman, JD'57, Vice President.

Plans are now being made for the Annual Meeting of the Alumni Club of Metropolitan New York in late January, for a San Francisco meeting at about the same time, for Los Angeles later in the Winter Quarter, and for approximately five other such gatherings in late winter and early spring.

A partial view of the Alumni Luncheon held during the Annual Meeting of the American Bar Association in Honolulu last August. The luncheon speaker was Professor Allison Dunham.

Moore W. Peregrine greets Mrs. Albert L. Hopkins, while Mrs. Phil C. Neal and Mr. Hopkins, JD’08 renew an old acquaintance.

Members of the Class of 1951 gather at the Reception before the Annual Alumni Dinner. Left to right: Abner J. Mikva, Jack M. Siegel, the Honorable Ramsey Clark, Paul A. Rosenblum, Charles A. Lippitz, David M. Sloan, and Alfred M. Palfi.

The Visiting Committee

The Annual Meeting of the Law School Visiting Committee was held on April 7, 1967. The Committee devoted the morning to a discussion with Dean Neal of recent developments in the School and of problems with which it is currently faced. A large group of law students then lunched with the Committee in Burton Dining Hall.

The afternoon was devoted to a discussion of the Law School's curriculum, led by Professors Bernard Meltzer, Edmund Kitch, Kenneth Dam and Gerhard Casper. In late afternoon, the Committee met in executive session, with the Honorable Walter V. Schaefer, JD '28, Committee Chairman, presiding.

The Annual Meeting was concluded with cocktails and dinner for the Committee and the Faculty, followed by a talk by Ronald H. Coase, Professor of Economics in the Law School, on the basic assumptions which distinguish classical economists from those of other views.
Alumni Reunions Flourish

The number and size of class reunions among Law School alumni have shown a steady and gratifying increase. In June, the Class of 1927 held its Fortieth Anniversary Reunion Dinner at the Ambassador West Hotel. Arrangements were handled by Miss Rhea Brenwasser, Meyer J. Myer, and M. A. Rosenthal, who presided. In addition to Dean Phil C. Neal, who spoke briefly following the dinner, guests of the Class included Mrs. Neal, Professor Emeritus and Mrs. George G. Bogert, and Assistant Dean James M. Ratcliffe. The program also featured several songs by Morton John Barnard and varied comments, ribald and reverent, from a number of members of the Class.

The Thirty-Fifth Anniversary Reunion of the Class of 1932 took place in September, beginning with a tour of the Laird Bell Law Quadrangle and continuing with dinner at the Center for Continuing Education. C. Bouton McDougal was Chairman of a large and active Reunion Committee. Class President Leonard P. Aries presided at the dinner, which was arranged by Herbert B. Fried and Frank Greenberg. Mortimer J. Adler and Dean Neal were the principal speakers. Other Faculty guests of the Class included Mrs. Adler and Mrs. Neal, Professor Emeritus and Mrs. George G. Bogert, Professor and Mrs. Sheldon Tefft, former Dean and Mrs. Wilber Katz, former Professor and Mrs. William Eagleton, and Assistant Dean Ratcliffe.

In June, the Class of 1942 held its Silver Anniversary Reunion Dinner at the Sheraton-Chicago Hotel. The Reunion Committee included Herbert Lesser, Chairman, Lorenz Koerber, Gerald Scott Moro and Joseph Stein. Professor Sheldon Tefft was the special guest of the Class.

Ronald I. Aronberg, C. Curtis Everett and Richard Hansen made up the Committee for the Tenth Anniversary Reunion of the Class of 1957. As with the Class of 1932, the evening began with a tour of the Law Buildings; the guide in this case was Professor Dallin H. Oaks, who is a member of the Class. Cocktails and dinner at the Center for Continuing Education followed. Professor Kenneth W. Dam, like Professor Oaks, a member of the Class, presided.
At the speaker's table for the Class of 1927 Reunion Dinner were, left to right, Mrs. George G. Bogert, Maurice A. Rosenthal, '27, Mrs. Phil C. Neal and Dean Neal.

Professor George Bogert, front row center, joins twenty-seven members of the Class of 1927 at the 40th Reunion of that Class last June.
The Annual Dinner

The Honorable Ramsey Clark, JD'51, Attorney General of the United States, was the featured speaker at the Annual Dinner of the Law Alumni Association on June 1. Dean Neal also spoke briefly. Peter N. Todhunter, JD'37, President of the Association, presided. J. L. Fox, JD'47, was Chairman of the Dinner Committee. Officers and Directors of the Association, including those elected at the Annual Meeting, are as follows:

PETER N. TODHUNTER '37
President

CHARLES W. BOAND '33
Vice President
WILLIAM G. BURNS '31
Vice President
J. GORDON HENRY '41
Vice President

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EDWIN P. WILEY '52
Milwaukee

President Todhunter addresses the Annual Dinner of the Law Alumni Association.
Judicial Activism, Nonjudicial Passivism, and Law Reform

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

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

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

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

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

(Continued on page 18)
Graduates and Honors

Each year, at the time of the Spring Convocation, the Law School holds a luncheon in honor of its graduating students, their relatives and friends. In June, 1967, the customary toast to the graduates was offered by Norval Morris, Julius Kreeger Professor of Law and Criminology. The response on behalf of the graduating class came from Don S. Samuelson, President of the Class of 1967. Dean Neal announced the award of honors and prizes to the students listed below. (Thinking it might be of interest to the reader, we have added the first job affiliation of each student concerned.)

The Joseph Henry Beale Prize, for the best work in the first-year tutorial program—John R. Labovitz, Class of 1969

The Karl Llewellyn Cup, for excellence in brief writing and oral argument in the second-year moot court competition—William F. Jacobs, Jr., Class of 1968, and Fred L. Morrison (Assistant Professor of Law, University of Iowa)

The Wall Street Journal Award, for excellence in the field of corporation law—Franklin E. Zimring (Assistant Professor of Law, The University of Chicago Law School)

The Lawyers Title Award, for excellence in the field of real property—John T. Gaubatz, (Dawson, Nagle, Sherman and Howard; Denver)

The United States Law Week Award, to the student making the most satisfactory scholastic progress in his final year in the Law School—James N. Williams, Jr. (Wyatt, Grattan and Sloss; Louisville)

The Robert H. Jackson Prize, for the best paper in the Seminar on Constitutional Law—Joseph I. Bentley, Class of 1968

The Edwin F. Mandel Award, for the outstanding contribution to the work of the Legal Aid program—Donald G. Alexander (National League of Cities; Washington)

The Hinton Moot Court Competition Awards, to the winners of, and the team finishing second in, the third-year moot court competition—First, John R. Beard (Law Offices of D. J. Price, Anchorage, Alaska), and Thomas A. Gottschalk (JAG Corps, U.S. Army); Second, Frank M. Cook (Clerk to Hon. W. E. Steckler, U.S.D.C., Indianapolis) and Don S. Samuelson (Kirkland, Ellis, Hodson, Chaffetz and Masters; Chicago)

The Order of the Coif, members of which are elected each year from the ten per cent of the graduating class ranking highest in scholarship—

Charles D. Anderson (Office of the General Counsel of the Air Force)

Vincent A. Blasi (Assistant Professor of Law, University of Texas)

Edwin S. Brown (Chapman and Cutler; Chicago)

Charles R. Bush (Graduate Student in History, University of California; Berkeley)

Franklin E. Zimring, JD'67, now Assistant Professor of Law at the Law School, was, by virtue of ranking first in the graduating class, the principal speaker at the Graduate's Luncheon.

Gene E. Dye (Parker School, Columbia University)

Howard C. Eglit (Teaching Fellow, University of Michigan Law School)

George P. Fellemen (Paul, Weiss, Rifkind, Wharton and Garrison; New York)

John T. Gaubatz (Dawson, Nagle, Sherman and Howard; Denver)

Alvin J. Geske (Jackson, Walker, Winstead, Cantwell and Miller; Dallas)

Charles C. Marson (Cooley, Crowley, Gaither, Godward, Castro and Huddleson; San Francisco)

Gary H. Palm (Schiff, Hardin, Waite, Doroschel and Britton)

John Henry Schlegl (Teaching Fellow, Stanford University Law School)

Rebecca J. Schneiderman

Franklin E. Zimring (Assistant Professor, The University of Chicago Law School)

The degree of Doctor of Law, cum laude, is awarded to those students who complete their work for the J.D. degree with a weighted grade average of 78 or more—Charles D. Anderson, Vincent A. Blasi, Gene E. Dye, Alvin J. Geske, Fred L. Morrison, Geoffrey Palmer (a Commonwealth Fellow) and Franklin E. Zimring.
Norval Morris, Julius Kreeger Professor of Law and Criminology, offers the traditional toast, on behalf of the Faculty, to the graduating seniors.

Don S. Samuelson, President of the Class of 1967, responds with a toast to the Faculty.

At the luncheon for graduating students, John O. Levinson, ’40, and his daughter Elinor, JD’67, are greeted by Sheldon Tefft, James Parker Hall Professor of Law.

The Hinton Moot Court Committee for 1966-67 was composed of Peter I. Ostroff, John C. Hoyle, Philip N. Hablutzel, John T. Gaubatz, Chairman, John R. Beard, Frank M. Cook, Geoffrey A. Braun, Robert M. Levin and Jeffrey H. Haas.

Among the graduate students enrolled in the School during the academic year 1966-67 were, left to right, back row: Bernd Ruster, Germany; Kenneth A. Hinnegan, U.S.A.; Mehmet R. Uluc, Turkey; Junjiro J. Tsubota, Japan; Otto Praschma, Germany; Djurica O. Krsic, Yugoslavia; and Robert J. Coleman, Great Britain; middle row: Yean Hi Lee, Korea; Claus D. M. McInhardi, Germany; Hans P. Lundgaard, Norway; Frans F. V. H. Van Hoeck, Belgium; Yves de Richemont, France; and Viktor Mueller, Switzerland; front row: Wolfgang O. Ohndorf, Germany; Philippe Dupre, France; David Libai, Israel; Nitza S. Libai, Israel; Marie-Dominique Dupre, France; Radha K. Pillai, India; and Gerhard Fischer, Germany.
Among the members of the Board of the Law Student Association in 1966-67 were, left to right, front row: Philip W. Getts, A.B., Princeton University; Heathcote W. Wales, A.B., University of North Carolina; Jane R. Levine, A.B., Duke University; Peter J. Levin, A.B., Brown University; and Don S. Samuelson, A.B., Dartmouth College, President. Back row: Edward M. Zachary, A.B., Colgate University; Joel H. Kaplan, A.B., Cornell University; Phillip M. Steans, A.B., Ripon College; C. Nicholas Vogel, A.B., Lawrence University; Morris G. Dyner, A.B., The University of Chicago; Joel M. Bernstein, A.B., University of Michigan; Lee F. Benton, A.B., Oberlin College; and Charles E. Murphy, S.B., Tulane University.


Rockefeller Memorial Chapel, as Convocation ceremonies were about to begin.

The Unexamined Course Is Not Worth Teaching

The first-year Tutorial Program, a three-quarter sequence of work in legal writing and research, was one of the most important innovations in legal education when it was introduced by the University of Chicago Law School some thirty years ago.

Feeling that innovation is too often allowed to harden into dogma, the Faculty has decided to reorganize the Tutorial Program in order to relate it directly to one of the substantive courses in the first-year curriculum. The 1967-68 Announcements describe the results as follows: "308. TUTORIAL WORK. Each first-year student is assigned to a tutor for individual and small-group work in legal analysis, research, and exposition, including an exercise in brief-writing and oral argument. During the Autumn and Winter Quarters the work will be integrated with the course in Contracts (see description of that course.)

302. CONTRACTS... the course will be linked with the first-year Tutorial Program. Weekly lectures by the instructor (Professor Grant Gilmore) will be followed by discussion classes which will be conducted by the Bigelow
Fellows. For these discussion classes, the first-year class will be divided into ten groups of approximately fifteen students each. Problems introduced in the lectures and discussions will be assigned as memoranda of law to be prepared in connection with the first-year writing program."

The Bigelow Teaching Fellows and Instructors who will be working with Professors Gilmore and David Currie in 1967-68 are:

**Jon L. Jacobson**, A.B., 1961, J.D., 1963, both from The University of Iowa. Mr. Jacobson was Editor-in-Chief of the *Iowa Law Review*. Since his graduation, he has been associated with the San Francisco firm of Bronson, Bronson and McKinnon.

**Joseph V. Karaganis**, A.B., 1963, Michigan State University, J.D., 1966, The University of Chicago. During the past year, Mr. Karaganis has served as law clerk to the Honorable Hubert Will, J.D.'77, Judge of the U.S. District Court for the Northern District of Illinois.

**Neil K. Komesar** received his A.B. in 1963, M.A. in 1964, and J.D. in 1967, all from The University of Chicago. He was a Managing Editor of *The University of Chicago Law Review*.

**Robin Potts**, of Newcastle-under-Lyme, Staffordshire, England, received his B.A. in 1966 and B.C.L. in 1967, both from Oxford University, where he was at Magdalen College.

**Christopher J. O'H. Tobin**, of Wellington, New Zealand, is a part-time lecturer in commercial law at the University of Wellington, and a member of the Wellington law firm of Chapman, Tripp and Company. Mr. Tobin was awarded the LL.M. by Canterbury College in 1961, and received the B.C.L. from Oxford in 1963.

"... Power to Lay and Collect Taxes on Incomes ..."

The Annual Federal Tax Conference of the University of Chicago Law School has become as inevitable as its subject matter. This October, for the twentieth consecutive year, a distinguished group of speakers spent nearly three days addressing themselves to a variety of the most interesting, complex and pervasive problems in the field of Federal taxation. The Planning Committee for this year's Conference was chaired by Middleton Miller, Esq., of the Chicago firm of Sidley and Austin. Professor Walter J. Blum and Assistant Dean James M. Ratcliffe were the School's representatives on the Committee. The program was as follows:

"Effect of State Court Decisions on Federal Tax Questions"

**Darrell D. Wiles**, Lewis, Rice, Tucker, Allan and Chubb; St. Louis

"The Commissioner's Inquisitorial Powers"

**Jules Ritholz**, Kostelanetz and Ritholz; New York

"The Unrelated Business Income Tax: Changes Affecting Journal Advertising Revenues and Exhibition Rentals"

**Stanley S. Weithorn**, Attorney at Law; New York

"Additional Consequences of Allocations of Income and Deductions among Related Taxpayers"

**Paul Farber, S. D. Leidesdorf and Company**; New York

"United States Taxation of Foreign Income of Americans"

**Richard A. Hoefs**, Arthur Andersen and Company; Chicago

"United States Taxation of the American Income of Foreigners"

**Mark H. Berens**, Mayer, Friedlich, Spiess, Tierney, Brown and Platt; Chicago

"Investment Credit and Depreciation Recapture—Their Effect on Buy and Sell Deals"

**John A. Bernauer**, Ernst and Ernst; Chicago

"Allocation of Cash Purchase Price among Assets Purchased in Bulk"

**Richard E. Murphy, Jr.**, McDermott, Will and Emery; Chicago

"Tax Treatment of Professional Fees Related to Asset Acquisitions and Changes in Business Entities"

**Harry I. Grossman**, Altschuler, Melvoin and Glasser; Chicago

A panel discussion of the three topics listed immediately above by **Walter J. Blum**, and Messrs. Bernauer, Grossman and Murphy.

"Reorganization Guidelines Problems"

**James H. Wilson, Jr.**, Sutherland, Asbill and Brennan; Atlanta and Washington

"Section 531 Problems, Including the Bardahl Formula"
Arthur I. Grossman, D'Ancona, Pfleum, Wyatt and Riskind; Chicago
A panel discussion of the above two topics by Paul F. Johnson, Ernst and Ernst; Chicago: Charles W. Davis, Hopkins, Sutter, Owen, Mulroy, Wentz and Davis; Chicago: Joseph E. Tansill, Lybrand, Ross Brothers and Montgomery; Chicago, and Messrs. Grossman and Wilson
"Pension Plans, Including Changes Regarding Discrimination, Qualification, and Integration, with Specific Reference to HR 10"
George W. Windhorst, Jr., Bell, Boyd, Lloyd, Haddad and Burns; Chicago
"The Tax Effect of Corporate Re-Adjustments Incident to a Privately Held Corporation 'Going Public'." James R. Wimmer, Lord, Bissell and Brook; Chicago
"Financing Corporate Expansion through Tax Exempt Bonds" David H. Nelson, Chapman and Cutler; Chicago

(Continued from page 13)

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

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

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

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

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

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

There is not much need to document this view of the Court as a reforming institution. Major areas in which it has accelerated the pace of legal change are familiar. The obvious and dramatic ones are segregation, reapportionment, and state criminal procedure. But there are hosts of other examples, both constitutional and statutory, that will come readily to mind. From my own field I would cite the rapid conversion of the antitrust laws into a set of rigid per se doctrines, especially but not exclusively in the field of mergers. The Court has even moved strongly into the field of private and common law, as in its new doctrines in the law of defamation. It has now given the signal for sweeping changes in the procedures and indeed the whole philosophy of juvenile courts. There are intimations that in the field of criminal procedure it may move on from problems of self-incrimination and right to counsel to imposing constitutional requirements of pre-trial discovery. The expanding concept of state action has become a quite open-ended war-
rant for intervention in new areas of the law previously left to the states, as in the Court's recent decision forbidding California to repeal its fair-housing law by a constitutional referendum (one-man, one-vote notwithstanding).5

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

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

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

There are different ways of viewing the Court's recent behavior. It is possible to think of the Court as a group of adventurous knights charging off to discover new causes and do battle. Another and more charitable view is that the Court has felt itself responsible for overcoming some of the lag in the response of our law to new pressures and conditions, compensating for the inertia of other agencies in the system. I have little doubt that the Court has often seen itself in the latter role, and has believed it was assuming initiatives forced upon it by the default of others. That clearly has been its position on the great problems of school segregation and reapportionment. Very likely a similar defense could be advanced for it in a good many other areas as well. (No doubt the Court found more than poetic justification for its long-expected miscegenation decision in the case this Term that originated under the compelling caption of Virginia against Loving.)6 The wide acceptance of Gideon v. Wainwright, for example, suggests that the bar was merely waiting to be formally advised of a responsibility that it had come instinctively to recognize in the many years since the Court had taken the first steps toward implementing the right to counsel in criminal cases.

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

Over a hundred years ago de Tocqueville made this observation:

"The Americans, who have made so many innovations in their political laws, have introduced very sparing alterations in their civil laws, and that with great difficulty, although many of these laws are repugnant to their social condition. The reason for this is that in matters of civil law the majority are obliged to defer to the authority of the legal profession, and the American lawyers are disinclined to innovate when they are left to their own choice.

"It is curious for a Frenchman to hear the complaints that are made in the United States against the stationary spirit of legal men and their prejudices in favor of existing institutions."7

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

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

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

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

My question is whether the time has not come to take old blueprints out of the closet and renew our interest in this idea as a progressive step for Illinois. A law reform commission is needed, not to take over all the work of development of the law, but to provide a steady source of energy and initiative. A commission would not displace bar committees, committees appointed by the Supreme Court, and other existing sources of law revision work. It would share the field with them and would draw upon these existing resources for advice and assistance in its own projects. It could do a great deal to make more effective use of sources of help that are now scattered and uncoordinated, including members of law faculties and even law students. Much good might come from diverting some of the student talent on the law reviews that now goes into refined criticism of the judges' work and turning it instead into research and drafting on legislative problems. We have recently had an encouraging experiment of that sort at our School, in a seminar directed by Professor Julian Levi which collaborated with the Legislative Commission on Low Income Housing, chaired by Representative Robert E. Mann.

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

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

But it is to be hoped that the charter of such a commission would not stop with these traditional kinds of technical law revision. It is in this respect that I think Illinois has an opportunity to press beyond the existing models of law revision commissions in this country. Such a commission should be encouraged to take a broad view and a long view. No area of the law or of our legal machinery should be barred from its field of interest. It would, of course, be expected to move modestly and cautiously at
the beginning. It should establish a solid basis for confidence in its work by superior craftsmanship in technical and noncontroversial parts of the law. But it should not be too modest. It should hope to become in time a source of perspective and wisdom, and even of bold proposals, on reforms in the law that may take a long time in coming and that may require the kind of perseverance that led to the new Judicial Article. It should expect to produce not only proposed legislation of matters appropriate for immediate action, but thoughtful reports on emerging problems that may not yet be ripe for final recommendations. It should aim to inform, and to elicit wide interest and debate, not only among the members of the profession but also in the public at large. We should judge its success not solely by its batting average in each session of the legislature, but by the extent to which it builds a record of reasoned statements that can constitute a foundation for the progressive development of the law.12

As Sir Leslie Scarman, the chairman of the English Law Commission, has reminded us, law reform is in many respects too serious a matter to be left to the legal profession. The profession must be on guard not to exaggerate its claim of competence to decide what is good for society. But our society has been in the habit of looking to lawyers for guidance. I am sure we believe that the habit should be encouraged and the faith vindicated. In Sir Leslie's words, "The real test for law reform and ... for the legal profession ... is whether we as professional men are prepared to lay our hands to the reform of questions of law which profoundly affect interests of great importance to society."13

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

FOOTNOTES

1. See 48 CHICAGO BAR RECORD 140 (1967).
11. See FOR BETTER HOUSING IN ILLINOIS, Report of the Legislative Commission on Low Income Housing, 75th General Assembly (1967).
12. An excellent example of the kind of study that is needed in many areas is the admirable report on Illinois antitrust law prepared by a committee of the Association under the chairmanship of Robert W. Bergstrom, Esq., which laid the basis for a new and greatly improved state antitrust statute. THE LAW OF COMPETITION IN ILLINOIS, A Study by the Special Subcommittee on Illinois Antitrust Laws of the Chicago Bar Association (v. U.S. LEGAL SERIES, 1962). See also note 1, supra.

(Continued from page 6)
mine what happened if prisoners were released nine months before their appointed time; specifically, whether such a premature release was likely to increase the rate of recidivism.6

Not much came of these experiments, partly perhaps because the recidivism rate is too brittle a measure of effectiveness since, in order to be counted as a recidivist, it is not sufficient to have committed another crime; it is also necessary to be caught and reconvicted. And since the odds of being caught, as revealed by the published statistics, are on the average about one in five, this ratio might well have a great variance and hence be a very unstable measure.7

A controlled experiment that allowed of precise measurement and had an immediate effect on the law was conducted in the state courts of New Jersey.

In most of our courts some or all of the civil suits, before they come to trial, are scheduled for what has become known as pretrial. There, counsel for both sides, occasionally with their clients, meet with the judge to present briefly the issues under dispute and air the possibilities of settlement. Tradition has it that these pretrials, aside from preparing and facilitating the subsequent trial, increase the rate of settlements prior to trial. The institution has, therefore, been considered a most desirable means of reducing the trial load and thereby the intolerable congestion of our metropolitan courts. Since many cases, the trial of which would have lasted two days on the average, are settled during a half-hour pretrial conference, this notion seemed well supported.

But analysis of available statistics made the point doubtful; there were indications that the cases settled at pretrial would have been settled also without it and that the court time spent on pretrying cases might be wasted. The precise answer, it was suggested, could, come only from a controlled experiment which pretried a random sample of cases and omitted pretrial in a comparable control group.8

At that time the New Jersey courts had a rule that made pretrial obligatory, and the state's distinguished Chief Justice and its Court Administrator, becoming sympathetic to both the query and the proposal, commissioned Professor Rosenberg, then Director of the Project for Effective Justice at Columbia University, to conduct the experiment.9 The design called for random assignment of cases by the clerks of the respective courts to two alternative procedures: to obligatory pretrial in one group of cases, and to optional pretrial in the control group, where it would be held only if one or both of the litigants requested it.10 Accordingly, 2,954 cases were assigned at random alternatingly to the two groups, for which the settlement ratios shown in Table 4-1 emerged.

<table>
<thead>
<tr>
<th>Table 4-1.</th>
<th>CONTROL GROUP:</th>
<th>EXPERIMENTAL GROUP:</th>
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<tr>
<td></td>
<td>OBLIGATORY</td>
<td>OPTIONAL</td>
</tr>
<tr>
<td>Pretrial</td>
<td>Pretrial</td>
<td></td>
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<tr>
<td>Suits settled before they reached the trial stage</td>
<td>76%</td>
<td>78%</td>
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</table>

There was no difference. In addition, the experiment failed to confirm a subsidiary hypothesis, namely, that the pretried, and hence prepared, cases required a shorter trial time. Thus the conclusion emerged simple and clean: contrary to a widely held belief, obligatory pretrial did not save court time, but in fact wasted it. Persuaded by the experiment, the State of New Jersey forthwith changed its rule and made pretrial optional.11

But the legal experiment that had the most profound and sweeping effect on the law was conducted in the criminal courts of Manhattan. It revolutionized one of the most solid traditions in the criminal law: the practice of setting bail for defendants arraigned in our criminal courts. Bail is set, as a matter of constitutional right, for nearly all defendants; if they can post it, they are set free; if not, they must remain in jail. Whether or not they can post it depends as a rule on the bondsman, who, against a premium of some 10 per cent, will or will not take the risk of providing the demanded bail. Only rarely is a defendant allowed to go free without posting bail.

The system has been heavily criticized because it favors the well-to-do, surrenders the actual decision to the bondsman, and keeps an inordinate proportion of defendants in jail, some of whom are subsequently acquitted. The system, nevertheless, withstood all criticism until the Vera Foundation made known its findings from a unique experiment which it conducted in 1961. With the co-operation of the New York judiciary and the New York University Law School, all defendants arraigned in the felony court of Manhattan were interviewed so as to assess the risk of their failing to appear at their trial, if the court were to free them without requiring bail. On the basis of these interviews the defendants were classified into two groups: those for whom a release without bail could be reasonably recommended to the court and those for whom such a recommendation could not be made. The recommendable group was then divided into two random halves: the experimental group, for which the recommendation to release the defendant without bail was actually transmitted to the arraignment judge, and the control group, with respect to which the judge was told nothing and thereby left to his own traditional mode of making the bail decision. In this latter group only 14 per cent of all defendants were freed without bail, as against 60 per cent in the recommended half. The hypothesis was that at the time of trial, from the group of which 60 per cent had been freed without bail, more
would fail to appear in court than from the group where only 14 per cent were free without bail, and the question was: how many more? When trial time came, only 1 per cent of all defendants released without bail, whether recommended or not, purposely failed to appear in court. The experiment thereby proved that the number of defendants released without bail could be quadrupled without reducing their availability at the time of trial.12

The results of the experiment were stunning. The City of New York took over the interviewing from the foundation and established it as a permanent service. The Attorney-General of the United States convoked a conference on the topic, and today almost all major cities and many rural areas have adopted the Vera procedure, and with it the liberalized practice of release without bail. And the Department of Justice left no doubt as to where the credit belonged: "Of particular significance is the fact that these changes have flowed not out of a crisis . . . but rather from education, through empirical research and demonstration."13

The secret of the success of this experiment was twofold. First, except for the bail bondsmen, everybody stood to gain from the liberalization: the municipal jails saved money; the defendants themselves were spared unnecessary hardships; and last, but not least, the ends of justice were advanced. Secondly, the numerical result of the experiment was so clear that no probability calculus was needed for its appreciation.14

The Natural Experiment

Sometimes administrative routine will present the investigator with a natural experiment, that is, with an experimental and a control group that were not purposely designed by him. Within limitations, this may be quite satisfactory, as the following case history shows.

Under traditional trial procedure, the plaintiff in a civil case first presents his case both as to liability and size of damages and is followed in turn by the defendant, who presents his side of the case. After both have had their say, the jury retires and decides whether the defendant is at all liable for damages and, if so, how large these damages should be. The question of damages thus becomes relevant only if liability is found. The suggestion was made to split the trial and to limit evidence and argument in the first part of the trial to the liability issue, asking the jury to decide whether the defendant owes anything at all. Only if this decision is affirmative does the trial proceed with the evidence and subsequent verdict on the size of the damages.15 Since liability is affirmed in only a little more than half of all cases, this mode of trial was expected to save something like half of the trial time normally spent on damages. The Federal District Court for Northern Illinois was sufficiently intrigued by this split-trial idea to try it out and to ask the University of Chicago Law School to help in assessing the effect of the split-trial rule, as it has come to be called.16

The court had adopted the rule in a form that left it to the discretion of the individual judges whether they wanted to apply it in the particular case. It was from this discretion that, seemingly, the difficulties, but eventually the salvation of the experimental design, arose. If each judge could apply the rule in some cases and not in others, and if he were to select—as in fact he often did—only those cases for split trial which, in his view, promised some gain in time from the application, the cases tried in the regular mode and those tried under the split-trial rule could not be compared. Whatever difference in trial length might be found between the two could not be attributed to the new rule, because the cases were admittedly different to begin with.

At first glance this lack of random assignment would seem fatal. Yet, while it made the analysis more complicated and less powerful, it did in fact make the experiment possible. Since the original assignment of cases to the individual judges was made randomly, the inference was allowed that the cases coming before Judge A did not differ from the cases coming before Judge B. And then something fortunate happened. The discretion of the judges resulted in an effective spread of the experimental stimulus: some used the rule in almost all their cases, some in hardly any, and some in varying proportions between.

If, then, it were true that the application of the split-trial rule saved time, the judges who applied the rule more often should require on the average less trial time than those who applied it less often. This turned out to be true, as Table 4–2 shows.

Table 4–2. Proportion of Split Trials and Average Trial Time in Personal Injury Cases

<table>
<thead>
<tr>
<th>Judge</th>
<th>Proportion of Cases Tried Under Split-Rule (Per Cent)</th>
<th>Average Length of All Trials Before This Judge (Days)</th>
<th>Number of Trials Before This Judge</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>89</td>
<td>3.2</td>
<td>(26)</td>
</tr>
<tr>
<td>B</td>
<td>51</td>
<td>3.3</td>
<td>(41)</td>
</tr>
<tr>
<td>C</td>
<td>38</td>
<td>3.5</td>
<td>(26)</td>
</tr>
<tr>
<td>D</td>
<td>14</td>
<td>3.8</td>
<td>(22)</td>
</tr>
<tr>
<td>E</td>
<td>7</td>
<td>3.9</td>
<td>(27)</td>
</tr>
<tr>
<td>F</td>
<td>7</td>
<td>4.3</td>
<td>(14)</td>
</tr>
</tbody>
</table>

*Only judges with more than 10 trials are included.
The regression line based on these data indicated that at the point where a judge conducted all trials under the split-trial rule, his average trial time was about 20 per cent below the point where none of the trials were split. This, then, was the magnitude of the time that could be saved through application of the rule.

But since the variation in the stimulus was not random, but self-selected, it was desirable to provide supporting evidence. It was clear that whatever savings there were must come from the elimination of the damage trial. The frequency of damage trials was, therefore, determined both for the regular and for the split trials. (See Table 4-3.)

Table 4-3. Disposition of Regular and Split Trials

<table>
<thead>
<tr>
<th>Category</th>
<th>Regular Trials (%)</th>
<th>Split Trials (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Complete trial on liability</td>
<td>76</td>
<td>15</td>
</tr>
<tr>
<td>and damages</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Trial ended after liability verdict</td>
<td>27</td>
<td>27</td>
</tr>
<tr>
<td>because verdict was for defendant</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>43</td>
<td></td>
</tr>
<tr>
<td>because damages were settled after</td>
<td></td>
<td></td>
</tr>
<tr>
<td>verdict affirming liability</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>15</td>
<td></td>
</tr>
<tr>
<td>Other dispositions (settlement during</td>
<td>24</td>
<td>27</td>
</tr>
<tr>
<td>trial, directed verdicts)</td>
<td>100%</td>
<td>100%</td>
</tr>
</tbody>
</table>

The dispositions of the two groups of cases were drastically different: 76 per cent of all regular cases went through a complete trial, against only 15 per cent of the separate trials. As for the latter group, 58 per cent were spared trial of the damage issue because of the intermediate verdict denying liability; in 43 per cent of the cases the trial simply ended when liability was denied, and in another 13 per cent of the cases there was no trial of the damages because they were settled after the jury had affirmed liability.

The split trial is a radical innovation in American law, brought to the fore by the pressures of court congestion. When the study was first published, the Joint Committee on Effective Administration of Justice, on suggestion of its chairman, United States Supreme Court Justice Clark, had copies sent to all trial judges in the United States; as of this writing, several state and federal courts have moved to authorize their judges to use the split-trial procedure, and the institution is likely to gain more ground.17

Experiment Under Seminatural Conditions

If an issue falls into the constitutionally protected area, not even a natural experiment is likely to occur, and a simulated one must suffice. But even then, as many natural components as possible must be retained, as for instance in the following series of experiments concerning the defense of insanity. They were designed to test jury reaction to certain variations in the law. The natural element in these experiments was the jurors, summoned by a real trial judge from the jury pool of his court with the request to partake in the experiment and to deliberate on the case as if it were a real one. 18

In Anglo-American law the defense of insanity has been embodied for more than a century in the so-called M'Naghten rule, which calls for an acquittal if the defendant either did not know what he was doing or did not know that what he was doing was wrong. Recently, the rule has come under criticism, primarily from psychiatrists. In 1954 the Federal Court in the District of Columbia established a new rule in a case in which one Durham was indicted, and subsequently acquitted, on a charge of burglary. The Durham rule considers the defense as established if the criminal act can be shown to be the "product of a mental disease or a mental defect." It became thus a point of major interest for the criminal law to find out what if any difference it made to the outcome of a trial whether insanity was defined under the M'Naghten or under the Durham rule.

The "law" in a criminal jury trial becomes operative primarily through the judge's instruction to the jury before it begins deliberation. In that instruction the judge spells out the circumstances under which the jury may find the defendant insane. In a way, then, the question as to what difference the law makes means what difference it makes to the jury whether it is instructed according to the rule in M'Naghten or in Durham.

To compare the insanity cases in the District of Columbia with cases from a court that operates under the M'Naghten doctrine could provide only unsatisfactory findings, since not only the rule of law but also the cases, the juries, and the judges are likely to be different. And it is obviously impossible to decide the issue through a controlled experiment under completely natural conditions. Therefore, an experiment had to be designed that combined natural with laboratory conditions, sufficiently realistic to justify confidence in its validity.

Two trial records were composed: one, a case of housebreaking, a simplified version of the original Durham trial; the other, an incest case, also an abbreviated version of an actual trial. In both trials the accused's only defense was insanity. The trial evidence was acted out, with the other elements of the trial put on recording tape. Of each case, three main variants were produced.19 The tapes
were identical but for that part of the judges instruction that dealt with the defense of insanity and for the concomitant psychiatric testimony. In one version the instruction and psychiatric testimony were according to M'Naghten; in the second, according to Durham; and in the third, the instruction left it in fact to the jurors own judgment as to whether the evidence in the case supported a defense of insanity, forcing the jury to establish its own law of insanity.

Each of the three versions was then taken into two metropolitan courts and presented in turn to more than a hundred juries. A judge called these jurors into his courtroom and asked them to co-operate in the experiment; by so doing, he advised them, they would oblige the court and also discharge their present turn of jury duty. The jurors then listened to the taped trial and afterward deliberated and arrived at a verdict. Table 4-4 shows the outcome of the experiment in terms of the jurors' vote on their first ballot, prior to the beginning of the deliberation.20

Table 4-4. Per Cent of Jurors Voting "Not Guilty—Insane" on First Ballot

<table>
<thead>
<tr>
<th></th>
<th>M'NAGHTEN</th>
<th>DURHAM</th>
<th>NO RULE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Incest</td>
<td>24</td>
<td>36</td>
<td>34</td>
</tr>
<tr>
<td>case</td>
<td>(240)</td>
<td>(312)</td>
<td>(264)</td>
</tr>
<tr>
<td>Housebreaking</td>
<td>57</td>
<td>65</td>
<td>76</td>
</tr>
<tr>
<td>case</td>
<td>(120)</td>
<td>(120)</td>
<td>(120)</td>
</tr>
</tbody>
</table>

In both trials, the Durham rule elicited a higher percentage of acquittals by reason of insanity than the M'Naghten rule. That the percentages under Durham are very close to those obtained under the "No Rule" instruction suggests, furthermore, as indeed it has been argued,21 that Durham comes close to being no rule.

The figures show that the incest case allowed a sharper differentiation between M'Naghten and Durham than the housebreaking case. This difference is instructive beyond the specific issue. The defendant in the incest case was an officer in a city's fire department, with an excellent record, who, except for the crime in question, had never shown any signs of abnormality. The defendant in the burglary case, on the other hand, much like the original Durham, had been in and out of mental institutions and hence had shown, by whatever legal or common-sense rule, signs of insanity. The fireman could be found insane only if the jury was instructed (as Durham allows) to consider the criminal act itself as a symptom of insanity.

The experiment raised two questions of general significance. One applies to the realism of simulation; the other, to the degree of generalizing from experimental findings.

In this experiment there were two simulated elements: the experimental stimulus was greatly reduced (a two-day trial condensed into an hour), and jury deliberation was clearly a mock procedure without consequences in the real world. As to the second point, there was considerable reassurance: these were real jurors called to duty by a real judge; they discharged their responsibilities with such obvious zeal and honesty that deliberations lasted up to ten hours, often engendering high-pitched battles among the jurors who, at times, ended in a "hung jury."

The other point raises a more serious problem. A tape recording of a trial, condensed to about an hour's length, may be something quite different from a full-blown trial, in which the jury not only hears but also sees over a period of many hours real people with all the significant details of their reactions. Without additional research, the point allows of no precise answer.

As to the consequences of the insanity experiments, one can at this stage only venture a guess. On the whole, the experiment should strengthen the hand of those who oppose the Durham rule, simply because its message to the jury is ambiguous. Whatever the shortcomings of the traditional right-wrong test, its criteria are clear and can be applied by the jury.

The jury, in spite of its deep constitutional roots, has been the topic of perennial debate, with little precise knowledge to support it.

Some years ago, the University of Chicago Law School began a large-scale study of the jury system, and one of its key questions was: What difference would it make if all jury cases were tried only by a judge sitting without a jury?

The question would seem to demand a controlled experiment—every case to be tried twice, once with and once without a jury—an obviously impossible solution. Equally impossible it would be to assign cases at random to jury and judge, since this is a choice no defendant must be deprived of. Nor would the simple comparison of actual jury verdicts with actual judge verdicts help, even if limited to trials of the same type of crime, because we know that the cases in which the defendant waives a jury are quite different from those where he wants one.

Curiously enough, the design eventually adopted for the study came close to the ideal design, the controlled experiment. A nationwide sample of trial judges reported for a specified time period on all the jury trials over which they presided. Each judge told us how the jury decided the case and how he, the judge, would have decided it, had he sat without a jury. The design thus made use of the fact that every case is tried twice, albeit simultaneously: once before the jury and once before the presiding judge, who, if there were no jury in the case, would have to render the judgment.

This research design is but a natural controlled experiment of a special order. Experimental stimulus (the jury) and control (the judge) are present in every case, but unlike a planned experiment, there is, except for the
judge who may preside over several trials, no replication.
The jury changes from trial to trial; and most important,
the case, too, of course, is never the same. The statistical
precision of such an experiment is relatively low. But this
lack of precision is the price for an unusually broad focus:
the study surveys the whole spectrum of cases that come
before the American jury. In this sense, the research de-
sign may fittingly be called a survey experiment.

From these data it was possible to determine how often
judge and jury agree or disagree; and when they disagree,
one could trace and count the reasons for their disagree-
ment since through some fifty-odd questions most de-
tailed information became available on every case.
The first part of this study on the role of the jury in
criminal trials has just been published. Figure 4-1 re-
produces one of its basic findings.

<table>
<thead>
<tr>
<th>Jury</th>
<th>Acquits</th>
<th>Acquits</th>
<th>Convicts</th>
<th>Convicts</th>
<th>Hangs</th>
<th>Hangs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judge</td>
<td>13</td>
<td>2</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>63</td>
<td>4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL 100%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>3,576</td>
</tr>
</tbody>
</table>

= Agreement
Figure 4-1. Agreement and Disagreement between Jury
and Judge in Criminal Trials

Judge and jury agree in (13 + 63 =) 76 per cent of all
cases; and of the 24 per cent disagreement cases, the jury
is found on the defendant’s side in (17 + 4 =) 21 per
cent and on the prosecutor’s side in (1 + 2 =) 3 per cent
of these cases.

The evaluation of the jury as an institution hinges, of
course, not only on the extent of its disagreement with
the judge but on the reasons that produce these disagree-
ments, and it is the presentation and analysis of these
reasons that form the main body of the study. They range
from different sentiments on the law which the jury en-
tertains (in spite of what law the judge may give them)
through sentiments concerning the particular defendant,
different views on the weight of the evidence, and occa-
sionally to an imbalance between the performance of
the prosecutor and defense counsel in the trial; a few times
it will even happen that the disagreement arises from a
discrepancy between what jury and judge know about the
case.

These are the five somewhat abstract categories in
which the specific causes of the various individual dis-
agreements were ultimately summarized.

At this early point it is not possible to assay the practical
consequences of that study. At a minimum, it will lend
focus and precision to an important debate in which both
sides so far have never been able to draw on more than
anecdotal support.28

Secondary Analysis

Two studies of contemporary legal problems are dis-
tinguished by their being primarily reanalyses of data
collected in normal administrative routine: one con-
cerned the alleged deterrent effect of capital punishment,
the other the problem of court congestion and delay.

In the debate over the merits of capital punishment, the
abolitionists had for a long time no good answer to the
claim that the death penalty helped to deter would-be
murderers. The change came after Thorsten Sellin inves-
tigated the problem.24 He compared homicide rates be-
fore and after abolition in some jurisdictions; before and
after reintroduction in others; and in jurisdictions that
have the death penalty with adjacent jurisdictions that
have abolished it. His data made one point clear: what-
ever other merits the death penalty may have, it has no
traceable deterrent effect.

Sellin’s data have been quoted wherever the issue is
being argued. To what extent they have been an effective
cause of abolition is nevertheless difficult to say. Probably
they have not been a major cause; growing revulsion
from deliberate killing and the actual or near execution
of an innocently convicted man have nearly always pro-
vided the major impetus. But Sellin’s data have helped to
silence, if not convince, a special opposition.

The study of court congestion opened insights into a
problem that is less dramatic but in the long run perhaps
more persistent. It is one of the puzzling aspects of our
judicial system that the adjudication of civil claims in
most of our metropolitan courts is scandalously delayed.
In Chicago, for instance, it takes on the average five and
a half years from the date a claim is filed until it can be
tried before a jury.

In 1957, the University of Chicago Law School pub-
lished a study of this congestion problem25 which had
this methodological distinction: its more than three hun-
dred pages of measurement and analysis were based al-
most entirely on data that had become available in the
course of routine housekeeping by the courts in their
normal administrative business. From these data a num-
ber of measurements and parameters were developed that
were to acquire some currency in the administration of
the courts: a basic formula for measuring delay was de-
veloped,26 a variety of remedies was evaluated, and, as the
case may be, rejected, recommended, or suggested for
further investigation. Among the latter were the pretrial
and the split trial discussed above.

With the ever mounting costs of securing primary data,
this harvest from secondary analysis holds a promise for
social research generally.

Surveys

Although, as we have seen, the border line between ex-
periment and survey is not a sharp one, it is useful to dis-
tistinguish the two, especially since, in contrast to the experiment, the primary function of the survey is to provide description. Out of the rapidly growing number of surveys undertaken to give guidance to the lawmakers, only two will be mentioned here. Both deal with most acute legal problems; one with the enforcement of civil-rights legislation, the other with the costs of automobile accidents.

In 1962 Blumrosen and Zeitz began to investigate the operation of New Jersey's antidiscrimination laws and its Civil Right Commission. Blumrosen examined all cases filed with the commission during the fiscal years 1962-1963, and Zeitz made a survey among Negroes on their attitudes toward enforcement of these laws. The main finding of their study was that "the laws of New Jersey against discrimination were not meaningfully and effectively enforced," partly because the Negroes themselves shied away from individual enforcement and partly because of shortcomings in the commission itself. The study had a number of traceable effects: the legislature substantially increased the commission's budget; the commission itself sharpened some of its policies and much of its mode of operations; and the state's attorney-general would speak of his civil-rights division as having been "a shield" so far but now to become "a sword."

The survey on the costs of automobile accidents is the latest on an issue of long-standing concern to the law and has a distinguished research history. The first major study was published in 1932 under the auspices of the Columbia University Committee for Research in the Social Sciences. Like the latest, the Michigan study, it too was a joint effort of lawyers and social scientists. It surveyed broadly, if somewhat haphazardly, the repairation problem caused by automobile accidents. The evidence was drawn from a variety of sources, but even where survey data were used, no claim was made to precision and completeness. Nevertheless, as in many first approaches, the outlines of the problem and the areas of research emerged with great clarity and thus marked an important beginning. The next step came in 1953 when Professor Adams of the Business School at Temple University studied the financial and legal history of a random sample of one hundred automobile accidents in the City of Philadelphia and thus established the pattern for later efforts. The Philadelphia survey displayed all the glories and some of the inadequacies of an inspired, pioneering shoe-string operation. The present study, undertaken jointly by lawyers and social scientists at the University of Michigan, is the apex of this development.

It covers all individuals killed or injured in automobile accidents that occurred in the State of Michigan during one calendar year and ingeniously combines two samples to represent this universe: one taken from the files of the police, the other from the files of the courts where personal injury claims are litigated. The difficulty of the yet unfinished court case was elegantly solved by substituting the results reached in a comparable group of earlier long-delayed cases. The major research instrument was a mail questionnaire to the parties concerned or to their heirs, thoughtfully supplemented at critical points with personal interviews, especially with the plaintiffs' lawyers in the cases.

We now have reliable, precise, quantitative information on almost every aspect of the injury-reparation process and hence a sound factual basis for the many debates which are currently raging over that problem area. To be sure, we have this knowledge only for one year and only for the State of Michigan. But, the United States being what it is, one should not be in danger if one generalizes from these findings. If there are doubts, they can be removed by duplication of the study elsewhere.

The survey provides, as any good survey should, information on both details and broad outlines. Roughly one out of every hundred Michigan residents suffered some loss in an automobile accident during a year. For over 60 per cent of the persons involved in accidents, the loss was below $500; another 36 per cent suffered losses between $500 and $3,000; and the remaining 2 or 3 per cent suffered losses beyond $70,000.

In terms of all victims or their heirs, 23 per cent received no compensation from any source, 37 per cent received some tort liability settlement, and about half of the victims received some compensation from loss, collision, medical care or life insurance. But in terms of the total dollar amount paid to all victims, almost half of the total damages remained uncompensated. The sources of total compensation were tort liability, 55 per cent; loss liability, 38 per cent; workmen's compensation and social security, 7 per cent. The surprising finding was the great role played by loss insurance and the increasing impact of the social-security laws.

The Trend

The sharp increase in recent years in the number and quality of social-science investigations of legal institutions was spawned by a number of convergent developments. There was first a jurisprudential movement, the Realists, who, beginning in the twenties, asked that the law in action be explored in contrast to the law on the books. Strangely enough, their aim remained for a long time no more than a battle cry. Only now, a generation later, does it assume substance. The second source was the rapid development of research techniques and a concomitant growth of sociological research in general.

It now appears that we are standing at the beginning of an era in which the lawmakers will find increasing use for empirical social-science research in the sound expectation that it is bound to alleviate their difficult task: of making good law.
1. In modern times, William Petty's survey of Ireland, made at
the time of the Cromwellian conquest, is perhaps one of the
first systematic surveys conducted for the lawmaker, British,
and to a much lesser extent also American, legislation has a
tradition of relying on systematically collected facts whenever
broad legislative issues are at debate. Royal Commissions,
Select Committees, and Ad Hoc Committees in the British
Empire and Commonwealth, Congressional and other legis-
late and administrative committees in the United States,
have made in their time major contributions to the law and
incidentally also the body of social science. See Marie
Jahoda, Paul F. Lazarsfeld, Hans Zeisel, Marienhall: new ed.
(Allensbach: Verlag für Demoskopie, 1960), Appendix, Zur
Geschichte der Soziographie.

2. Ironically, the most famous of these social-science footnotes,
the celebrated decision of the United States Supreme Court
in Brown v. Board of Education, the school desegregation
case, refers probably to a not very relevant piece of research.
It concerned an experiment designed to prove the evil
of segregation. The legal scholars seem to be agreed that it did
not influence the Court, which was clearly moved by larger,
more moral considerations; see, for instance, Edmond Cahn,
150. There was even considerable debate about the evidential
value of that research. See Kenneth B. Clark, "The Desegrega-
tion Cases: Criticism of the Social Scientist's Role," Vil-
lanova Law Review, V (1960), 224, 236; Ernest van den
Haag, "Social Science Testimony in the Desegregation Cases
—A Reply to Professor Kenneth Clark," Villanova Law
Review, VI (1960), 69; A. J. Gregor, "The Law, Social
Science, and School Segregation: An Assessment," Western
Reserve Law Review, XIV (1963), 621–636; Ovid C. Lewis,
"Parry and Riposte to Gregor's The Law, Social Scientist,
and School Segregation," ibid., 637.

Law Quarterly, XLV (1960), 322.

4. By way of apology: it is impossible to list all such studies; any
offered selection is bound to remain arbitrary.

5. The argument that follows has been developed in more detail
in Hans Zeisel, "The New York Expert Testimony Project:
Some Reflections on Legal Experiments," Stanford Law
Review, VIII (1956), 730–755, and in Hans Zeisel, Harry
Kalven Jr., and Bernard Buchholz, Delay in the Court (Bos-
ton: Little, Brown, 1959), Chapter 21: The Case for the
Official Experiment.

6. California Board of Correction Monographs, Sacramento.

7. See Daniel Glaser, The Effectiveness of a Prison and Parole
System (Indianapolis: Bobbs-Merrill, 1964), p. 34.


9. Maurice Rosenberg, The Pretrial Conference and Effective
Justice (Columbia University Press, New York and London,
1964).

10. The control group was allowed to have optional pretrial,
because it was thought that to simply deprive these litigants
of their right to pretrial might engender constitutional diffi-
culties.

11. One may ask why the state did not abolish pretrial altogether.
One answer is that the particular experiment answered the
issue conclusively only with respect to the option alternative.
Moreover, pretrial had deep roots in the state's tradition, and
the limited design of the experiment probably offered a
welcome pretext for a compromise.

12. The pioneering study was Arthur Beeley, The Bail System in
Chicago (Chicago: University of Chicago Press, 1927). A sur-
vey of the literature can be found in Daniel Freed and
Patricia Wald, Bail in the United States (Washington, D.C.,
1964), pp. 9–21. The attack that brought the reform move-
tment to fruition began with a distinguished study by Profes-
sor Caleb Foote of the University of Pennsylvania Law
School. On the latest developments see C. E. Ares, A. Rankin,
and H. Sturz, "The Manhattan Bail Project: An Interim
Report on the Use of Pre-Trial Parole," New York University
Law Review, XXXVIII (1963), 67. On the long-range im-
plementation, see also Caleb Foote, "The Coming Constitutional
Crisis in Bail," University of Pennsylvania Law Review,
CXXIII (1965), 959.


14. Normally, it is considered essential that in a controlled exper-
iment the experimenter be in direct control of the experi-
mental variable; if two types of fertilizer are to be tested, he
must be able to control their assignment to the various plots
of land. But in the realm of the law such direct control is
rarely feasible. Even in the two experiments discussed so far,
the ultimate experimental variable was not under the control
of the experimenter: in the bail-bond experiment, the final
decision whether or not to release the defendant without bail
was up to the judge; and the decision whether or not a pre-
trial was to be held was, in fact, left to the litigants. Yet
because of the prior randomization of the experimental and
the control group, these decisions did not invalidate the con-
trolled character of the experiments. For general exposition
of this approach, see Irwin Towers, Leo Goodman, and Hans
Zeisel, "A Method of Measuring the Effects of Television
through Controlled Field Experiments," Studies in Commu-
nication, IV (1962), 87.

15. This suggestion too was made in Zeisel, Kalven, and Buch-

16. See Hans Zeisel and Thomas Callahan, "Split Trial and
Time-Saving: A Statistical Analysis," Harvard Law Review,
LXXVI (1963), 1606–1625.

17. One of these many court decisions had a direct reference to
the Zeisel-Callahan paper: Driver v. Phillips et al., U.S. Dis-

of Insanity (Boston: Little, Brown, 1967).

19. There were also two minor variations built into the exper-
iment pertaining to the quality of the psychiatric expert testi-
mony and to the informing of the jury as to the consequences
of a finding of insanity.


21. Symposium, "Insanity and the Criminal Law—A Critique of
Durham v. United States," University of Chicago Law
Review, XXII (1955), 317.

22. Harry Kalven Jr., and Hans Zeisel, The American Jury
(Boston: Little, Brown, 1966).

23. It is, however, possible to cite one early application of find-
ings from the jury study, albeit to a proposed reform of the
English jury. The British government has proposed legis-
lation that would allow majority verdicts of 10:2 and 11:1 votes
in criminal cases and remove thereby the requirement of
unanimity. It was possible to provide the British Home Of-
ICE with a set of relevant predictions as to what to expect
from such a law, because one of the American states, Oregon,
allows the majority verdicts Great Britain plans to introduce.
The first prediction was that the number of hung juries
(juries in which a mistrial is declared because unanoni-
ity cannot be reached) would decrease by about 40 per cent.
Since about 5 per cent of all trials end in hung juries, this
means a change for two out of every hundred trials. The
second piece of relevant information was that the presiding
judge is by no means always critical of these juries who
remain hung at a 10:2 or 11:1 vote; about one-third of these hung juries are characterized as a result "which a judge too might have come to." Thus, not all of these hung juries are without merit. Thirdly, the Oregon experience suggested that England must henceforth expect some dissent in about one-fourth of all jury verdicts, an experience that might well be shocking in view of the serious sentence that usually follows a verdict of guilty. See H. Kalver Jr. & H. Zeisel, The American Jury; Notes for an English Controversy, Round Table, No. 226, April 1967.


25. Ibid., Kalven, and Buchholz, op. cit. Note 5.

26. ibid., pp. 6 and 43. It has now been adopted as standard measurement by the Administrative Office of the Illinois Courts.


33. The two most distinguished names in that group were Karl N. Llewellyn, until his recent death professor at the University of Chicago Law School, and Jerome Frank, judge and author.


(Continued from page 1, Col. 1)
There was, in the first place, the rapid provision of a specifically American legal literature, which supplied an orderly statement of rule and principle in a form accessible to the practicing lawyer. There was, secondly, the establishment of the handful of so-called national law schools which, both in their faculties and in their student bodies, represented a truly extraordinary concentration of talent. In their teaching, these schools seem, almost from the beginning, to have indoctrinated or brainwashed their students in the idea that there was such a thing as the true rule of law—a universal and unchanging absolute, always and everywhere the same. As a matter of jurisprudence, the proposition was clearly untenable. As a description of what actually was going on in the United States, with its continental range and its melting-pot population, it was grotesque to the point of absurdity. As a device for promoting national uniformity in the law, it could not have been better designed. Thirdly, and most important, was the announcement in 1843 by a unanimous Supreme Court, in *Swift v. Tyson*, of the doctrine of the general federal commercial law. The obvious solution to the problem of local diversity has always been federalization of the substantive law. We have never forthrightly adopted the federal solution; on the other hand, we have never been able to do quite without it and the federal principle has a way of rising stronger than ever from its own ashes each time it is ceremonially consigned to the funeral pyre. At all events the point about *Swift v. Tyson* is not the case itself, which was of almost no interest and could easily have been left to wither on the vine. The point is that the doctrine of the general federal commercial law was gratefully accepted in all quarters, lovingly tended and persuaded to flourish like the green bay tree. The Supreme Court of the United States became, and for fifty years remained, the country’s leading commercial court—a surprising discovery for any lawyer who knows the court only in its current guise.

These devices postponed the codification of commercial law for fifty years, so that, in the event, we got a codification vintage 1900 instead of one vintage 1850. That made a good deal of difference—although the difference was essentially one of form, not substance. That, to any lawyer, should be enough. The life of the law, as Justice Holmes might well have told us, has not been substance; it is, always has been and always will be, form.

An 1850 codification, we might think, would have been a disaster because in fact few of the propositions which had seemed true in 1850 as rules of sales law or of negotiable instruments law or of security law had survived until 1900 in anything like a recognizable form. Many of the rules, indeed, including the most basic ones, had in effect been replaced by their opposites. These reversals had been worked out by the courts with the aid of inherently flexible and increasingly refined case-law techniques. How could the job have been done at all if the courts had been hobbled by statutory fetters?

An 1850 codification would, I am sure, have had no effect whatever in preventing the necessary evolution and transformation of rules and principles. We know now that the 1900 codification had no such effect. We are already far enough into our experience with the 1950 codification—the Uniform Commercial Code—to be sure that it will have no more success than did its predecessors in stabilizing this remarkably unstable body of law.

Businessmen and their lawyers have always had an almost obsessive desire for certainty, and the predictability which results from certainty, in the law which regulates commercial transactions. Why this is so is easy to understand: there is a great deal of money at uncertain risk; it would be helpful to know what will happen if such and such a transaction is carried out in such and such a form. On the other hand, after a hundred and fifty years of experience, we can say with confidence that there are few, if any, areas of the law in which certainty and predictability are, and always have been, at such a premium and in which, the opinions of counsel to the contrary notwithstanding, sailing blind over uncharted seas is, and always has been, so recurrently the order of the day. Why this is so is also easy to understand. In the extraordinary dynamism, which has been the glory or despair of our industrialized society, the patterns and practices, the methods and techniques of “doing business” have, from the clearest of necessities, been in the highest degree unstable. Generation by generation, almost decade by decade, radically new problems have demanded radically new solutions. The law, a faithful reflector of whatever is, has simply mirrored the chronic instability of business practice.

The desire for certainty and predictability no doubt played a considerable role in gaining acceptance for the idea of a commercial codification in the first place and in actually bringing it about, not once but twice. Opponents of codification have always argued that a Code, specific enough to be meaningful, would have the undesirable effect of freezing the law as of the date of the Code’s enactment. I have suggested that the problem is not a real one—that the freezing effect does not take place. The mirror image of that suggestion is that the fancied benefit which will result from the Code—the anticipated gain in certainty and predictability—is not real either. Both the gains we had hoped for and the losses we had feared turn out to be largely illusory.

The codification of commercial law which we got after 1900 was at a far remove from the 19th century European Codes. The differences are attributable to timing and chronology much more than they are to differences between the American legal mind and the European or between a common law and a civil law system. An
American codification in 1850 might well have been quite like the European model: comprehensive and designed to be, from the date of enactment, the exclusive source of law. At least that hypothesis is plausible in the light of the Field Codes, drafted during the 1850's for enactment in New York, which were very much in the European or civil law tradition. I have suggested that the fifty-year delay in carrying out the codification made a great deal of difference in the all important matter of form: this is one of the points at which the delay seems to have been decisive.

Instead of a comprehensive Code of Commercial Law, we got a series of separate statutes, each purporting to deal with a bit or a piece or a fragment of the field, none of them purporting to state the whole law of the matter even with respect to its own bit or piece or fragment. These statutes were drafted under the sponsorship of the National Conference of Commissioners on Uniform State Laws, which was set up as a sort of subsidiary to the American Bar Association during the 1890's. Within ten or fifteen years the Conference promulgated uniform acts on negotiable instruments, sales, bills of lading, warehouse receipts and stock transfers. All these acts were, in remarkably short order, widely enacted—some in all states, others in all but a handful of states. On the other hand, subsequent attempts by the Conference to codify the law of personal property security transactions met with relative failure. It may be that the steam had gone out of the movement or that the material of security law, then in a state of violent and rapid flux, was intractable. At all events that part of the commercial complex was given another generation of non-uniform and largely case-law growth before being brought under the statutory yoke.

Thus in most of the country by 1920, and in many states as early as the 1900's, we had a codified law of sales, negotiable instruments, documents of title and security transfer. The several statutes, thanks no doubt to their common sponsorship, were loosely related even if they were in no sense integrated. They were on speaking terms even if they did not always speak the same language. These statutes were, truly, codifying statutes of a type we had not theretofore known. Between 1850 and 1900 there had been a great deal of legislative activity in the commercial law area. The law of sales and negotiable instruments had been moved a considerable distance from a pure common law base. But the earlier statutes had been narrow, specific and precise. For the first time, with the N.L.L. and the Sales Act, we get statutes which, for all their incompleteness, take a broad sweep; which do not deal merely with details of custom and practice; which provide a general framework for the whole of the relevant area of law.

We broke then with the European tradition by codifying bit by bit and piece by piece instead of all at once in a single swallow. But we broke with the older tradition even more significantly by making it expressly clear that our codifying statutes were not designed to be, and were not to be taken as, exclusive statements of all the law, past, present and future. From the N.L.L. on, each of the Uniform Acts contained a section captioned "Cases not Provided For by This Act" or some variant. The N.L.L. formula was:

"In any case not provided for in this act the rules of law and equity including the law merchant shall govern."7

In the Sales Act the formula had become more elaborate:

"In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy and other invalidating cause, shall continue to apply to contracts to sell and to sales of goods."8

Thus the codifying statutes were not to swallow up the pre-statutory law which was, over a broad range, in the Sales Act formulation, to "continue to apply." The statutes were to be, so to say, engrafted on the parent stock of the common law in the hope that graft and stock would continue, both vital, to grow together.

The general understanding of the profession seems to have been that the codifying statutes were merely declaratory of the common law—like the Restatements of the following generation. Since lawyers knew what the common law was, there was no particular reason for them to pay much attention to the statutory text or to take the statute seriously or even to take it as a statute. In the case of the Sales Act, this tendency was reinforced by the fact that the draftsman, Professor Williston, promptly produced a magisterial treatise on sales to accompany the statute.9 In the Sales Act case law nothing is more common than copious allusions to and quotations from Williston on Sales; nothing is rarer than a direct reference to the Sales Act itself; judicial analysis of the statutory text was almost nonexistent. It is true that in this respect the N.L.L. suffered a somewhat different fate from the Sales Act—perhaps because no treatise of the stature of Williston on Sales was ever provided to serve as a gloss on the statute. At all events a few—not very many—sections of the N.L.L. came to be treated as holy writ, even though the rest of the statute could be taken lightly and largely disregarded.

We had then a series of loosely drafted statutes, which expressly kept open the possibility of further case law development and which were generally regarded as not much more than Restatements. The problem of living with such statutes under such circumstances was, we may conclude, not an intolerably difficult one—surely not as difficult as the problem which the courts will face in living with the Code during the second half of the century. But there is one more point about living with statutes,
which is presumably as true now or next century as it was in 1900.

It is an unhappy fact of life that, while we can know the past only imperfectly, we know the future not at all. Our best informed guesses about what is going to happen next have an uncomfortable habit of missing the mark completely. These truisms may seem to make the lot of the statutory draftsman a particularly unhappy one. On another level of analysis, they may represent his justification and salvation—at least to the extent of guaranteeing that his statute will do no particular harm since it will in all probability have nothing, or almost nothing, to say about the issues which become the focus of litigation during its life. From our vantage point in time we can see a few examples of how this process worked out in the case of the turn of the century statutes.

The N.I.L.L. is the classical example of a statute devoted almost entirely to the resolution of once important issues which, even at the time the statute was drafted, had, in any significant statistical sense, lost all relevance for the current scene. Undoubtedly the central proposition of nineteenth century negotiable instruments law—which naturally became the heart of the codifying statute—was that the holder in due course of an instrument held it free of equities of ownership and of defenses. Now it is clear enough that due course holding or good faith purchase becomes a matter of importance, with respect to any type of property, only when that property is regularly bought and sold in a market and may be expected to pass from hand to hand in a series of transfers. From sometime in the eighteenth century and for a hundred years or so thereafter mercantile bills of exchange and notes had in fact circulated in such a market; before the development of a modern system of bank credit, such paper was an indispensable supplement to a chronically inadequate supply of currency. The theory of due course holding was an obvious legal response to an obvious commercial need. For a hundred years this theory had in fact been the heart and center of negotiable instruments law. At the time the N.I.L.L. was drafted it had already ceased to be so—for the reason that bills and notes had, in statistically significant volume, ceased to circulate; bank checks, the most recent addition to the family of short-term money instruments, of course never had circulated. We need not insist, for the sake of paradox, that commercial paper had quite ceased to circulate in 1900, the point is that negotiability—in the sense of due course holding—had become a matter of peripheral importance in most institutional lending transactions.

It is an occupational hazard of a draftsman, as he lovingly embalms the past, to fail to see what is going on before his eyes. In this respect too the N.I.L.L. offers us an instructive example.

We may say that the law of negotiable instruments has to do with the rules of law which regulate instruments which evidence either payment of debt or extension of credit. By 1900 the typical payment instrument had become the check and the check necessarily involves the relationship of people with banks as well as the relationships of banks among themselves. To the extent that notes and acceptances continued in use, it had become customary in this country to domicile them by making them “payable at” the maker's or acceptor's bank of deposit. It is hard to imagine any sort of instrument within the coverage of the N.I.L.L. which would not involve, at some point in its life history, the use of the banking system for collection, or the relationship between a bank and its customer, or both.

Bank collections and the bank-depositor relationship would have been, the intelligent analyst will assume, among the central preoccupations of the draftsman. The moral of the story is that the N.I.L.L. contains nothing whatever which is relevant either to the law of bank collections or to the bank-depositor relationship or which suggests that the draftsman even thought about either problem. Furthermore, most of the N.I.L.L. provisions on indorsement, transfer, presentment and payment (or dishonor), which made perfect sense with respect to the transactions the rules were designed to deal with, made little sense or nonsense or even a sort of anti-sense with respect to banks as holders, agents for collection and payors. All these matters became the focus of a great deal of litigation during the N.I.L.L. period. Since the codifying statute was unhelpful and, indeed, in many respects positively harmful, there was need, as we endured the boom of the twenties and the gloom of the thirties, for a great deal of legislation, non-uniform and much of it hastily contrived, to remedy these glaring deficiencies.

You may feel that the inadequacies of the N.I.L.L. are to be attributed to an unimaginative and incompetent draftsman—and indeed, so far as we know anything about the draftsman, there is good reason to believe that he was both unimaginative and incompetent. We are therefore fortunate in having the Sales Act as a companion piece, since its draftsman, Professor Williston, had, in the highest degree, all the qualities which, for the sake of argument, we may assume the N.I.L.L. draftsman to have lacked. Nevertheless, it is quite as true of the Sales Act as it is of the N.I.L.L. that the statute proved to be largely irrelevant to the issues which in fact provided the focus of litigation during the Sales Act period. It may be added that nothing in the Sales Act proved to be as harmful as some of the N.I.L.L. provisions—which may be a measure of the draftsman's genius.

It has become a truism to say that the volume of sales litigation dropped sharply after 1900 or thereabouts. One explanation for the decline, which found favor among
the proponents of a recodification, was that the law as codified in the Sales Act was so out of tune with the needs of this century, so anti-commercial, that the mercantile community fled the courts in favor of an extra-judicial resolution of their disputes by commercial arbitrators. Accepting the proposition that the Sales Act was out-of-date, I suggest that the decline in the volume of sales litigation was more apparent than real. There was just as much sales litigation as there ever had been. To much of the litigation the Sales Act contributed nothing and there was no need to cite it. Meanwhile the West Publishing Company, imprisoned in its own categories, digested the cases under Contracts, Agency and God only knows what other headings.

There was, for example, a great deal of litigation after 1900 about various types of long-term contractual arrangements: output contracts, requirements contracts, contracts with open or flexible pricing arrangements. In the state of law which the Sales Act reflected, the typical transaction was conceived to be a one-shot single delivery deal. The Act contained almost nothing relevant to the problems presented by long-term arrangements or forward contracts of sale. 15 These new types of contracts were, clearly enough, contracts for the sale of goods. It might therefore be assumed that decisions concerning their validity and proper construction would be thought of as belonging to the law of sales. Oddly, however, following the lead of the West Publishing Company, everyone agreed that these developments had nothing to do with sales law but were properly part of the undifferentiated law of general contracts.

The fact that the Sales Act largely ignored long-term contractual arrangements also led to curious results with respect to the calculation of damages for breach. The Sales Act damage rules were quite clearly geared to cases of breach at the time scheduled for performance 16 and, for such cases, the rules made perfect sense. In a long-term arrangement, however, breach will typically come at a time when the contract is, at least in part, executory: the contract, for example, is to run for five years and either seller or buyer repudiates after the first year. Application of the Sales Act damage rules to that situation would have produced legal chaos and economic nonsense. The courts, responding sensibly to a difficult situation, constructed a new set of damage rules without benefit of the Sales Act. 17 Indeed, by 1930 or so, the original Sales Act rules had been in many states lost, mislaid or forgotten so that, in the sales litigation spawned by the Great Depression, it is common to find the new set of judicially improvised damage rules applied not only to the case of advance repudiation of executory contracts but also to the case of present breach. As with the requirements contracts and open price arrangements, the law relating to so-called anticipatory breach was thought of, not as sales law but as contract law.

We need not argue the point that sales law is concerned with the distribution of goods as they move from manufacturer or producer to the ultimate consumer. At different periods in our history different methods of distribution have been in use. During the first half of the nineteenth century the factor, or agent for sale, was an important figure in the distribution chain. Consequently there developed an enormous amount of learning about the law of factors and the relationship of the factor, his principal and the people who either bought from the factor goods consigned to him for sale or made loans to him on the security of the goods. 18 A Sales Act drafted in 1850 would have told us, in great detail, all about the institution of factoring. During the second half of the century the factor gradually lost his importance as a distribution agent and was replaced by a series of independent middlemen: goods now moved from the manufacturers through various levels of wholesale distributors to a retail outlet in a series of sales. Naturally sales law of the second half of the century tells us a good deal about these independent middlemen. Most of this learning passed into the Sales Act, which is quite as good on middlemen as our hypothetical 1850 Act would have been on factors.

After 1900 the independent middleman, like the factor before him, began to disappear from the commercial scene. Increasingly manufacturers began to control their own retail outlets—either directly or through franchise arrangements with dealers. The complicated relationship between manufacturer and dealer provoked a great deal of litigation. Except for the accident of codification, it is reasonable to assume that the franchised dealer, like his nineteenth century predecessors, would have become a significant figure in sales law. However, sales law in this century has been whatever happened to be covered in the Sales Act. Thus, while factors and middleman, to the extent they survive, are figures in sales law, the franchised dealer is not.

Examples of this sort could easily be multiplied—not only for the Sales Act and the N.I.L. and their companions but for any codifying statute, whatever the time and place of its drafting and whatever the area of its coverage. Indeed I am sure that the same demonstration could be made quite as easily in the area we think of as public law—say, for the New Deal legislation of the 1930's—as in the area of private law which occupies us today. The truth of the matter is that we are always outwitted and surprised by what actually happens—which is on the whole an excellent thing.

Thus, we shall no doubt be surprised by what happens to the Uniform Commercial Code between now and the year 2000. We need not, however, forego speculation merely because the choice seems to lie between being
wrong for the right reasons and right for the wrong reasons.

In what has now become the American tradition of codification, the Code incorporates the same form of common-law saving clause which was included in the earlier statutes.\(^9\) Even without the saving clause we may assume that the tradition would have imposed itself: the idea that a codifying statute comes not to supersedethe common law but to coexist with it has become a part of our heritage, not to be gainsaid. If the Code had described itself as the exclusive source of law, we may doubt that the description would have been taken seriously, even for literary purposes. But it does not.

The Code purports to be an integrated and unified treatment of commercial law—which the earlier statutes neither purported to be nor were. No doubt some progress was made in this respect. It should be kept in mind, however, that the Code was the better part of twenty years in the drafting and that the world of the 1950's, when the project was finished, was, in some respects, a different world from the world of the 1930's, when it was begun. There are a good many discrepancies—internal self-contradictions—within the Code. Some of these could have been avoided if a more thoughtful and careful job of coordination had been done at the end. Others were inherent in the structure: even if the statute had been drafted by one hand, conceived and developed within a single brain, the solitary draftsman's responses in the 1950's would not at all points have squared with his responses in the 1930's. Consistency is not, to that extent, a hogoblin of any one's little mind. Thus the courts will still have work to do in reconciling the irreconcilable, harmonizing the disharmonies and so on. In this there is nothing surprising: it is what judges are paid to do.

Stylistically, the Code is at a far remove from the earlier statutes. It is tight where they were loose; precise where they were ambiguous; detailed and specific where they were vague and general. I am sure that codifying statutes which are loose, ambiguous, vague and general are to be preferred to codifying statutes which are tight, precise, detailed and specific. Here is a retrogression—no doubt an inevitable retrogression. This is the way a generation, weaned on the Internal Revenue Code, wants its statutes to be. The courts will just have to try harder.

There are, however, notable differences in style between the Articles of the Code which were first drafted—such as Article 2 on Sales—and the later Articles—in particular, Article 9 on Secured Transactions. In style the Sales Article can, without much exaggeration, be said to be closer to its predecessor, the Uniform Sales Act, than it is to the Code Article on Secured Transactions. For this difference there is an explanation in the Code's drafting history. During the early years of drafting, practical men, involved in the real problems of the real world, paid little or no attention to the project: it was, like the Restatements, something which could safely be left to the law professors. By preference, perhaps for jurisprudential reasons, law professors, whether they are working on Restatement or Code, draft in a style of loose and vague generality; they are not much concerned with providing specific answers to specific questions; they are concerned with the erection of a conceptual framework which will at most, when a specific question is posed, serve as a guide to the range of possible answers. Practical men seem to have become aware of the Code and to have decided that they should do something about it only toward the end of the 1940's. A practitioner's instinctive preference, in drafting style, is at the opposite pole from the preference I have attributed to my own breed. He quite naturally wants the statute to answer, clearly and unequivocally, the questions which he wants to put. So far as the Code was concerned, the practitioners came too late to have much effect on those parts which, like the Sales Article, had been finished and, so to say, put on the shelf. The Code sponsors resisted any idea of a general re-examination of the work already accomplished; except in detail the Sales Article, as well as Article 3 on Commercial Paper, retained their original form and style. They will, therefore, be relatively easy to live with. The practitioners did have the opportunity to influence the drafting of the later Articles. In many respects, their participation was most helpful and the product was greatly improved by being subjected to intensive professional scrutiny and analysis. A less fortunate result was that the drafting style of the later Articles was greatly tightened up: the i's were dotted, the t's were crossed, the questions were answered. Nowhere was this process carried further than in the Article on Secured Transactions, which is already beginning to creak arthritically in more than one of its joints.

Substantively, the Code, as all statutes must, devotes most of its wordage to a recreation of the past. Indeed, in this respect, the Code outdous its predecessors since, as a general drafting principle, everything that was in any of the earlier uniform commercial acts was carried over into the Code. Thus, all the 19th century rules, which were obsolete or obsolescent even in 1900, are lovingly preserved. There is nothing objectionable in this. It is what we might call the museum aspect of codification and is not without charm. It is unlikely that there will ever again be a case involving the seller's right to stop goods in transit on discovery of the buyer's insolvency; it is pleasant, nevertheless, to have a section on Stoppage in Transit which runs on for a full page of smooth, well-varnished prose, transporting us nostalgically back to the great days of railroading.\(^9\) Naturally, the Code also reproduces the events of the period between 1900 and 1950. Thus the requirements contracts and open price arrangements which were missing from the Sales Act make their appearance in the Code,\(^9\) along with a
good deal of material on formation and modification of contract which the earlier statute had left to the general law. Bank collections and the bank-depositor relationship, so strangely missing from the N.I.L., received detailed—perhaps overly detailed—treatment in Article 4 of the Code. We may confidently expect that these Code innovations will, like their Victorian predecessors, lose interest as new and unexpected issues become the focus of future litigation.

The Code broke new ground in Article 9 on Secured Transactions. The earlier attempt to codify security law had met with an almost flat failure. Most people who were involved with Article 9 in the drafting stage expected that the Article would arouse so much opposition and would occasion so much controversy that its presence might jeopardize enactment of the entire Code. In fact there was almost no opposition, the Article received general acclaim and its presence was undoubtedly the principal reason why the Code was, within ten years, enacted throughout the country. The Article 9 story tells us, I think, something about the real benefits of a successful codification.

What can be done, when the time is ripe, is to achieve a simplification of apparent complexity. Personal property security law had in the 1940's reached an intolerable state: there seemed to be no end to the proliferation of new security devices and with each new growth the matted jungle of security law became more nearly impassable. Beneath the surface, however, a process of unification had been obscurely working itself out. The separate security devices—conditional sale, chattel mortgage, trust receipt, factor's lien and so on—tended through time to lose their separate identities and to fuse or merge into each other. When the process had gone far enough, it was no great trick to cut away the tangle of underbrush and reveal the unified structure of security law that had already grown up. We should not forget the fate of the Uniform Chattel Mortgage Act of the 1920's, which proposed essentially the same sort of simplification and was never enacted anywhere. Retrospectively, we are in a position to say that the Chattel Mortgage Act came too soon: the underground process of unification had not gone far enough; the diversity still had deep roots; the tangle could not yet be cut away. Article 9 came at the right time and has had a success as spectacular as the earlier Act's failure.

The problems of living with the Code will, as in the past, to a considerable degree solve themselves as new issues appear with respect to which the Code's positive provisions will, increasingly, have little relevance. The overspecificity of some of the Code Articles and its occasional rigidity of detail will no doubt prove bothersome. To the extent that it is true that the judges of our generation are more timid, less willing to innovate, more deferential to the legislative command than were the judges of half a century ago, the process of rewriting the statute through judicial decisions will become more difficult. I was, I must say, gloomier about this aspect of the problem ten years ago than I am today. Since then two developments have considerably cheered me up. One has been the spectacular rebirth of judicial creativity and energy. Judicial activism on the public law side has, within a generation, recast and rewritten great chunks of our constitutional law—not, it must be admitted, to universal acclaim. On the private law side the same pressures seem to have been at work—for example, in the elaboration of radically new theories of a manufacturer's liability to users of his defective products. What had seemed to be a failure of judicial nerve after 1930 was evidently a merely temporary phenomenon: judges, it appears, are quite as willing to judge as they ever were.

The other has been the reappearance, after a short-lived eclipse, of the general federal commercial law: the announcement of its death in 1939 had evidently been exaggerated. The federalization can be seen in two somewhat different developments. The federal bankruptcy courts have become the principal forum for the resolution of novel issues of commercial law. The Bankruptcy Act of 1938 seems to have contemplated, when it was first enacted, a federal procedural framework for the liquidation (and later the reorganization) of insolvent estates, to be carried out according to state law rules of property and other rights. A notable feature of the history of bankruptcy law, particularly during the past twenty years, has been the gradual weakening of the state law component, the progressive strengthening of the federal law component. The bankruptcy court has now a considerable degree of freedom in deciding what the law ought to be; it will in the future have even more freedom. The other development is the doctrine that federal, not state, law applies to any transaction to which the United States, in any of its manifold capacities, is a party. That includes a considerable number of transactions. Needless to say, I do not expect to see the federal courts run roughshod over state law as represented by the Code. On the contrary, I would expect the federal courts to deal with the Code thoughtfully, intelligently and sympathetically. But I would also hope that, to avoid stumbling blocks, the federal courts will on occasion take advantage of their independence; if the results are sound, the state courts can be expected to follow.

It is unlikely that the Code will be left to the courts to anything like the extent that its predecessors were. Except for the N.I.L., the early uniform acts completed their fifty-year run in much the same shape, or in any case form, they had been in to start with. The Code in all probability will be the subject of a continual process of legislative tinkering—partly because the spirit of the times looks instinctively to a legislative solution, partly
Codification, or the drafting of a legal code, is a process that involves the synthesis and harmonization of existing laws into a comprehensive, organized, and coherent body of rules. This process is typically undertaken by a special commission or group of experts who are knowledgeable in the field. The result is a code that is intended to be more accessible, easier to understand, and more consistent than the existing laws. This can make it easier for people to understand their legal rights and obligations, and for lawyers and judges to apply the law correctly.

Codification is often seen as a solution to the problem of legal inconsistency and complexity. When laws are codified, they are organized and structured in a way that makes it easier to see how they are related to each other and how they interact. This can make it easier to identify gaps in the law, and to propose changes that will fill those gaps.

However, codification is not a panacea. It can lead to legal uniformity, but it can also lead to legal rigidity. Once a code is drafted, it can be difficult to change, and this can make it hard to adapt to new situations or technologies. Codification can also lead to the overgeneralization of laws, which can make them less relevant to individual cases.

Despite these challenges, codification continues to be an important tool for legal reform. It is often used to address problems of legal inconsistency and complexity, and to make the law more accessible to the public and the legal profession.
rupture of Insull Utility Investments, Inc. in the liquidation of that enterprise his acumen and sound practical judgment commanded the respect and admiration of businessmen and lawyers alike, many of whom were much surprised that a professor could master even the most intricate problems of that very complicated business organization.

When Mr. Bigelow reached the University's retirement age in 1939, he relinquished the Deanship, but, though emeritus, continued to teach classes in Conflict of Laws and in Property. In 1947, he was drafted by President Harry S. Truman to be a member of the National Loyalty Review Board and to the work of that agency he devoted much time and energy during the last years of his life. One who does not have access to the files of the Board cannot, of course, know how invaluable to the nation were his services, but no one who knew how preeminent were his qualifications for the difficult and extremely sensitive work of that agency could fail to be thankful that, in spite of his failing health, Mr. Bigelow had accepted the appointment.

The service that he rendered to the nation as a member of the Loyalty Board was a fitting climax to Mr. Bigelow's career, and when added to his contributions to his students, to the Law School to which he had devoted forty-six years, and to the profession at large, will merit eternal gratitude and always inspire those who were privileged to be associated with him.

It is particularly appropriate that the professorship which Mr. Bigelow's bequest sustains should bear his name. For it will serve as a perpetual memorial of a lifetime of eminently distinguished teaching and scholarship that encompassed substantially all of the first half-century of the School's existence, and contributed so brilliantly toward the realization of Mr. Harper's goal that the new Law School of The University of Chicago should be worthy of a place in the great institution he envisaged.

(Continued from page 1, Col. 2) as Medicare and public housing as embodying major issues of public policy when, in fact, they involved only issues of method and administration. But only politicians, by and large, seemed to take seriously their own continuing debate over the essential necessity for government's assumption of broad responsibility for the general welfare. Not all the demands of social responsibility, of course, have yet been met. Crime, juvenile delinquency, structural unemployment, bad housing, racial discrimination, the urban ghetto—these are deeply disturbing and stubbornly resistant manifestations of our continuing failures. There is good reason to hope, nevertheless, that they will eventually yield to massive applications of techniques and resources we now know how to use. The problem, essentially, is to find ways—especially in a period of limited but large-scale war—of making such applications massive enough.

Meanwhile, a new crisis has emerged. Compounded of population growth, technological change, mass communications, and big government, it is a crisis of identity—a crisis characterized by the progressive submergence of a sense of individual significance in a gray, featureless sea of homogenized humanity. And though it is a crisis characterized rather by a sense of vague anxiety and unease than by misery and pain, it is serious nonetheless for a society dedicated from its outset to the liberation of human aspirations and the fulfillment of human potential. It is serious because it portends the failure of that society in serving these ends. And since the processes which are blurring the individual's belief in himself are progressive and inexorable, it is hard to shake off a sense of impending decay and gathering darkness.

But even the gloomiest forecast can be useful in identifying a challenge—or so, at any rate, "the optimists and chronic hoppers of the world," as Mencken called us, are bound to believe. As I see the challenge, it is to maintain, create and, where necessary and possible, to restore, an environment for living which, first, is physically safe; second, provides aesthetic satisfaction; third, encourages the maximum development of human capacities; fourth, gives scope for the development of personal relationships in which the need for affection, mutual respect, and the recognition of individual dignity can be satisfied; and fifth, affords opportunity for the individual to play a meaningful part in the shaping of the policies and programs directed toward the four preceding goals.

Now, if I were giving five lectures instead of one (and, mind you, this is not a complaint because there is no conceivable prospect that I could have prepared more than one), I would cheerfully dilate on all of these themes. Indeed, as you know, my present responsibilities are largely concerned with some of the aspects of public safety. As to aesthetic satisfaction, I have long felt that if I could choose any job in the world it would be that of
eradicating ugliness in Boston—assuming, of course, that I were armed with complete authority to promulgate and enforce zoning ordinances, could exercise the power of domain, and had at my disposal upwards of a billion dollars. The third topic—the maximum development of human capacities—is the central theme of most of my graduation speeches (as it is, I suppose, of everyone else's), and the fourth would give me a welcome excuse to tee off on the tendency to denigrate as the mere product of an adventitious "Protestant ethic" what I am powerfully convinced are moral values rooted in the very subsoil of the human condition.

Regrettfully, however, I shall be obliged to restrict the focus of this lecture to the last of these five objectives—maximum opportunity for the individual to share in shaping the policies and programs which profoundly affect the quality of his life. And although some of the components of our present crisis—population growth and technological change, for example—can only indirectly be modified by the conscious direction of government policy, the same can hardly be said of big government itself. The former, after all, are byproducts of human activity, while government is its conscious creation. Insofar, therefore, as remoteness and impersonality, coupled with imperviousness to the impact or influence of the individual, are characteristics of big government which contribute to the existence of the current crisis, it can be the deliberate and specific objective of government to modify and offset these characteristics.

And yet it will not do to underestimate the power of the thrust toward big and still bigger government. It would be futile, in the first place, even to contemplate a slowdown in the growth of all government, as distinguished from the central government; the expansion of governmental action at some level is an inevitable response to the growing complexity and interdependence of an urban and technological age. We can, however, usefully seek to neutralize and even to reverse the gravitational pull which for decades past has been attracting power toward the center. The first step must be to identify and understand the components of this centripetal force.

One such component, surely, is the characteristic American demand for quick results (I shall have occasion further on to refer to this as "product demand" or "the product"): "End poverty!" "Cure cancer!" "Stop pollution!" In the face of these categorical imperatives, how can we be anything but impatient with the necessity for having to deal with scores of state governments, thousands of local governments, hundreds of thousands of voluntary organizations, and millions of individual people? The ready answer—the direct route—is to exert pressure at a single point, call upon federal funds, enact a new law, set up a new agency. And at the head of the march on Washington will often be found state and local officials whose primary allegiance is not to relationships within their own level of government, but to the groups centered around the aims and needs of their own profession or service.

One of my first assignments in the Department of Health, Education, and Welfare back in late 1956 or early 1957 was to analyze the functions of the Children's Bureau and make a recommendation to the Secretary, then Marion Folsom, as to whether they should or should not be split up and redistributed among other agencies of the Department. For me the most significant result of that assignment was the discovery that the Children's Bureau is not really a separate entity at all but the core of a bundle of personal relationships among people who share a common concern about maternal and child health programs and services to crippled children. This core extends vertically down through all layers of government into the voluntary agencies having similar concerns; the ties which bind children's service professionals together are far stronger than the bureaucratic affiliations connecting them horizontally to the administrators of other programs at the same level of government. The same phenomenon in many other fields explains why you so often find state and local officials aiding and abetting an exercise of federal power which apparently overrides their own authority but which actually serves a cherished program objective that has encountered some state or local impediment.

The second major component of the centripetal process springs from the need for reliance upon a taxing authority which can disregard inequalities in state and local tax bases and has no concern with interstate or intermunicipal competition. These are, to be sure, very substantial reasons for major reliance on federal revenue sources for the financing of state and local functions. They are not, however, in themselves reasons for reliance on federal authority over the exercise of these functions: the justification for such authority must rest on independent grounds. And while it may be impossible in an hypertrophied federal organ to distinguish those elements in its growth which are traceable merely to the necessity for reliance on federal funds from those which derive from some legitimate need for the exercise of federal responsibility or initiative, it can hardly be doubted that a new expansion of the federal bureaucracy proportional to every new increase in federal expenditures has generally been easy to rationalize.

The third element in the growth of big government—it produces, I suppose, a push toward rather than a pull from Washington—is the incompetence of state and local government. This is not to say, of course, that state and local governments are mostly incompetent most of the time; it is to say that inertia, legislative malapportionment, inadequate salaries and professional standards,
shortsighted restrictions on adequate staffing, political interference, and even corruption, have all too widely and too frequently impaired the effectiveness of state and local government. And in no area have these inadequacies been more manifest than in that of planning to meet new needs and to make efficient use of available resources.

Now, if this quick review of the major components of the centripetal process proves anything, it is that none is inherently bad. My own impression, for what it may be worth, is that the pursuit of power for its own sake has been a negligible factor; the process is not motivated by a willfully totalitarian thrust. One might well ask, then, why worry about it? And the fact is, of course, despite Mr. Justice Brandeis’ fifty-year-old warning against “The Curse of Bigness,” that until very lately only Republican orators have seemed to take the warning seriously. In candor, however, I think it must be acknowledged that bigness in government today, because of its contribution to our current crisis of identity, gives us far greater cause for concern than used to be justified. Insured though we have become to the cry of “Wolf!,” even a “liberal” can now admit that the wolf may indeed be in the neighborhood. Just this week, in fact, the senior Senator from Massachusetts denounced the evils of big government in a speech at Amherst College.

But the recognition that a problem exists is only a pre-condition to its solution. Then comes the hard part. And in tackling the hard part, a useful first step is to put aside approaches which, however appealing, cannot possibly work. For one thing, we cannot, as William F. Buckley has said he would like to do, sit astride history screaming “Stop!”. Social security and “socialized medicine,” like the automobile and automation, are here to stay. Besides, there just isn’t room for all of us out there in Marlboro Country with Barry Goldwater. Experience, moreover, has demonstrated the bankruptcy of even such sophisticated approaches as that of President Eisenhower’s Federal-State Action Committee which, as you may recall, urged the states to take over the federal grant-in-aid programs for vocational education and waste treatment construction in return for a share of the federal telephone excise tax. And while it may well be that Generals O’Brien and Gavin are right in forecasting that operation of the Post Office by a private corporation would pay dividends in efficiency, the substitution of business bureaucracy for government bureaucracy is obviously not the way to get the citizen into the act.

No, the only conceivable approach that offers any real prospect of success is the same one we followed in establishing the federal system, inventing the regulatory commission, and devising the ingenious arrangements of federal, state, and private functions under which our social security, employment security, and workmen’s compensation systems are administered. And what is that approach? Essentially that of a good lawyer: to seek to understand the problem, to grasp the relevant principles, to assemble the essential facts, and to exercise resourcefulness in achieving a constructive solution.

Let me, then, restate the problem: it is to devise ways of giving the individual the opportunity to play a more meaningful part in shaping the governmental policies and programs which affect his physical, aesthetic, occupational, recreational, and human environment.

How are we to go about this? What real opportunity is there to involve individuals in matters affecting them? The first essential, plainly, is the conviction that the goal is important. And this, in turn, has implications for our present attitude toward “the product.” If we are really as concerned as I think we should be about the crisis of identity, we must be prepared to accept some sacrifice of the premium we have habitually placed on speed and efficiency and to put in its place an ungrudging preference for citizen participation in collective decisions. Such a fundamental change in attitude, of course, will not easily be achieved. My revered teacher Judge Learned Hand once wrote:

“Life in a great society”—this was in 1929, long before LBJ—“or for that matter in a small, is a web of tangled relations of all sorts, whose adjustment so that it may be endurable is an extraordinarily troublesome matter. Men have indeed in periods of revolution tried to start afresh and contrive a new scheme from the bottom up. The surprising thing about it is that when they finish they have accomplished no very startling changes. The French Revolution shifted the center of political power from one class to another, but the relations of the individual to the government did not very deeply change for long after, if they have ever changed at all. Habit was too strong for any fabric which could be woven from the brain of Jean Jacques Rousseau. . . . In ordinary times at any rate men have no time and no capacity to draw new patterns for their society: they must make their living and answer the other problems of their individual lives. Until something in the general frame of things is so irritating as to tease them into action, they go along with what is usual. . . .”

In the present crisis, one hopes that just such an irritant is teasing us into action. For there will be required something like a revolution in attitudes to produce the kind of priority for the individual in the context of governmental program development and administration that is already accorded to individual rights in the administration of criminal justice. Indeed, since governmental programs are progressively coming to have greater and greater impact on more and more of us, it is not, I believe, too farfetched to suggest that the constitutional compulsion to respect the claims of individual worth and dignity which is manifested now in the requirements of procedural due process in criminal cases will someday be extended to the guarantee of procedures whereby individuals are enabled to participate in governmental processes. There is, to be sure, a wide difference in directness
of impact on the individual between the trial of a criminal charge against him and the regulation of billboards along the roadways he uses, but this, arguably, is a difference more appropriately reflected in the degree of strictness of the indicated procedural safeguards than in their general character. Early signs that just such safeguards are in fact developing can perhaps be discerned in recent judicial pronouncements on the "one man—one vote" theme, as well as in the recent decision affirming the right of citizens fighting to preserve the Hudson River Gorge to be heard "on a basic concern, the preservation of natural beauty."

Be that as it may, the task of defining a role for the individual in the policy-determining process requires the development of the very sort of criteria for identifying the functions appropriate for such participation as would have to be applied in determining when the Constitution compels it. Let us grant, for example, that the command of troops in South Viet Nam (or South Carolina) is an obvious example of a function inappropriate for citizen participation. An equally clear example of the opposite is the conduct of a neighborhood rehabilitation program. Most governmental functions, of course, fall somewhere between these extremes, and among the factors which can make them more or less suitable for citizen participation are such variables as the directness of their impact on the individual, his family, or his community; the scope of the geographical area within which, as a matter of practical necessity, the function must be exercised; the importance, again as a practical matter, of uniformity of administration within this area; and the necessity (which should be held to a minimum) of reliance on technical expertise.

Having identified a function which is appropriate for citizen participation, it then becomes necessary to ask:

First, how, without excessive sacrifice of "product," can this function be made accessible to the understanding and impact of the concerned individuals?

Second, who are the individuals—the electorate or constituency, in effect—who should be entitled to participate?

Third, what form should this participation take?

The natural and legitimate concern with school policies shared by the parents of the children attending an elementary school in a slum neighborhood should entitle them to an understanding and respectful hearing by department of education officials, and yet "product" considerations inescapably prevent constituting them in effect as an autonomous school board for that one school. Dwellers in a congested urban neighborhood can effectively band together on a narrow geographical base to secure improvements in municipal services; the urban parents of retarded children, to be comparably effective, are likely to want to draw into their organization similarly concerned suburban parents. For some purposes, a neighborhood action group is the answer; for others, membership on a policymaking board; for still others, the right to vote for elected spokesmen, as in the case of Boston's projected 18-member "Model Neighborhood Board" under the Model Cities program.

In every such situation it is crucial not only to involve the right citizen participants, including the recipients of services (AFDC mothers, for example), but so to define their role that their participation will afford a real and not fictitious opportunity for citizen participation. In every case, moreover, it is essential to consider whether the governmental response should be to encourage citizen participation through their own voluntary organizations or through representation on some official body.

Massachusetts enacted last year a community mental health program which illustrates one approach to the problem of citizen participation. Consistently with the requirements of the federal Community Mental Health Act of 1963, the program establishes a statewide pattern of mental-health service areas embracing somewhere between 75,000 and 200,000 people. Generally speaking, these areas are larger than our cities and towns and smaller than our counties and thus could not be assimilated by any existing governmental structure. There were a number of compelling reasons, moreover, including the fact that no local taxing authority would be contributing any substantial amount to the cost of the program, why its overall direction had to be centered in the state mental health agency.

Within this framework we gave each area, under an area director and a citizen board, a substantial degree of autonomy, vesting in the board the power to approve the selection of the director, to participate in the development of the area budget, to approve contracts and other fee-for-service arrangements with voluntary agencies, and certain other enumerated powers and responsibilities. This answered the question of how to make the overall function to be performed accessible to citizen participation. The question of who should participate—the constituency question—was answered by spelling out various institutions, agencies, interest groups, and professions whose representation on the area board would be required. The means chosen to provide a vehicle for citizen participation was, of course, the area board itself.

This kind of citizen-board is a model I hope to see adapted in Massachusetts to similar programs in public welfare, public health, and vocational rehabilitation administered in areas geographically coextensive both with each other and with the mental health areas. Indeed, planning along these lines is already in various stages of progress. In the case of public welfare and public health, this will mean administration on the basis of larger geographical units than at present, since in Massachusetts public welfare and public health have traditionally been municipal functions. The result, nevertheless, should bring about a net gain in citizen involvement, for the
area boards will provide a better vehicle for meaningful citizen participation than the present system of municipal administration.

Similar considerations are, I think, applicable to any problem transcending the municipal boundaries which subdivide a metropolitan area. Our present reliance on the fragmented functions of autonomous local units can clearly be excessive. And yet the fact that such units do so conveniently afford opportunities for citizen participation makes it important to continue to rely on them for those functions that can be handled locally. As it was written in the 1648 edition of the Laws and Liberties of Massachusetts, "The Freemen of every Township . . . shall have the power to make such Laws and Consti-
tutions as may concern the welfare of their town . . . not repugnant to the public Laws and Orders of the Coun-
trie." The question is, what functions can only be handled on a metropolitan basis and what functions—or elements thereof—can just as well be handled on a municipal, community, or neighborhood basis?

Among the things most obviously eligible for administration on a metropolitan basis are water and sewage, as was recognized as long ago as 1889 when Greater Bos-
ton's pioneering Metropolitan District Commission was given these functions. More recent candidates for metropolitan administration are fire and police services. For these services, however, one can visualize a compromise which would treat training activities, communications, and reciprocal arrangements for the sharing of information and specialized personnel on an area-wide basis while preserving a substantial degree of local responsibility for other activities.

Or again, take land use, one of our most troublesome existing problems and one certain to become more so. We can't for long in any megalopolitan area continue to allow the location of industry and low-income housing to be products of such uncontrolled circumstances as, for example, what community gets there first with the most restrictive zoning by-laws, or, as the case may be, offers the most attractive inducements to the location of new industrial plants. The regulation of land use and occup-
cancy is the key to a host of other problems—social stratification, de facto segregation, tax-revenue distribution, and availability of citizen leadership, not to mention such more obviously land-related matters as access to recrea-
tional facilities and open spaces. To solve these problems demands planning—and that means planning with teeth. But this, on the face of it, can be done in broad strokes for the megalopolis as a whole while leaving the inter-
mediate details to specially constituted regional bodies and the ultimate details to the municipalities, with appro-
riate provision for citizen participation at each level. The hardest question—and in due course it is bound to become urgent—is going to be: how much authority over private decisions must such bodies be allowed to exercise?

This is, perhaps, a good place to pause and look back over the ground we have covered. We began by recognizing a crisis of identity, and enumerated some of the factors contributing to the growth of the central government. Having then defined the problem as that of finding ways of giving the individual a meaningful part in shaping the governmental policies and programs which most directly concern him, we proceeded to consider opportunities of making the individual a direct participant in this process. We come now to alternative means of involving him.

One such alternative offers almost unlimited potential for bringing public functions within reach of the citizen: the utilization of contract and fee-for-service arrange-
ments with private voluntary agencies. Such agencies have a number of advantages over government agencies—flexibility, receptivity to innovation, and so on—but their most important asset is that they seek out and enlist the concern of individuals who care deeply about the agency's social purpose and the needs it is trying to meet. Millions of volunteers give time and energy and deep devotion to Boy Scouts and Boys' Clubs, to community hospitals and community chests, to little theaters and Little Leagues, which they would never give to a government program. It is important, therefore, to expand the role of voluntary agencies not alone or even primarily for the sake of the services they perform but for the sake of the opportunity they give so many people to feel that they are making a personal contribution to a worthwhile effort.

Government programs can, of course, be so designed as to displace or to encourage reliance on voluntary agencies and private organizations. Rhode Island's temporary disab-
ility insurance program preempts the field; New York's, through the option on "contracting out," leaves room for voluntary arrangements. Medicare, to the extent of the coverage provided, ousts other forms of insurance (I once spent most of six months trying to work out a health insurance scheme for people over 65 which would have preserved a role for voluntary and commercial carriers); the community action part of the poverty program (Title II of the Economic Opportunity Act) invites the involve-
ment of voluntary agencies.

Certain other recently enacted federal programs, par-
ticularly in the health field, confront us with the urgent necessity for a choice between the expansion of direct government services and a partnership between govern-
ment and private organizations. Medicare, medicaid, the heart-cancer-stroke program, and the expanded maternal and child health services called for by Title V of the Social Security Act, not to mention the community men-
tal health program which has already been discussed, individually and in combination demand the develop-
ment of better and more accessible health services for low-income people. As I've had occasion from time to time to bring to the attention of medical groups just as
forcefully as I know how, either this demand will be met by cooperation between voluntary health services and public health agencies through various contractual arrangements, or else government will be forced to build and staff its own clinics.

I have elsewhere tried to spell out what I think are the very real human considerations that favor this kind of partnership over the direct purveying of government medicine. For present purposes it will have to suffice to cite on this point Dr. Bertram Brown, former head of the community mental health program in the National Institute of Mental Health, now Deputy Director of the Institute, who has said that the development of community mental health programs throughout the nation demands wherever possible a “coalition of resources”—a coalition, in other words, which draws upon whatever services can be provided by the agencies that have already come into being as an expression of community concern with the problems of mental health.

Another approach toward offsetting the bigness of government and bringing it within reach of the citizen requires the evolution of a number of new kinds of people whose roles would have in common the function of serving as a link between the citizen and government.

One such person would have a role best described, perhaps, as that of “neighborhood counsellor.” As matters now stand, all the established categorical disciplines such as public health, public welfare, mental health, and vocational rehabilitation, have to rely on individuals filling roles which in practice draw much more heavily on a basic understanding of human problems and on a general knowledge of the capacities of more specialized fields than on any specific professional training such individuals may once have had. Public health nurses, public welfare caseworkers, psychiatric social workers, and rehabilitation counsellors all, in their day-to-day work, devote a large part of their time to this kind of counselling and referral.

The burgeoning complexities of governmental programs and the continuing subdivision of old professions into new sub-specialties combine to make counselling and referral, at the first point of contact by a government agency with people in need of help, increasingly important. In view of this, it makes sense, I believe, to visualize educational programs designed from the outset to train people for this essential service—people who would become as intimately familiar with the urban neighborhoods in which they serve as an agricultural agent with his own rural area and who could, in addition, help to mobilize the interest and the skills of the “indigenous non-professionals” who should play an increasingly important part in all community-oriented programs.

A second area in which a similar function can be performed is in law enforcement and police protection. Indeed, this would appear to be very much the role visualized by the National Crime Commission for the “community service officers” who, under the Commission’s recommendation, would operate out of storefront headquarters in slum areas.

Thirdly, there is a need for lawyers who, in representing the indigent, will not only provide needed assistance in matters that are traditional functions of the lawyer but will also serve as spokesmen for poor people in their dealings with government agencies.

I’m not yet convinced, however, that we should take the additional step of creating an ombudsman whose charge would be to serve as an omniscient champion of the people in their relationships with government because I’m not sure that we can expect a man both to cover such a broad range and to be able to do it effectively. And I see these three—the neighborhood counsellor, the lawyer for the poor, and the community service officer—as between them doing everything that an ombudsman could do and doing it better.

But to make these various approaches toward meaningful citizen participation in government really effective, we must reverse the pull toward the center exerted by present systems of financing governmental functions. To restate a point made earlier, we should realize that the level of government at which money is collected and disbursed has no logical relevance to the question of where any given program should be administered. The fact is, however, that it has often had a decisive influence, and the result is a dilution of citizen participation not offset by any product advantage. It should follow, therefore, as a consistent principle of government, that reliance for financial assistance by a lower level of government on a higher one should never in itself be a reason for giving the higher level administrative jurisdiction over the programs thus assisted.

Recognition of this principle is made all the more important by the explosive growth of demand for governmental services at the lower levels of government, since the combination of inequality in their taxable resources and of competition among them creates entirely legitimate reasons for their seeking assistance from above. Thus, revenue sharing by the federal government with the states is just as necessary and desirable as revenue sharing by the states with local governments. It follows, moreover, that insofar as the justification for revenue sharing depends on inequalities among tax bases, the revenue to be distributed should be shared on a basis favoring the poorest states and communities. To let the volume of income taxes collected within the boundaries of a given state be the measure of the share of federal revenue receivable by that state would be just as wrong as to make the total amount of real-estate taxes collected within a given municipality the measure of the state revenue allocable to that municipality.

For these reasons I favor a revenue-sharing plan along the lines of the bill (S.482) proposed by Senator Javits,
which is based on the principles underlying the Heller Plan. Under Senator Javits’ bill, however, only 15% of the funds to be shared would be distributed on a basis favoring the low-income states; my own preference would be to distribute the entire amount, as in the case of many existing grant-in-aid programs, under a formula inversely weighting per capita income. In order, at any rate, to have a significant equalizing effect, the amount of federal funds thus distributable should eventually reach something like 20% of all state and local expenditures, or, at their present rate, about $17.4 billion. This amount, added to present categorical grants of another $10.7 billion, would bring total federal aid expenditures to about one-third of all state and local expenditures—which would seem to me about the right proportion.

A second type of federal assistance (included in the categorical grant total given above) should take the form of block grants for such broad functional purposes as education or public health or mental health, subject to no restriction beyond the requirement that they be expended for these purposes. Some of this money, depending on other pressures on the federal budget, might be new, but much of it, at the outset, could be obtained by cutting the strings on the funds furnished under established grant-in-aid programs whose state-plan requirements no longer serve a necessary purpose. The creation of these block grants, moreover, should be accompanied by the initiation of a regular and continuing procedure for the reappraisal of grant-in-aid programs to determine when their stimulatory or standard-setting purpose has been sufficiently well fulfilled to justify their transfer into the block-grant category. As leading candidates for early transfer, I would nominate the old vocational education programs, the “impacted areas” program, and some of the titles of the National Defense Education Act, in whose drafting I had a considerable share.

Now, I am well aware that this “put-it-on-the-stump-and-run” approach (which is what we used to call it when I was at HEW) has been criticized as involving an abdication of the federal responsibility to see to the wise use of federal funds—a complete abdication in the case of revenue-sharing per se, nearly so in the case of block grants. But the short answer is that the money isn’t “federal” money at all; it’s just collected through use of the federal taxing power. And the only reason for relying on the federal taxing power to collect this money is to take advantage of the federal tax base for the benefit of the states. The federal government would not otherwise have occasion to collect it at all. There exists, therefore, no more reason for federal supervision over the expenditure of these funds than over the expenditure of funds collected by the states themselves.

In addition to these two types of federal assistance, there should continue to be grant-in-aid programs of the kind now so widely used (a Brandeis University graduate student, before he stopped counting, recently identified more than 200 separate grant programs in HEW alone). But since such programs demand a substantial degree of federal direction and since they evidently cannot be divorced from a built-in tendency to generate cascades of paperwork, they should have to bear—and throughout their existence continue to sustain—a substantial burden of proving that their stimulatory and standard-setting function is really necessary.

Finally, there will remain a need for project grants for research and demonstration purposes, subject also to periodic reappraisal to determine when the project-grant program has reached a stage mature enough to be included in the nearest categorical grant-in-aid program, from there moved into the block-grant stage, and, ultimately perhaps, consigned to the revenue-sharing program.

To recapitulate, it is possible to identify a number of potentially useful approaches toward giving the individual a greater influence on the forces which shape his environment: the breakdown of governmental functions into segments that can be adapted to citizen participation; the expanded use of contracts and fee-for-service arrangements with private organizations; the use of people who can serve as a link between the individual, the neighborhood, and governmental agencies; and the development of less restrictive means of federal financial assistance to governmental functions at the state and local levels. Quite plainly, however, none of these approaches is self-executing; they must be consciously pursued. And so it seems to me that one more element is needed, and that is the creation of mechanisms for the planning of decentralization itself.

As coordinator of health, education, and welfare programs in Massachusetts during the last two years, I gradually learned that the greatest need in program development and administration is for joint planning among agencies and across the lines of professional disciplines. And yet the lack of machinery for this purpose is glaringly obvious. On the one side, such planning must be comprehensive and embrace the many points at which programs aimed at meeting human needs overlap or impinge on each other. On the other, it must be finely enough subdivided to be capable of coping with the particular kinds of problems requiring a specific response. And within each of these subdivisions the planning process must concern itself directly with the ways in which citizen participation can be built into the system—a task, essentially, of constitution-making for an enormously wide variety of situations.

I drafted last year a bill which in the present Congress has been sponsored by Senator Hill, the Chairman of the Senate Committee on Labor and Public Welfare, Senator Javits, the ranking Republican on the Committee, and a
number of other Senators, and which would provide federal leadership and funds for just this kind of planning. And while it is true that enactment of this bill would on its face mean a step in the direction of still bigger government, unless state and local governments develop the capacity to plan—and particularly to plan for ways of involving the individual citizen—the forces controlling our lives will continue to become more and more remote and less and less responsive.

Nearly three years ago, looking at the faces of thousands and thousands of people during the course of a long statewide campaign, I suddenly remembered the dedication of a book I once read which goes something like this:

“This book is dedicated to the people who are sometimes called 'the little people.' Well, I want you to know they're just as big as you are, whoever you are.”

Our government exists for and because of individual people, and it will have failed in its responsibilities to them if it fails to preserve an environment in which every individual, whoever he is, feels just as big as you are, whoever you are.

Exits and Entrances

George E. Fee, Jr., JD'63, has been appointed Dean of Students in the Law School, succeeding James C. Hormel, JD'58, whose resignation was effective June 30, 1967. Mr. Hormel has been a major source of strength to the School in his six years in that office; he will be greatly missed.

Mr. Fee practiced briefly in Boston following his graduation. He was serving as Associate Editor of the Law Book Department of Little, Brown and Company when he came to the Law School as Director of Placement two years ago. As Dean of Students, he will be responsible for the selection of students in the J.D. program, for student aid in the same area, and such matters as course and examination scheduling and recording of grades. Admissions and fellowship awards for graduate students are handled by Professor Edmund Kitch, JD'65, Chairman of the Graduate Committee. Mr. Fee will continue to oversee the Placement Office.