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The Teaching of Jurisprudence in American Law Schools

Anthony T. Kronman*

When Dean Morris asked me to share with the Visiting Committee some of my ideas about the teaching of jurisprudence in American legal education, my reaction was a mixed one. To be invited to speculate on such a large and complicated topic was of course very flattering—especially for a junior faculty member who is new not only to the Law School but to law teaching as well. However, the topic Dean Morris proposed to me—the teaching of jurisprudence in our American system of legal education—is a high-risk topic. In speaking on it even for a short time, one runs the risk of being overly simple or pretentious or just plain silly. I am sure that you will understand when I tell you that the prospect of today’s talk has produced a moderate amount of anxiety on my part.

Although this clearly is neither the time nor the place for a sober dissertation on the role of jurisprudence in our system of legal education, I should like to make one or two points—or rather raise one or two questions—that I think are sufficiently serious to warrant, and sufficiently interesting to reward, a few moments of reflection.

The first thing we must do is fix our terms. Jurisprudence is an elastic word, which is easily stretched to cover a host of different things. At one extreme, the term is synonymous with legal theory or, perhaps even more generally, with moral and political philosophy. At the other extreme, it is sometimes used to describe any investigation or description of the guiding principles that inform a particular substantive area of the law—as when we speak of the “jurisprudence” of torts or taxation. Constitutional interpretation, I suppose, is somewhere in the middle.

In my remarks today I shall use the term “jurisprudence” to refer to a branch of philosophy. I have in mind the sort of thing that traditionally has been taught in the jurisprudence course offered by most American law schools. Although the content of such a course naturally depends upon the instructor’s interests, there are certain core questions that are almost always included on its agenda. Among them, I would list the following four: (1) What is a legal system, and what are the materials of which it is composed? (2) What is the nature of legal obligation, and how does it differ from or resemble other forms of obligation—in particular, moral obligation? (3) Must the law be just? Or, more cynically, can it be? (4) What are the properties of legal argument, and how does the interpretive use of precedent by lawyer and judge differ from other kinds of interpretation—for example, from those which a physicist brings to bear on the results of his experiment, or a literary critic on his text, or a psychoanalyst on his patient?

This is a formidable list of questions. But the questions are by no means of interest only to teachers of jurisprudence. In one way or another,
they work themselves with regularity into our substantive law courses—into contracts and torts and taxation and administrative and criminal and constitutional law. It is a rare law school class that has no jurisprudence in it. Like Molière’s prose-speaking gentleman, we are doing jurisprudence all the time. I hasten to add that the comparison is not really apt, since I suspect that my colleagues are fully aware of what they’re up to.

Jurisprudence is everywhere in the law curriculum. I cannot imagine, for example, teaching the doctrine of promissory estoppel to my contracts class, or exploring with them the notions of duress and unconscionability, without talking about the relation between legal and moral obligation. The concepts of fault and causation in tort law, the notoriously difficult problem of criminal punishment, the use of the tax system to achieve a just distribution of wealth, the constitutional conflict between the express right to freedom of speech and the judicially implied right to privacy, the idea of ownership, the use and abuse of precedent in every field of the law—all these raise jurisprudential issues, or more precisely constitute jurisprudential issues, since they cannot be “got at” without doing some philosophy.

The jurisprudence course, then, has no monopoly on jurisprudential questions. But, if this is so, it is more difficult to see what marks jurisprudence off as a special discipline, and unless we know what sets it apart, it is quite impossible to describe its place in the law curriculum. If we have difficulty identifying what jurisprudence is all about, I think it is because we expect it to have a substantively distinct subject matter of its own (like federal taxation or bankruptcy or civil procedure). This expectation, however, is a misleading one: what distinguishes jurisprudence as an enterprise is not so much the questions that it asks as the way in which it asks them. Questions about law and morality and the nature of a legal system and the function of precedent arise routinely in every course in the curriculum. But in the jurisprudence course they are treated in a peculiarly abstract way. It is the abstractness of jurisprudence that sets it apart.

The single most striking fact about the teaching of jurisprudence in American law schools is that it is typically not taught by the so-called case method. Most jurisprudence courses are taught from texts, from books and articles, and if a case comes in now and then, it is by way of illustration, to embroider an idea and perhaps give it some added poignancy. But it is not the cases that are important, and few jurisprudence teachers would argue that the subject can be taught best or most economically by the case method. Jurisprudence is a branch of philosophy, and at least since Plato the advocates and practitioners of philosophy have instructed us to direct our attention to principles rather than particulars. Of course, to paraphrase a very famous remark of Kant’s, if particulars without principles are blind, principles without particulars are empty. In legal education the particulars are the cases or, more precisely, the cases and the materials that today customarily accompany them.

Of course we do not serve up the particulars blindly, but attempt to give them some coherence and meaning by drawing out their principles, often at a length exasperating to teacher and student alike. But in the courses taught by the case method, it is the particular case or statutory provision that is ultimately the important thing. Although a teacher of jurisprudence may be unable to do without an occasional case or two to illustrate his point, it is the conceptual proposition (whatever it might be) that he regards as interesting and important. In the jurisprudence course, one has an opportunity to linger at a level of abstraction which, if reached in other courses, must be abandoned almost as soon as it is attained. What place we assign jurisprudence in our law curriculum will depend upon the role we think this kind of abstraction should play in legal education.

I happen to think that the role ought to be a rather substantial one, and one of the most attractive things about the University of Chicago Law School—from my vantage point—is that this view is widely shared among the faculty. There is, however, a traditional argument for suppressing abstraction in legal education. I should like to say a word or two about it.

It is often said that one of the great strengths of a legal education at an American law school is that it dissolves the misplaced optimism that most undergraduates tend to have concerning the power of ideas. There is much to this, I think.
The students in my contracts class are very good at handling abstractions. This is precisely what their undergraduate training has prepared them to do. They are less good at handling cases. I am overgeneralizing, to be sure, but it seems to me that my first-year students find it very easy to state the principle of a case and very difficult to say what the principle, as applied to that particular set of facts, actually means or may be said to stand for. The Socratic method of interrogation is intended to repair this deficiency. Under Socratic fire, the student is disciplined to think about the facts and is made to see, as Professor Corbin often remarked, that it is the facts that are all-important—not the rules of law.

This sensitivity to the facts is something that must be learned or acquired in the first year of law school. The beginning law student must have his (or her) nose rubbed in the facts: everything else one does in law school depends on it. This is often both a painful experience for the student and an exhilarating one. It is painful and exhilarating for the same reason: the facts are something new, at best only rarely encountered in one’s undergraduate years. Undergraduate education is primarily theoretical. Even a very successful undergraduate, who is comfortable and competent with theoretical questions, is likely to lack a feel for the facts. This requires good judgment, and judgment is something altogether different from intelligence. A legal education is a training in judgment: intelligence is only the raw material on which it works. So it is sometimes said that one of our main tasks, as law teachers, should be to discourage abstraction (or at least philosophical abstraction), to continually insist upon the limits rather than the power of ideas, because only in this way will our students be led to abandon their adolescent enthusiasm for thinking and to become men and women of good judgment.

Although I have overstated this view in order to criticize it, it does point to one of the great strengths of the case method of instruction. An American legal education is in good part a training in skepticism, and, if it is tempered with an appreciation of the importance of ideas (not just in the law, and not just as instruments, but in human life generally and for their own sake), such skepticism is a powerful—indeed, an indispensable—aid to clear thinking. I have found in my own experience, in conversations with philosopher friends, that a pointed hypothetical is often the most economical way to make a point or to deflate one. Lawyers, on the whole, are no smarter than philosophers, but their case-hardened caution about ideas makes them slower to accept an abstraction that hasn’t been baptized by the facts. This is often infuriating to philosophers, but the lawyer’s propensity to test the reach of an idea with cases not only is a healthy counterweight to what might be called the exuberance of thinking—it also makes him a formidable opponent in any philosophical argument.

This is the positive side of the case method. There is, however, a negative side as well. The case method is designed to erode the student’s naive confidence in the power of ideas by keeping constantly before his eyes the difficult borderline case that strains principled distinctions to the breaking point. Undoubtedly this is a painful experience for many students, since it strikes at the heart of their intellectual self-confidence, and the temptation is great to combat the pain by denying that ideas have any power in their own right, apart from their use as counters in the struggles of practical life. No one is more likely to feel the seductive appeal of this kind of anti-intellectualism than a harried first-year law student who has been Socratically battered from pillar to post. In fact, once they have discovered the trick, most law students (or at least the best ones) appropriate the Socratic engine for their own purposes and begin ruthlessly grinding one another down in a kind of mock combat in which they try to anticipate what it will be like to think and act like a lawyer. All this is perfectly understandable: it is part of learning the craft. But as Karl Llewellyn noted in the Bramble Bush, the line between skepticism and cynicism is a thin one. We want to teach our students to be sensitive to the limits of ideas so that they may practice law responsibly. At the same time, we must guard against the smug conviction that thinking is a luxury, a self-indulgence, a kind of pale reflection of the robustness of practical life. Most of our students, when they come to us, are infatuated with theory. And by and large they are very good at theory because abstract thinking
does not require experience. For them, the first year of law school is a disenchantment. But when we have taught our students how fragile and unsure any abstraction really is, we must help them to regain something of their old confidence in the power and importance of thinking. This restorative task is, if anything, more difficult than the destructive one. But it is just as important: we want our students to be able lawyers, but we also want them to be intellectually mature men and women. It is a sign of intellectual maturity that one affirms the value of thinking in full awareness of its limitations.

Because it provides a forum in which abstraction is encouraged, the jurisprudence course plays an important restorative role in our law curriculum. To be sure, it is not the only course in which legal questions and legal materials are examined from a purely theoretical standpoint. One of the extraordinary things about this law school is the number and variety of theoretical courses and seminars it offers its students. This is evidence, I think, of the rather special commitment that the faculty of the Law School has to intellectual concerns. Of course, we are a professional school, and our first task is to train lawyers. But we are also an unusually theoretical bunch—so much so, in fact, that to many outsiders the Law School looks as much like a research institute as it does a professional school. I think this perception is an essentially accurate one, and I regard the hybrid nature of the Law School as its greatest strength. It is a great strength because it is a source of tension; thinking and working here, one is never permitted to lose sight of either the value or the limitations of abstraction. I suppose this tension is present wherever the law—which, after all, is a practical profession that employs ideas as its tools—is taught. But I like to think that the tension is felt more acutely here than it is at other law schools. It is a rather delicious tension; and we are teaching here, rather than somewhere else, because we enjoy it. Our one great object as law teachers should be to help our students experience the tension themselves. But in order to do so, we must undermine their uncritical confidence in ideas without destroying their native enthusiasm for theory. Only in this way do we meet what I think is the basic obligation of every teacher: the obligation to give his student what he himself prizes and has found worthwhile in life.

Why is jurisprudence important to a law student? First, I suppose, because it increases his facility with ideas, making him a better practitioner and advocate. When Karl Llewellyn told his jurisprudence students that the course in jurisprudence was the most practical bread-and-butter course they would take in law school, I expect he had something like this in mind. Second, the jurisprudence course exposes the student to a body of ideas—and, more important, of writings—with which every educated lawyer should be familiar. There are relatively few classics in jurisprudence, and in my view they should form an indispensable part of every law student's education. If familiarity with these few texts does not in any obvious way sharpen the student's rhetorical skills, it will certainly broaden his empathetic capacities by exposing him to what Max Weber called the "polytheism of ultimate values." If the practice of law requires empathy, then this is another way—an indirect one—in which the jurisprudence course is useful to the practitioner.

Finally, jurisprudence is important because it helps the student to discover that thinking is a pleasure in itself—an activity that men enjoy for its own sake and not merely because it promotes some other end. This is an important discovery, especially for the practitioner, because it helps him to recognize that there are many different ways in which human excellence may display itself, and that his way, the way he has chosen, is but one of these. The same thing should be said, by the way, for the theory-minded teacher who must confront the one-sidedness of his own chosen way in teaching philosophy to lawyers. This recognition is bound to be a humbling one, regardless of whether one's vocation is in the world or in the university. In either case, it is a precondition to accepting responsibility for the vocation one has chosen—and this, I think, is what we mean by freedom.

These are some of the benefits jurisprudence has for the law student. I should like to conclude with a word or two about the benefits that jurisprudence has for the law faculty itself. Law teaching is of course subject to the same pressures of specialization, the same division of in-
intellectual labor, which in this century has transformed higher education and produced the modern university, with its atomized faculties and factory-like atmosphere. Although the process of specialization in law teaching has been slowed somewhat by the fact that most law teachers share a common educational background, and by the resistance to substantive curricular change in American law schools, the proliferation of complex statutes and the emergence of entirely new branches of legal scholarship (such as law and economics) have made it increasingly difficult to appreciate, or even to assess, the value of work being done in a field other than one's own. At Chicago this difficulty has so far proved not to be a serious one. The relatively small size of the
faculty and the rather remarkable eagerness of its members to keep abreast of one another’s accomplishments have preserved a wholeness of spirit and understanding that is striking, given the diversity of their scholarly tasks.

And yet, even here, the risks of specialization cannot be eliminated altogether. Foremost among these risks is the danger that one may lose sight of the basic assumptions and value-preferences on which work in his specialty depends. Just as the fertility of a field requires that it be turned over regularly, the vitality of a discipline demands that its philosophical underpinnings occasionally be exposed to view so that they may be critically scrutinized. This is necessary if others are to understand what the specialist is doing and what his aims are. It is also necessary if the specialist himself is to retain the breadth of vision he needs to appreciate his place in the larger enterprise of which he is a part.

Jurisprudence—and now I am talking not so much about a course as about a mode of inquiry—provides a forum in which many of these basic methodological questions may be raised. It offers the specialist an opportunity to reflect on the foundations of his specialty and to compare his premises and values with those of his colleagues. In this way it helps him to combat the terrible tendency of every specialized organization to turn its members into the cogs of a machine. The simple questions that jurisprudence poses help us to remain masters of our own work rather than being mastered by it. In this sense, jurisprudence has a liberating influence.

But I am afraid you have become suspicious that now I am only praising my own specialty, and so, perhaps, I am. I hope that my remarks today have made this concluding burst of enthusiasm more understandable.
Leviathan and Education

Philip B. Kurland*

Probably most, if not all, of what I shall have to say will prove irrelevant to the subject of this conference. There are several reasons for this lack of congruity.

The first is that I really have nothing to tell you. The second is that my experience in the area of school finance is limited to a single foray, some years ago, into the question of the constitutional obligation to equalize school funds throughout a state. I was in the minority then in believing, first, that it wasn’t a good idea, and, second, that it certainly was not yet a constitutional mandate.

The Supreme Court of the United States agreed with me on the constitutional question— or at least five of nine of them did in the Rodriguez case. The Supreme Courts of California and New Jersey—perhaps others—disagreed with me and have ordered their state school systems to equalize. So far, I think that these states can report only much chaos and little benefit. The problem with equality, it seems, is that it is more easily attained by reducing all to the lowest common denominator than by raising all to the highest.

The third reason I have so little to contribute is that my experience in the field of education has been limited to the university level, and the private university level, at that. Moreover, I am not a teacher whose subject is law, but rather a lawyer who teaches.

Finally, I am out of joint because all I have to tell is a twice-told tale. And, if I may quote the words of Byron’s Hints from Horace:

'Tis hard to venture where our betters fail,
Or lend fresh-interest to a twice-told tale;
And yet, perchance, 'tis wiser to prefer
A hackney’d plot, than choose a new, and err.

You may readily see, therefore, why my place at this conference is rather that of the court jester at a council of state: out of the mouths of fools and babes may come—accidentally—some words that may be transmuted into words of wisdom when touched by the catalyst of minds with experience and sophistication.

To fit my talk into the subject of the conference, what I shall speak to is a cost of finance. I do not mean, of course, to expatiate on bonds and interest rates. What I do mean is that the attainment of funds, even in these straitened times, is not an end in itself. And care should be taken that the means and ends of education are not distorted or frustrated by the price of the moneys available. Were I before a different audience, I should tell them that my subject is not academic freedom but the freedom of the academy. And I apologize further if what I shall...

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have to say is reported not only in the context of law, but the context of constitutional law. For while I do not know a lot about that subject, I know more about that subject than about any other.

Neither academic freedom nor freedom of the academy is mentioned in the Constitution of the United States. After all, public education is a late nineteenth-century growth, and the American university did not really come into existence until the twentieth century was almost upon us. It would have required greater prescience than even the Founding Fathers had to make adequate provision for these educational institutions.

Academic freedom, however—the right of faculty to be free from control by government of their teaching, their research, and their public utterances—has received judicial protection through the First Amendment of the United States Constitution. A concurring opinion by Mr. Justice Frankfurter, one of only two Supreme Court Justices ever to be elevated directly from the chair to the high court bench, is instructive as to the reasons for such protection:

That our democracy ultimately rests on public opinion is a platitude of speech but not a commonplace in action. Public opinion is the ultimate reliance of our society only if it be disciplined and responsible. It can be disciplined and responsible only if habits of open-mindedness and of critical inquiry are acquired in the formative years of our citizens. The process of education has naturally enough been the basis of hope for the endurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards.

To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infractions by National or State government. [Wieman v. Updegraff, 344, U.S. 183, 196-97 (1952)]

Thus, academic freedom is thought to be incorporated into the protection of the Constitution because it is an essential underpinning for all of those freedoms that are specified in the First Amendment.

Then the Justice shifted from freedom of the academic to freedom of the academy, which he concluded with an extensive quotation from the testimony of Robert M. Hutchins before a sub-committee of the House of Representatives.

The functions of educational institutions in our national life and the conditions under which alone they can adequately perform them are at the basis of these limitations [i.e., the First Amendment limitations] upon State and National power. These functions and the essential conditions for their effective discharge have been well described by a leading educator:

"Now, a university is a place that is established and will function for the benefit of society, provided it is a center of independent thought. It is a center of independent thought and criticism that is created in the interest of the progress of society, and the one reason that we know that every totalitarian government must
fail is that no totalitarian government is prepared to face the consequences of creating free universities.

"It is important for this purpose to attract into the institution men of the greatest capacity, and to encourage them to exercise their independent judgment.

"A university, then, is a kind of continuing Socratic conversation on the highest level for the very best people you can think of, you can bring together, about the most important questions, and the thing that you must do to the uttermost possible limits is to guarantee those men the freedom to think and to express themselves." [Id. at 197-98]

In still another case, we find Mr. Justice Frankfurter espousing the same cause of academic freedom and freedom of the academy (Sweezy v. New Hampshire, 354 U.S. 234, 263 [1957]). This time he borrowed from Sir Thomas Henry Huxley, including a definition of the essential freedoms necessary to a university:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

To suggest, however, that these are but examples of Supreme Court extrapolation of the meaning of the Constitution so far as academic freedom and freedom of the academy are concerned would be misleading. There is not much in Supreme Court jurisprudence to specify the proper realms and limits of this freedom of the academy.

When one seeks a reason for this paucity of judgments on the subject, it is not hard to find. There would seem to have long been a general acceptance of the concept of freedom of the academy from governmental infringement which needed no judicial protection because it was not threatened. Until the Second World War, the "four essential freedoms" of the academy, stated by Huxley, "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study," were as fully protected as if they had been written into the Constitution. A fifth freedom, unspecified by Huxley because he spoke before the growth of the modern university, the freedom to determine the subjects of research, was equally assured.

In part, the common understanding, custom as constitution, protected the academy. In part, the academy was protected from federal government interference by the recognition that the national government's limited powers afforded no basis for federal interference in the academic world. Until the birth of the service state in the 1930s and 1940s, the federal role in education was pretty much limited to its contributions to land-grant colleges dating back to the Northwest Ordinance of 1787.

Two congeries of events brought the federal government into the field of education in the 1940s. The first was a change of constitutional doctrine of no small importance. It may lie within the memories of some of you that the Supreme Court of the United States invalidated the New Deal's AAA program in a decision which announced that the constitutional provision that the national government could spend money for the general welfare was not an authorization to it to spend moneys on subjects other than those enumerated in the list of congressional powers in Article I of the Constitution. The spending power was deemed supplementary to, and not in addition to, the enumerated powers (United States v. Butler, 297 U.S. 1, 44 [1936]). As Robert H. Jackson—not yet, but soon to be, a member of the Court—wrote: "the original Butler decision, more than any to that date, had turned the thoughts of men in the (Roosevelt) Administration toward the impending necessity of a challenge to the Court" (Jackson, The Struggle for Judicial Supremacy 139 [1941]).

The Roosevelt court-packing plan came. Whether or not it succeeded depends on the measure of success invoked. The proposed statute was defeated, but the New Deal came to have its way in a vastly changed membership on the Court. In 1937, in an opinion written for a split Court by Mr. Justice Cardozo, the Constitution was revised (Steward Machine Co. v. Davis, 301
U.S. 548 (1937)]. The day of the service state was upon us. The "general welfare clause" was established as an independent ground for the federal spending power which need not be tied to any specific authority granted to the national government by the Constitution.

Much later came another change in the Constitution. The law came to recognize that there were rights that might be asserted against the academy by individuals. And the national government, through the guise of the Fourteenth Amendment, began to impose on universities duties that clearly invaded Huxley's "four freedoms." Universities were, in effect, being told who they must have on their faculties, not measured by academic considerations, and who they must have in their student bodies, not measured by academic considerations, among other things. But I shall go no further down this line, because today we are concerned with finances, the power and curse of the almighty dollar.

After the Second World War, the government went about the business of buying up the academy. And, one can ask, why not? It is an arm's-length transaction between a willing buyer and a willing seller. There is no Thirteenth Amendment to prevent the academy from selling itself into bondage. There is no Labor Relations Act to prevent the exercise of economic coercion by one on the other. Professor Edward Shils re-
cently described the condition of which I speak (Shils, "Government and the University," International Council on the Future of the University, Newsletter, Vol. III, No. 5 [December 1976]):

The universities of the United States have allowed themselves to be placed in a very vulnerable position by the federal government. Always eager to extend the sphere of their activities, always eager to be of service to society, they have become dependent on the federal government for the conduct of certain activities which are integral to their program of discovery, teaching and training, mainly in scientific research and in training for the learned professions. They have become dependent on the federal government for funds to such an extent that they feel themselves constrained to respond to every programmatic proposal of the federal government in order to relieve their immediate financial embarrassment. Many of these proposals promise only transient relief from this embarrassment; they add to administrative expenses, they are of marginal intellectual interest if of any interest at all, and some of them bring the universities into further financial difficulties once the government decides to bring them to an end. If the universities are to help establish "a new constitution of government and university according to the idea of each," they must come to a better understanding of what is their own "idea." The idea is certainly not the idea of being a "service station" to the federal government, performing services which do not even pay for their actual cost in monetary terms and which deform the conception of the "idea" by which they should conduct themselves.

It might appear offensive to counsel restraint to the impoverished and the desperate who have no unity among themselves in the face of a monopolistic and often harsh dispenser of momentary relief from poverty and desperation. The government as a monopolist is in a strong position in dealing with a multitude of separate applicants for its support. The existing constitution of government and university developed out of good intentions on both sides but it has developed into a condition which is inimical to the long-term interest to both sides. It is even repugnant to the nature of a contract; it becomes a relationship between sovereign and subject, between a suitor for largesse and a dispenser of it. There must be a restoration of a balance which renders unto Caesar what is Caesar's and unto understanding what is necessary to it.

Having already borrowed at great length from Professor Shils, as I confessed I should in my quotation from Hints from Horace, allow me to afford you a little more of his language, because I cannot improve on it:

[T]he government must discontinue its piecemeal intrusion into the affairs of universities, intruding into the details of admissions, appointments, curriculum, etc. These intrusions are infringements into a sphere of action which universities can justly claim to be one in which their traditions, their experience and the record of their judgment entitles them to autonomy. They are also fields in which the civil service has little likelihood of acting wisely or foresightfully. They are moreover disturbing to the interior life of universities, they consume a great deal of time and they are fruitlessly vexatious.

The recent intrusions of the federal government into the making of academic appointments is too well known to require extended treatment here. It is of a piece with the rest of the "policy" of the federal government with regard to universities, in the ineptitude of its conception, in its piecemeal character, in the hostility and harassment with which it is executed and in the comprehensively damaging character of the sanctions which are threatened against the universities for failure to comply. I think there is no government in the world, even in the communist countries or in the oligarchies of Latin America, Africa or Asia, which threatens the universities of its country with such large-scale sanctions for infringements of any of the very numerous demands which are made of them.
Mr. Shils dwelt on generalities. As always, he took the high road of principle. Let me take the low road of example by recounting a specific case of the moment.

Let us suppose that the national government, in its wisdom, decides that there are too few doctors being trained for the good of the nation. And let us suppose that the government decides to afford monetary inducements to students to attend medical schools. And let us suppose that, recognizing the fact that tuition pays only a small part of a medical school education, it affords capitation grants to medical schools to help them bear the cost of training the additional medical students. The cost to the medical school still, of course, far exceeds the income from both tuition and capitation grants. But university medical schools, being dedicated to societal good as well as research and training, expand their facilities and their faculties to provide the additional education.

So far, so good. Up to this point, the government has shared with the university the cost of training additional doctors. The university has, perhaps not wisely, committed resources not only for the period of commitment to the proposed government subsidies but for the indefinite future. Hospitals, laboratories, and faculties are not negotiable paper. A university that builds them and hires them has a very long-term commitment on its hands, a commitment which is in no way compensated by the federal moneys received.

Let us suppose the government then decides that it really is interested not just in more doctors but in more doctors with particular specialties or more doctors who will commit themselves to work in specific parts of the country, and the capitation grants as well as the scholarships are so conditioned. And let us suppose the government discovers that a large number of Americans incapable of securing admission to American medical schools decide to go abroad to medical schools, most notoriously those where admission is secured by making large monetary contributions. Necessarily their medical training is primarily in a foreign language.

Let us suppose, finally, that the statute renewing the capitation grants therefore adds still one more condition. The capitation grants for all students will depend upon the commitment of the university to accept as upper-class students American students who had completed two years of training at a foreign medical school and who had passed the first boards.

The American universities were not required to accept all such students, but only those who met all the university's standards, except the standards for residence and academic qualifications. Moreover, the students to be accepted were not to be chosen by the university but were to be named by the Secretary of Health, Education, and Welfare. The reason given by Congress for the imposition of these students on the universities was succinctly—but not cogently—stated:

It is not the conferees' intent, in including this requirement, either to encourage or condone the practice of U.S. citizens' receiving their medical education in foreign medical schools if such persons intend to practice medicine in the United States. Rather, it is intended to remedy an unfortunate situation which currently exists. In the view of the conferees, the current situation, in which thousands of U.S. citizens are presently enrolled in foreign medical schools where, in most cases, the education they are receiving is not of the quality provided by U.S. medical schools and is being taught in languages other than English, is a situation which deserves the immediate attention of the Department of Health, Education, and Welfare, the American Medical Association, and the Association of American Medical Colleges.

And so, until the next time the statute comes up for renewal, the decision of Congress is that American universities must make new places—certainly they are not expected to displace students who have had training in this country and have met the academic requirements of the university—for poorly trained students who do not meet the academic requirements, and who are to be selected by the Secretary of Health, Education, and Welfare.

Now, it's true that the universities are not required to take these students. They are free to reject them and thereby reject also not merely the capitation grants for these additional students but
the totality of the capitation grants.

The question I would address now is whether the condition in the statute I have just described should be regarded as invalid. My heart, as well as my mind, being with the universities, I believe that the conditions in the capitation grant statutes are unconstitutional. But, as with equal financing requirements, I cannot predict with certainty that the courts will be with me. (I am prepared here, as I was in Rodriguez, to settle for a plurality of one.)

The argument for the validity of the imposed conditions is not difficult to state. It takes the form of an aphorism that is almost as popular on the campus of the University of Chicago as “There is no such thing as a free lunch.” It is the related principle of classical economics that “he who pays the piper calls the tune.” But I submit that the proposition is—or should be—inapplicable here for two reasons.

The first is that, as a matter of fact, the university is “paying the piper” every bit as much, if not more than, the government. Each is contributing a large sum of money and assets for the education of additional medical students. The program for expansion was undertaken as a partnership arrangement, not for the benefit of the university but rather for the benefit of the society for which the government is purportedly the representative and the university is not. As between the university and the government, it is the government that is the beneficiary of the program, not the university. But both university and government are financing work in it.

Second, the proposition about the payer and the piper implies that the payer is spending his own money and is, therefore, entitled to condition the payment. That is not the case here. The money paid by the government no more belongs to the bureaucrats who spend it or the legislature that appropriates it than money in the control of private or corporate trustees belongs to the trustees rather than to the beneficiary of the trust. A trustee’s funds are held by the trustee to be expended not at the whim or will of the trustee but only in accord with the will of the grantor and for the best interests of the beneficiary. Even where there is great discretion in the trustees, the expenditures are valid only if they fall within the charter of the trust document, which in this case would be the Constitution of the United States.

It seems clear to me that the Constitution does not give to the government any authority to tell the academy what courses should be taught or which students it should teach. On the contrary, if we take seriously the dicta from the Supreme Court’s opinions that I have already read to you, such actions by the government are not only not authorized, they are specifically forbidden as violations of the First Amendment.

The argument goes, however, that the government is not imposing curricula or choosing students. It is simply offering to buy from the university its freedom. And surely, it is said, we have known since the reversal of the AAA opinion, that Congress can authorize the purchase of anything that it wants, so long as it decides that the expenditure is for the “general welfare.”

It was years ago, before Charles Reich turned from lawyer-philosopher into a flower child who sought to “green” America, that he perspicaciously noted in a law review article:

The most clearly defined problem posed by government largesse is the way that it can be used to apply pressure against the exercise of constitutional rights. A first principle should be that government must not have power to “buy up” rights guaranteed by the Constitution. It should not be able to impose any condition on largesse that would be invalid if imposed on something other than a “gratuity.” [Reich, “The New Property,” 73 Yale L.J. 733, 779 (1964)]

The fact is that at a lower level of society the actions of the government to use its spending power to get the academy to do what the government could not legitimately order it to do would be not only immoral, but illegal. Blackmail, at common law, is the threat of the use of force to compel the victim to perform an act, even an act that the victim is otherwise under a duty to perform.

My proposition that the conditions on the government grant are invalid is not without support in Supreme Court decisions. There is a judicial doctrine of “unconstitutional conditions” that is applicable to the example I have cited. Were it not for the fact that the doctrine has taken a bifurcated path in the Supreme Court, I should be
more certain of my conclusion. Unfortunately, the two lines of decision have never been fully reconciled. Perhaps the time has come.

The line of authority that I would follow derives from a mundane case entitled Frost & Frost Trucking Co. v. Railroad Commission of California, 271 U.S. 583 (1926). There a state, with undisputed "power to prohibit the use of the public highways in proper cases," attempted to require a trucker to become a common carrier as a condition of using the highways. The Court said that the State could not do by indirectness what it could not do directly.

Constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion. . . . In reality, the carrier is given a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.

It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the State may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence. [271 U.S. 593-94]

The doctrine has been not infrequently invoked, and at least once in the area of academic freedom, when the Court held that a state may not remove a professor from his job because he invoked his Fifth Amendment privilege.

There is another line of decisions that dates back to still another of Oliver Wendell Holmes's unfortunate witticisms that have all taken so heavy a toll on the development of constitutional law. Holmes was on the Supreme Judicial Court of Massachusetts when he ruled that a police official could be compelled to surrender his right of free speech as a condition of his employment (McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220 [1892]). A policeman, said Holmes, "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." Although the holding of this case is probably no longer good law, there are recent decisions that sustain the propriety of imposing conditions which destroy constitutional rights that could not be taken directly. Thus, the recent decision of Buckley v. Valeo, 424 U.S. 1 (1976), where the Court sustained the power of the government to withhold presidential election funds unless the recipient surrendered his right to spend other moneys in his pursuance of the presidency.

I think that the policeman line of cases is clearly "not a happy one." I think, too, however, that these cases are clearly distinguishable from my medical school case. For, where the condition of surrender of a constitutional right has been sustained, its surrender was a necessary ingredient in the effectuation of the legitimate statutory scheme in question. That is not the case with the medical school example, certainly so far as the HEW power of appointing students is concerned. That provision was added as an afterthought in conference committee without debate or informed judgment. It offered nothing toward the goals or purposes that the statute was enacted to effect. It would deprive the universities of their constitutional rights without any countervailing values being attained.

Obviously, I have exhausted you, if not my subject, with a legal discourse that you did not come to hear. My point is only that I do not think it incumbent on the universities placidly to submit to invasions of their academic integrity as a condition of receiving financing from the govern-
ment. And I wish that the universities would show a commitment to their function that would afford them the courage to face up to the illegal demands that threaten the destruction of the independence of the academy, an independence which is the only justification for its existence.

I started this tirade with a quotation from Byron. I should properly end it with a quotation from the Faust legend—not Shaw's, but Goethe's. A human who has sold his soul to the devil is no longer a human. An academy that has sold its will—over the selection of faculty and students, over its curriculum and research—to the government is no longer an academy. In neither case can it be called a fair bargain. Nor should it be thought that the bureaucracy's power is less evil than that of the devil. Certainly it was not the best interest of Faust that brought the devil's offer; nor is it the best interest of the academy that brings forth the government's largesse. It may be, however, that the idea of the university is of consequence only to a free society, a concept which is itself going out of style so rapidly as to be seen only here and there in the United States and almost nowhere else.

In sum, all that I have to say to you could be—and should have been—stated in two sentences. (1) Before you agree to be financed by the devil, find out the true cost of his money. (2) The further away you get from local financing, the closer you come to the devil.
Mr. Chairman, Members of the Committee: Your letter of invitation stated that you are addressing the issue whether disclosure of intelligence budgets is "in the public interest." As I lack expertise concerning this general question, I shall not attempt to answer it—nor have you specifically asked me to do so. All I am prepared to do this morning is to give you my analysis of some constitutional and legal issues connected with disclosure of intelligence budgets.

First I turn to the constitutional question, which is whether Article I, section 9, mandates disclosure. Most analysis of this section tends to focus on the Statement and Account Clause. It is my view that the Appropriations Clause is at least equally relevant and important.1 The Appropriations Clause is formulated as a prohibition, although no particular addressee is mentioned. What purpose is served by the clause? Its wording has led to the belief that "it was intended as a restriction upon the disbursement authority of the Executive department."2

While this is clearly one of the purposes served by the Appropriations Clause, this was not its main function when conceived. The Convention debates on the subject are sparse yet relatively unambiguous. As originally drafted, the clause meant to ensure the control of the "popular" House of Representatives over all money bills—tax bills as well as appropriations. It was especially provided that appropriations bills should originate in the House.

Thus the clause was an important element in the early debate over representation as well as over the role of the "aristocratic" Senate and the small states in the new government. A special committee was appointed to report on these matters. The discussion, on July 6, 1787, of the committee report3 led to a major comment by Benjamin Franklin concerning the appropriations policy. Indeed, as far as I can make out, this comment by a crucial member of the special committee is the only statement of any significance on the subject matter:

Docr. Franklin did not mean to go into a justification of the Report; but as it had been asked what would be the use of restraining the 2d branch [of the legislature] from meddling with money bills, he could not but remark that it was always of importance that the people should know who had disposed of

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*Max Pam Professor of American and Foreign Law and Professor of Political Science. Mr. Casper delivered this statement to the Select Committee on Intelligence of the United States Senate on April 28, 1977.
their money, & how it had been disposed of. It was a maxim that those who feel, can best judge. This end would, he thought, be best attained, if money affairs were to be confined to the immediate representatives of the people.  

Franklin’s remark suggests that the Appropriations Clause itself was intended to serve accountability. The subsequent elimination of the requirement that appropriations bills originate in the House does not change this assessment.  

Story, displaying his usual acumen, thus saw the object of the Appropriations Clause correctly as interposing a restraint by which the public treasure “should be applied, with unshrinking honesty, to such objects, as legitimately belong to the common defense, and the general welfare.”  

Story understood clearly that the Appropriations Clause and the Statement and Account Clause are but part and parcel of what I have called the accountability function: “Congress is made the guardian of this treasure; and to make their responsibility complete and perfect, a regular account of the receipts and expenditures is required to be published, that the people may know what money is expended, for what purpose, and by what authority.”  

The Statement and Account Clause was added in the closing hours of the Convention on September 14, 1787 (the Convention was adjourned on September 17). The crucial question as to its interpretation is how much discretion the clause grants Congress as to the timing of accounting and the details of disclosure. I find the short discussion of these matters on the floor of the Convention and in the ratification conventions so ambiguous as not to assist materially in the interpretation of the clause beyond what one can deduce from the text itself and from its function in relation to the Appropriations Clause.  

Only as concerns the timing may we conclude from the debates that accounting need not necessarily be done annually, as a requirement to this effect was amended out of Mason’s original motion.  

What one can deduce from the wording of the clause is that publication of a statement is mandated, that such statement must account for all receipts and expenditures, and, finally, that the timing must be such that the statement can actually perform its accounting function. The clause
does not by itself mandate a specificity of details except insofar as the accounting categories must reasonably relate to the purpose of the two clauses—to secure accountability of the legislature (and the executive branch).

What do these principles suggest as to the major question before you: whether there is a constitutional obligation to publish figures concerning intelligence expenditures? Further analysis may be aided by looking at possible accounting categories in terms of three different considerations: (1) the purpose of expenditures; (2) the magnitude of expenditures; and (3) truthfulness.

In terms of accounting by governmental purpose it is obvious that some detailed breakdown has to occur because otherwise the people will not know for what purpose their money has been expended. But what do we mean by purpose? Is the category “for purposes of defense” too broad? Does the answer to this question depend on the second consideration, the magnitude of expenditures? If the accounting were in terms of “100 billion dollars for purposes of national security,” I assume we would all agree that such statement would make neither Congress nor the executive genuinely accountable. But what degree of detail is required? The question is, essentially, “How much is too much?” (or “How little is too much?”).

When the Constitution is ambiguous, constitutional lawyers frequently turn to its interpretation by early congresses, the First Congress in particular. The First Congress authorized $40,000 annually to provide “the means of intercourse between the United States and foreign nations” and gave the President discretion not to account specifically for such expenditures as he thought it advisable to make public.9 This discretion was continued and the procedures formalized by the Second Congress.10

The Third Congress increased the appropriation for expenses “in relation to the intercourse between the United States and foreign nations” by 1 million dollars and made this very substantial amount subject to presidential discretion to withhold details from the public eye, although an account of the expenditures was to be laid before Congress.11

The rather startling increase in appropriations “for the expenses attending the intercourse of the United States with foreign nations,” which included the authority to borrow the amount needed, was for ransoming American hostages held by Algiers, “purchasing peace,” and paying off foreign officials and other individuals. In submitting a report of the secretary of state on the subject to the Congress, President Washington, on December 16, 1793, requested confidentiality, since “it would still be improper that some particulars of this communication should be made known.” “Both justice and policy required,” the President stated, “that the source of that information should remain secret, as a knowledge of the sums meant to have been given for peace and ransom might have a disadvantageous influence on future proceedings for the same objects.”12

A treaty with Algiers was concluded in the fall of 1795 and submitted to the Senate in February of 1796. The Account of Receipts and Expenditures for the year ending September 30, 1796, made no reference to Algiers-related expenses.13 On January 2, 1797, the House passed a resolution calling on the President to provide information about the Algiers affairs,14 it was supplied in confidence on January 9, 1797, and included a relatively detailed report by the secretary of the Treasury.15 A secret debate took place on January 17. On February 21, 1797, the House voted 53 to 36 to lift the injunction of secrecy with respect to the Treasury report and some other matters.16

What the episode suggests is that Congress was satisfied with appropriating a very substantial amount of money for a rather vaguely stated purpose and, perhaps, that there is more of a relationship than some of the commentators admit between the Appropriations Clause and the Statement and Account Clause, on the one hand, and the Journal Secrecy Clause in Article I, section 5, on the other.17

However, in order properly to evaluate the events, it should be kept in mind that Congress itself was generally informed. It must also be remembered that it took Congress some time to evolve the degree of appropriations specificity considered necessary to forestall unwarranted discretion, an endeavor helped along by the development of a party system.18 On the other hand, it should not be overlooked that the early statements of receipts and expenditures are mostly in
ters of such very general categories as "diplomatic department," "military department," "trade with Indians," etc.19

In view of this early history20 and in view of my general sense of the attitude of the Framers toward secrecy, I find it difficult to believe that the Statement and Account Clause mandates annual disclosures of intelligence expenditures if it is the considered judgment of Congress that publication would harm the national security. Let me hasten to stress that difficult matters are difficult, and before I read the headline "constitutional law expert states secrecy of intelligence budgets is warranted," I should like to be heard out.

The following points seem crucial to me. First, I doubt whether there is a constitutional command. This, of course, does not mean that Congress has no authority to legislate disclosure. This is a matter of judgment, a judgment that has to take into consideration the need of the voters for adequate information. In making that judgment, I do not believe that Congress can hide behind a constitutional syllogism, although the policy underlying Article I, section 9, is obviously pertinent. Second, this is not to say that what is apparently the present system of decepti

tive appropriations and accounting is constitutionally bearable. Here the third consideration mentioned earlier becomes relevant. Accounting to serve any purpose must be accurate. This requirement may be served by allocating funds to relatively nonspecific governmental functions; it cannot be served, however, by pretending to spend money for one purpose while in reality it is spent for a totally different purpose. The present system for hiding intelligence appropriations should be scrutinized very closely as to what it does in terms of poor accounting and bad constitutional practices. Obviously, this is all I can say on the subject, since I am not privy to the precise categories used for making intelligence appropriations. Third, I said that there was no requirement of annual disclosure. This does not mean that the accountability function of Article I, section 9, does not require disclosure of information about intelligence expenditures at some point before the subject becomes one of historical interest only. Whether this means two years after the fact, three years after the fact, or five years after the fact cannot be determined with any precision and is a matter of judgment for those who have the relevant information.

NOTES

1. Article I, sec. 9, reads in part: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." The legal literature on the subject is not exactly extensive. In this statement I cannot engage in a detailed analysis of what there is, although obviously I have been aided by existing discussions. See, in particular, L. Fisher, Presidential Spending Power 202-28 (1975); Note, "The CIA's Secret Funding and the Constitution," 84 Yale L.J. 608 (1975); Note, "Cloak and Ledger: Is CIA Funding Constitutional?" 2 Hastings Constitutional L.Q. 717 (1975); Note, "Fiscal Oversight of the Central Intelligence Agency: Can Accountability and Confidentiality Coexist?" T.N.Y.U.J. Int'l Law & Politics 493 (1974).


3. The report can be found in 1 Farrand, Records 526 (July 5).

4. 1 Farrand, Records 546. The words in brackets were added by me.

5. Ibid. (remarks by Wilson). The requirement was dropped on August 8; see 2 Farrand, Records 224.

6. 2 Story, Commentaries on the Constitution 201 (2d ed.) (1851).

7. Ibid.

8. The debate is reported in 2 Farrand, Records 618–19. For an assessment of the legislative history see Yale Note, n. 1 supra at 609.

9. 1 Stat. 128 (Act of July 1, 1790).


12. 4 Annals of Cong. 143. For further details see 16 The Papers of Alexander Hamilton 429 (1972); American State Papers: Foreign Relations, I, 288.

13. 6 Annals of Cong. 2782.

14. Id. at 1767.

15. Id. at 2238.

16. Id. at 2235. See also Account of Receipts and Expenditures for the year ending March 31, 1797, 9 Annals of Cong. 3562.

17. "Each House shall keep a Journal of its Proceedings, and from time to time publish the same excepting such parts as may in their Judgment require Secrecy."


19. See, e.g., nn. 13 and 16 supra.

20. It is, of course, possible to argue that the early Congresses acted unconstitutionally. The Supreme Court, in 1803, had no difficulty finding a provision of the Judiciary Act of 1789 unconstitutional.
I wish to start with two general observations. First, what I have to say is largely based on my knowledge of developments within the United States and Britain. But I have sufficient confidence in the international character of science to believe that what can be observed in these countries is paralleled by similar developments elsewhere. My second observation is that a paper which deals with what is happening within a series of disciplines and which ranges so wide within economics itself, must inevitably mean, at any rate in my case, that it deals with many subjects about which the writer’s knowledge is extremely vague. What I have to say will often have the character of assertion rather than that of a conclusion based on a careful study of the literature in the many fields covered by my subject. I believe that such a careful study would confirm what I assert. But it is equally true that it may refute my views. Papers presented at international conferences are not usually high-risk ventures, but this one is. However, I do not think that what is called for at this stage is a paper guarded by qualifications and difficult to attack because it says so little except what is generally accepted.

What is the subject with which I am dealing? What I am concerned with is what determines the boundaries between disciplines, in particular with what determines the boundaries between economics and the other social sciences, sociology, political science, psychology, and the like (without excluding the possibility that there may be overlaps). What the boundaries are at any particular time can, of course, be discovered by examining the range of activities engaged in by members of any given professional association, by the subjects treated in the journals devoted to particular disciplines, by the courses given in university departments, by the topics covered in textbooks, and by the books collected in libraries concerned with the various areas of knowledge. A forecast of the boundaries of a discipline is thus a forecast of what topics will be covered by professional associations, journals, libraries, and the like. I have long considered the definition of economics which Boulding attributed to Viner, and has since often been repeated, “Economics is what economists do,”4 as essentially sound, but only if it were accompanied, which it never is, by a description of the activities in which economists actually engage.

If the question is asked, how do these boundaries between disciplines come to be what they are, the broad answer I give is that they are de-
The process is essentially the same as that which determines the activities undertaken by firms or, to take another example, the extent of empires. Gibbon describes how Augustus came to accept the boundaries of the Roman Empire. Gibbon says that it was easy for Augustus to discover that "Rome, in her present exalted situation, had much less to hope than to fear from the chance of arms; and that, in the prosecution of remote wars, the undertaking became every day more difficult, the event more doubtful, and the possession more precarious, and less beneficial." The same kind of calculation ultimately led, and this is Gibbon's grand theme, to an abandonment of much of what had been contained within the Roman Empire and finally to its division within quite another set of boundaries. It is much the same with disciplines. The practitioners in a given discipline extend or narrow the range of the questions they attempt to answer according to whether they find it profitable to do so, and this is in part determined by the success or failure of the practitioners in other disciplines in answering the same questions. Since different people are satisfied with different answers, victory is not necessarily clear-cut, and different answers and different ways of tackling the same question may exist side by side, each satisfying its own market. So one group of practitioners may not drive from the field another group but may merely, to use an economist's terminology, increase their market share. Of course, when the number of those who are satisfied with the answers given by any group of practitioners becomes so small and/or the questions for which this is true are few or trivial, the field may be abandoned altogether except by those whose competence is so low elsewhere that they cannot compete in a wider, more active, and more profitable market.

If we look at the work that economists are doing at the present time, there can be little doubt that economics is expanding its boundaries or, at any rate, that economists are moving more and more into other disciplines. They have been conspicuously active in political science, where they have developed an economic theory of politics and have done a great deal of empirical work analyzing voting behaviour. Economists have also moved into sociology, and we now have an economic theory of marriage. Nor should we be surprised that there is also an economic theory of
suicide. Other subjects on which economists have worked are linguistics, education, and national defence. I am sure that it is only my lack of familiarity with what is going on in the other social sciences which restricts my list. One striking example, with which I am familiar, is the use of economics in the study of law. The general movement is clear. Economists are extending the range of their studies to include all the social sciences, which I take to be what we mean when we speak of economics’ contiguous disciplines.

What is the reason why this is happening? One completely satisfying explanation (in more than one sense) would be that economists have by now solved all the major problems posed by the economic system, and therefore, rather than become unemployed or be forced to deal with the trivial problems which remain to be solved, have decided to employ their obviously considerable talents in achieving a similar success in the other social sciences. However, it is not possible to examine any area of economics with which I have familiarity without finding major puzzles for which we have no agreed solutions or, indeed, questions to which we have no answer at all. The reason for this movement of economists into neighbouring fields is certainly not that we have solved the problems of the economic system—it would perhaps be more plausible to argue that economists are looking for fields in which they can have some success.

Another explanation for this interest in neighbouring fields might be that modern economists have had a more broadly based edu-
cution than those who preceded them and that in consequence their interests are wider, with the result that they are naturally dissatisfied with being restricted to so narrow a range of problems as that presented by the economic system. Such an explanation seems to me largely without merit. If we think of Adam Smith or John Stuart Mill or Alfred Marshall, the range of questions with which they deal is greater than is commonly found in a modern work on economics. This impression is reinforced if we have regard to the articles which appear in most of the economics journals, which, to an increasingly great extent, tend to deal with highly formal technical questions of economic analysis, usually treated mathematically. The general impression one derives, particularly from the journals, is of a subject narrowing rather than extending the range of its interest. This seems inconsistent with the concurrent movement of economists into the other social sciences, but I believe there is a connection between these two apparently contradictory developments.

If we are to attempt to forecast what the scope of economists' work is likely to be in future—which is surely what is needed if we are to be helpful to the librarians and others for whose benefit this conference was planned—we have to understand the reason why economists have been moving into the other social sciences and what the situation is likely to be in the future. To do this, we have to consider what it is that binds together a group of scholars so that they form a separate profession and enables us to say that someone is an economist, someone else a sociologist, another a political scientist, and so on. It seems to me that what binds such a group together is one or more of the following: common techniques of analysis, a common theory or approach to the subject, or a common subject matter. I need not conceal from you at this stage my belief that in the long run it is the subject matter, the kind of question which the practitioners are trying to answer, which tends to be the dominant factor producing the cohesive force which makes a group of scholars a recognizable profession with its own university departments, journals, and libraries. I say this in part because the techniques of analysis and the theory or approach used are themselves to a considerable extent determined by what it is that the group of scholars is studying, although scholars in a particular discipline may use different techniques or approaches in answering the same questions. However, in the short run, the ability of a particular group in handling certain techniques of analysis, or an approach, may give them such advantages that they are able to move successfully into another field or even to dominate it. In making these distinctions, I do not wish to deny that techniques, approaches, and subject matter will all exert some influence at any given time. Nor would I argue that it is inevitable that techniques and approach should exert their influence only in the short run. They could be dominant in the long run as well. But I believe there are reasons for thinking that this will not usually be the case. If my description of the binding forces of a scholarly discipline is correct and if my assessment of their long-and short-run influences is also valid, then we will have to decide whether the current movement by economists into the other social sciences is the triumph of a technique or approach, or whether such an extension of their work illuminates and is interrelated with the solution of the central questions which economists attempt to answer, that is, is necessitated by the nature of the subject matter which they study. To the extent this movement is based on technique or approach, we can expect a gradual displacement of economists from their newly won ground. To the extent that it is necessitated by their subject matter, we may expect the range of studies undertaken by economists to be permanently enlarged.

My first example of a technique, linear programming, is one which I am particularly unqualified to discuss, but, fortunately, extensive discussion is not called for. It is, if I understand correctly, a mathematical method for discovering the proportions in which inputs should be combined in order to achieve a certain result at minimum cost. Such a technique has, potentially, applications in many fields. It is, however, difficult to believe that such a highly mathematical technique could not be as easily acquired or as well handled by suitably endowed scholars in other disciplines. Indeed, some of these might find such a technique easier to acquire or handle than would most economists. To the extent that economists have moved into other fields using
linear programming, I would expect the forces of competition to be such that they would be largely displaced, although individual economists might still do useful work using linear programming. In any case, it seems improbable that knowledge of a technique such as linear programming would become such an essential part of any discipline as to outweigh command of the theory or knowledge of the subject matter. One would not expect economists to dominate such fields as nutrition or oil refinery engineering even if (which seems improbable) economists as a class were particularly adept in linear programming.

The employment of quantitative methods, now so commonly part of the equipment of the modern economist, has also enabled a number of economists to move into neighbouring disciplines. To the extent that economists find it easier to acquire these techniques and/or can handle them with greater dexterity than their colleagues in the other social sciences (in part because they use them so frequently), it is possible that this may offset their unfamiliarity with the subject matter of these other disciplines and the analytical framework within which these other social scientists work. But it seems a rather fragile basis for predicting a long-run movement by economists into the other social sciences.

My next example, cost-benefit analysis, is more difficult to discuss.\textsuperscript{11} My guess would be that the great bulk of the incursions made by economists into contiguous and not-so-contiguous disciplines in recent years have been in connection with the undertaking of cost-benefit studies. Cost-benefit analysis seems to me best described as a technique. But since it is essentially applied price theory, having as its aim to give a monetary value to what is gained and what is lost by following a particular course of action, it is certainly an activity in which economists have some obvious advantages. However, since these studies are usually carried out with a view to facilitating decision making, particularly by public bodies, with the problem to be investigated selected by such bodies, rather than with a view to understanding the system of which these public bodies are a part, and since economists working in unfamiliar fields will tend to rely on the work of others for their data, economists engaged in these studies will tend to play a useful but subordinate role, except to the extent that the particular decisions being investigated are closely related to their main concerns.

More important and more persuasive is the view, which I associate with the name of Gary Becker, that economic theory or the economic approach can form the means by which economists can work in, if not take over, the other social sciences.\textsuperscript{12} But before examining this point of view, I will consider what I believe to be the normal binding force of a scholarly profession, its subject matter.

What do economists study? What do they do? They study the economic system. Marshall defined economics in the first edition of the \textit{Principles of Economics} thus: "Political Economy, or Economics, is a study of man's actions in the ordinary business of life; it inquires how he gets his income and how he uses it."\textsuperscript{13} A modern economist, Stigler, has phrased it differently: "Economics is the study of the operation of economic organizations, and economic organizations are social (and rarely individual) arrangements to deal with the production and distribution of economic goods and services."\textsuperscript{14} Both of these definitions of economics emphasize that economists study certain kinds of activity. And this accords well with the actual topics dealt with in a book on economics. What economists study is the working of the social institutions which bind together the economic system: firms, markets for goods and services, labor markets, capital markets, the banking system, international trade, and so on. It is the common interest in these social institutions which distinguishes the economics profession.

A very different kind of definition is that of Robbins: "Economics is the science which studies human behaviour as a relationship between ends and scarce means which have alternative uses."\textsuperscript{15} Such a definition makes economics a study of human choice. It is clearly too wide if regarded as a description of what economists do. Economists do not study all human choices, or, at any rate, they have not done so as yet. However, the view that economics is a study of all human choice, although it does not tell us the nature of the economic theory or approach which is to be employed in all the social sciences, certainly calls for the development of such a theory.
I said earlier that there are at present two tendencies in operation in economics which seem to be inconsistent but which, in fact, are not. The first consists of an enlargement of the scope of economists’ interests so far as subject matter is concerned. The second is a narrowing of professional interest to more formal, technical, commonly mathematical, analysis. This more formal analysis tends to have a great generality. It may say less, or leave a lot unsaid, about the economic system, but, because of its generality, the analysis becomes applicable to all social systems. It is this generality of their analytical systems which, I believe, has facilitated the movement of economists into the other social sciences, where they will presumably repeat the successes (and the failures) which they have had within economics itself.

The nature of this general approach has been described by Posner in his Economic Analysis of the Law: “Economics is the science of human choice in a world in which resources are limited in relation to human wants. It explores and tests the implications of the assumption that man is a rational maximizer of his ends in life, his satisfactions—what we shall call his ‘self-interest.’”16 By defining economics as the “science of human choice,” economics becomes the study of all purposeful human behaviour, and its scope is therefore conterminous with all the social sciences. It is one thing to make such a claim; it is quite another to translate it into reality. At a time when the King of England claimed to be also King of France, he was not always welcome in Paris. The claim that economics is the science of human choice will not be enough to cause sociologists, political scientists, and lawyers to abandon their field or, painfully, to become economists. The dominance of the other social sciences by economists, if it happens, will not come about simply by redefining economics but because of something which economists possess and which enables them to handle sociological, political, legal, and similar problems better than the present practitioners in these other social sciences. I take it to be the view of Becker and Posner that the decisive advantage which economists possess in handling social problems is their theory of, or approach to, human behaviour, the treatment of man as a rational, utility maximizer.

Since the people who operate in the economic system are the same people who are found in the legal or political system, it is to be expected that their behaviour will be, in a broad sense, similar. But it by no means follows that an approach developed to explain behaviour in the economic system will be equally successful in the other social sciences. In these different fields, the purposes that men seek to achieve will not be the same, the degree of consistency in behaviour need not be the same, and, in particular, the institutional frameworks within which the choices are made are quite different. It seems to me probable that an ability to discern and understand these purposes and the character of the institutional framework (how, for example, the political and legal systems actually operate) will require specialized knowledge not likely to be acquired by those who work in some other discipline. Furthermore, a theory appropriate for the analysis of these other social systems will presumably need to embody features which deal with the important specific interrelationships of that system.

I am strengthened in this view by a consideration of the part played by utility theory in economic analysis. Up to the present it has been largely sterile. To say that people maximize utility tells us nothing about the purposes for which they engage in economic activity and leaves us without any insight into why people do what they do. As Stigler has told us, the chief implication of utility theory is that, “if consumers do not buy less of a commodity when their incomes rise, they will surely buy less when the price of the commodity rises.”17 But that consumers demand more at a lower price is known to everyone, whether an economist or not, who is at all familiar with the operation of a market. Utility theory seems more likely to handicap than to aid economists in their work in contiguous disciplines. Recently the work of Lancaster on “characteristics analysis”18 and of Becker on “commodities,”19 which relate the satisfactions derived from goods and services to certain specified more fundamental needs, shows promise of being more fruitful. But it seems improbable that the list of the important “commodities”, to use Becker’s term, will be the same in the various
social sciences or that they will be uncovered except by specialists in those disciplines.

Economics, it must be admitted, does appear to be more developed than the other social sciences. But the great advantage which economics has possessed is that economists are able to use the "measuring rod of money." This has given a precision to the analysis, and, since what is measured by money are important determinants of human behaviour in the economic system, the analysis has considerable explanatory power. Furthermore, the data (on prices and incomes) is generally available, so hypotheses can be examined and checked. Marshall said: "[T]he steadiest motive to ordinary business work is the desire for the pay which is the material reward of work. The pay may be on its way to be spent selfishly or unselfishly, for noble or base ends. ... But the motive is supplied by a definite amount of money: and it is this definite and exact money measurement of the steadiest motives in business life, which has enabled economics to outrun every other branch of the study of man."20

If it is true that the more developed state of economics as compared to the other social sciences has been due to the happy chance (for economics) that the important factors determining economic behaviour can be measured in money, it suggests that the problems faced by practitioners in these other fields are not likely to be dissipated simply by an infusion of economists, since, in moving into these fields, they will commonly have to leave their strength behind them. The analysis developed in economics is not likely to be successfully applied in other subjects without major modifications.

If I am right about the relative unimportance of technique as a basis for the choice of professional groupings, if subject matter is really the dominant factor, with the theory or approach in large part determined by the subject matter, what is the outlook for the work of economists in the other social sciences? I would not expect them to continue indefinitely their triumphal advance, and it may be that they will be forced to withdraw from some of the fields which they are now so busily cultivating. But such a forecast depends on the practitioners in the other disciplines making a competitive response. The success of economists in moving into the other social sciences is a sign that they possess certain advantages in handling the problems of those disciplines. One is, I believe, that they study the economic system as a unified interdependent system and therefore are more likely to uncover the basic interrelationships within a social system than someone who is less accustomed to looking at the working of a system as a whole. Another is that a study of economics makes it difficult to ignore factors which are clearly important and which play a part in all social systems. Such a factor would be that people choose their occupations to a large extent on the basis of money incomes. Another would be that a higher price lowers the demand. Such factors may appear in various guises, but an economist is likely to see through them. Punishment, for example, can be regarded as the price of crime. An economist will not debate whether increased punishment will reduce crime; he will merely try to answer the question, by how much? The economist's analysis may fail to touch some of the problems found in the other social systems, but often the analysis can be brought to bear. And the economist will take full advantage of those opportunities which occur when the "measuring rod of money" can be used.

But if the main advantage which an economist brings to the other social sciences is simply a way of looking at the world, it is hard to believe, once the value of such economic wisdom is recognized, that it will not be acquired by some practitioners in these other fields. This is already happening in law and political science. Once some of these practitioners have acquired the simple but valuable truths which economics has to offer, and this is the natural competitive response, economists who try to work in the other social sciences will have lost their main advantage and will face competitors who know more about the subject matter than they do. In such a situation, only the exceptionally endowed economist is likely to be able to make a significant contribution to our knowledge of the other social sciences.

Economists may, however, study other social systems, such as the legal and political systems, not with the aim of contributing to law or political science but because it is necessary if they are to understand the working of the economic system itself. It has come to be realized by many
economists in recent times that parts of these other social systems are so intermeshed with the economic system as to be as much a part of that system as they are of a sociological, political, or legal system. Thus it is hardly possible to discuss the functioning of a market without considering the nature of the property right system, which determines what can be bought and sold and which, by influencing the cost of carrying out various kinds of market transactions, determines what is in fact bought and sold, and by whom. Similarly, the family or household and the educational system are of concern to the sociologist, but their operations affect the supply of labor to different occupations and the patterns of consumption and production and are therefore also of concern to the economist. In the same way, the administration of the regulatory agencies and antitrust policy, while part of the legal system and as such studied by lawyers, also provide the framework within which firms and individuals decide on their actions in the economic sphere.

The need to take into account, in analyzing the working of the economic system, the influence of other social systems, above all the legal system, is now widely accepted by economists. It has resulted in numerous studies of the effect of the legal position on the performance of the economic system. Such work, because of its focus on the economic system, is likely, in general, to be best done by economists. Unlike the movement by economists into the other social sciences which has as its aim the improvement of these other social sciences, a movement which, for reasons I have already given, seems to me likely to be temporary, the study by economists of the effects of the other social systems on the economic system will I believe become a permanent part of the work of economists. It cannot be done effectively by social scientists unfamiliar with the economic system. Such work may be carried out in collaboration with other social scientists, but it is unlikely to be well done without economists. For this reason, I think we may expect the scope of economics to be permanently enlarged to include studies in other social sciences. But the purpose will be to enable us to understand better the working of the economic system.

NOTES
2. Edward Gibbon, The Decline and Fall of the Roman Empire, chap. 1.
22. It is only necessary here to refer to the kind of article that appears in The Journal of Law and Economics.
George Gleason Bogert (1884–1977)

Ernst W. Puttkammer*

George Bogert began his legal career as a practicing lawyer in Upstate New York in 1908. This career was interrupted by the first World War, in which he served in the Judge Advocate General’s office and was cited in divisional orders. At the end of the war, he became an instructor at Cornell Law School, and in 1921 he was named dean of that law school. In 1925 he left Cornell and joined the University of Chicago Law School faculty, where he became the James Parker Hall Professor.

George Bogert commenced his legal writing with a work on the law of sales of personal property, but he soon specialized in the area of trusts, a field in which his writing became preeminent. His work in this field culminated in the publication in 1935 of his 15-volume work *Trusts and Trustees*, which, with its later editions, has remained the standard treatise.

At the height of his distinguished career George Bogert devoted increasing attention to the efforts to harmonize the laws of the different jurisdictions of the United States. He was active as the Commissioner on Uniform State Laws from New York in 1920–25 and from Illinois in 1927–49. He was a principal draftsman of the Uniform Acts on sales, trustees’ accounting, trusts, and common trust fund.

George Bogert served as the President of the Association of American Law Schools in 1935–36. A 1906 graduate of Cornell College and a 1908 graduate of Cornell Law School, he was elected to Phi Beta Kappa and to Phi Delta Phi. He was a member of the New York and Illinois bars.

Upon his retirement in 1949 from the University of Chicago Law School faculty, he joined the faculty of Hastings College of Law in San Francisco; he remained at Hastings until 1959. Thereafter he lived part of each year in California and part on the farm that he and his wife Lolita had in Michigan. He died in Florida on March 28, 1977.

The friendship my wife Helen and I had with the Bogerts was of long standing; we shall miss him.

*Professor Emeritus of Law.*
I first met Max Rheinstein when he came to Chicago in 1935, after teaching at Columbia and Harvard. Even if one’s German were perfect, it would be difficult to perceive fully the extraordinary range of studies and writings of his German period. Fortunately, Konrad Duden describes Max’s contributions during this period.

Duden wrote, “He was and is unbelievably generous toward the Germans who expelled him. Before and after the end of the war he fought with all his might against equating Germans with Nazis and for a reasonable peace. One cannot read what he said and wrote at that time without being moved.”† Max’s efforts contributed to softening asperities due to the War of 1939 and to seeing in perspective the vicissitudes of denazification. He seems to have foreseen at an early time the cooperation of the present American and German governments.

My association with Max was closest in the courses we taught in the comparative law of contracts. I was impatient with the slow growth of American law—in particular with respect to form and consideration and with respect to mistake and related matters.

Max did not indulge this impatience of mine. He pointed out that German law was by my tests “behind” ours in the treatment of mistake. And he joined me in amusement at the course of the so-called reasoning which had led the German law to one happy result: A gratuitous promise of an option was said to be a gratuitous grant and “like” an effective gift.

Max also taught the comparative law of torts—in which we seem to be even more in need of wisdom—and at times he taught courses in general comparative law. Of course, it was in the

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field of comparative family law that he made his greatest contribution in his later years.

Max's voracious appetite for new experiences and travel was remarkable. It is this, probably more than anything else, which I shall remember most vividly about him. It contributed to making his and his wife Lilly's lives happy and full.

* * *

Malcolm Sharp has asked me to supplement these recollections of his with some words about the influence of Max Weber on Max Rheinstein, and about Max Rheinstein's work in his later years. In fact, to discuss either of these subjects involves speaking of the other. The years since Max's nominal retirement from the Law School in 1968 were as active as those that preceded it. He published two more books, a steady stream of articles, and taught and lectured frequently here as well as in Italy, The Netherlands, and the Federal Republic of Germany. Nearly all of this was a continuation of his lifelong preoccupation with matters in which Max Weber had awakened his interest in 1919-20 and which are now commonly grouped under the heading of legal sociology. This is particularly true of the 1972 book Marriage Stability, Divorce and the Law; of the 1969 lecture on Rechts­honoratioren, and his 1974 essay The Family and the Law, which introduces the Family Law volume of the International Encyclopedia of Comparative Law.

Max Rheinstein was one of the students in a course given by Max Weber at the University of Munich during the last year of Weber's life. In this course, General Economic Theory, Weber presented the distillation of his life's research and thought. Rheinstein was then a 21-year-old law student, a World War I veteran who had served at the Italian front ("It collapsed when I arrived"), and a part-time librarian in Ernst Rabel's comparative law institute. Weber made such a deep impression on him that, years later, Rheinstein described as a "labor of love" the prodigious work he did in translating, editing and explaining Weber's Law in Economy and Society.

It is said that Weber himself apparently thought that the sociology of law, together with his presentation of the basic forms of domination, and his political writings, was the most original part of his great unfinished systematic treatise, Economy and Society. What Rheinstein did for his old teacher, however, went far beyond making this important work available in English. The complexity and subtlety of Weber's thought, as is well known, have caused his work to be frequently misunderstood, oversimplified or ignored. The difficulties of substance have been compounded by the impenetrability (even for Germans) of Weber's writing style.

Max Rheinstein and Edward Shils, working together on the translation, rendered the sociology of law more understandable by including translations of other related parts of Economy and Society. They devised English equivalents for German words that were artificially coined by Weber. Rheinstein's remarkable footnotes and annotations explained those frequent passages where Weber's remarks (in the manner of Malcolm Sharp) were as cryptic as they were heavy with meaning. These notes, a delight to read in themselves, take the reader through Hohfeldian analysis, courtly love, the lost civilization of the Khazars, the disrepute of Roman Law Studies under National Socialism as a "product of the Jewish mind," the Albigensian and Waldensian heresies, and so on. Rheinstein checked Weber's sources, and furnished missing references for Hindu, Chinese, Jewish, Islamic, and primitive legal systems, as well as for Roman, English, and medieval European law, and the laws of Germany, America, and France. He explained technical terms from each of these systems, and indicated where later research or new discoveries had altered the views of the generation of scholars whose works had been used by Weber.

Rheinstein's annotated translation itself rendered a monumental service to sociology in general, and legal sociology in particular. But he did more. In one of his finest essays, a 48-page Introduction to Weber's thought, Rheinstein in his own lucid, systematic, and concise style, so different from Weber's, set forth an authoritative

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explanation of Weber's sociology. This remarkable essay makes Weber's thought seem (like Immanuel Kant's) beautifully clear but hidden in sentences where every proposition is narrowed by a qualifying proposition, which in turn is repeatedly qualified, and where (still in the same sentence) the main proposition is combined with its set of qualifiers and subqualifiers. Weber wrote in this fashion partly because of his intolerance for overgeneralization and partly because, as his widow put it, "He was entirely unconcerned with the form in which he presented his wealth of ideas. So many things came to him out of that storehouse of his mind, once the mass was in motion, that many times they could not be readily forced into a lucid sentence structure."6

As his students know, Rheinstein was like Weber in his obsession with keeping generalizations tailored close to the facts. But Rheinstein went into Weber's storehouse of ideas and put the wares in order. Only someone with Rheinstein's peculiar gifts, his universality of knowledge, his ability to see through to the essentials, and his awesome command of languages could have attempted such a task.

The value of Rheinstein's work in making Weber as understandable as he can be made without losing any of the refinement of his thought is known among sociologists. However, Rheinstein succeeded so well in making the rough places plain that his Introduction to Weber often has been mistaken for "common knowledge" by lawyers.

So, one aspect of the Rheinstein-Weber connection is that, through Rheinstein, Weber has continued to teach legal sociology. Another is that Rheinstein continued to learn from Weber and to make his own contributions to legal sociology. The influence of Weber on the young Max Rheinstein entered into happy combination with the influence of a quite different sort of genius, Ernst Rabel, whose Assistant he became in 1922.

Unlike many European legal scholars of his generation, Rabel was intensely concerned with the relevance of law to practical problems and their solution. Through Rabel, Rheinstein was exposed to the methods which came in Germany to be called Jurisprudence of Interests, and in the United States sociological jurisprudence. The fusion of the interest Weber inspired in the complex reciprocal interaction of law and society, with Rabel's insistence on ascertaining social reality and the practical effects of laws, released a sustained flow of creative ideas which did not cease until death came to Max Rheinstein on July 9, 1977.

Rheinstein saw that comparative law was a fruitful source of insight for sociology because it directs attention toward the extent to which law is a function of a particular society and facilitates recognition of the social problems to which law is addressed. All of his "family law" work of the past 10 years was the work of Rheinstein the legal sociologist and comparatist, as well as the work of Rheinstein the private law scholar intensely concerned with "How does it work in practice?" and "What do people really do?" His knowledge of, and meticulous labors in, many different areas of substantive law (in particular, obligations, succession, private international law) gave depth and credibility to his sociological and comparative work. Conversely, his comparative, historical, and sociological perspective enriched all of his studies of positive law. The very qualities Rheinstein attributed to Weber are the qualities one came to associate with Rheinstein: "universality of knowledge together with the gift of penetrating analysis, . . . objectivity, . . . passion for accurate formulation, and . . . genius for recognizing the essentials, and the relations between seemingly remote phenomena. . . ."7

Reinforced no doubt by his experiences in Germany and Italy in the early 1930s, Max always refused to be drawn into trends or fashions of the moment. In fact, he was ever ready to point out that the apparently new was often merely the reappearance of an old or recurring phenomenon in altered guise.

It is his resistance to intellectual fads (which he saw and identified for what they were) and his refusal to be drawn into the methodological controversies of the moment that give Rheinstein's written work a lasting freshness. In this connection, it is very gratifying to be able to report three recent events which will result in making some of his work more accessible. Of the greatest importance is that two of Max's former students, Reimer von Borries and Hans Leser, have edited collections of papers from the nearly 350 items in
the Rheinstein bibliography. Von Borries has brought many of the comparative law writings into a unified "Introduction to Comparative Law."9 Leser has assembled an 800-page volume of The Rheinstein Papers, in four great divisions: Legal Theory and Sociology, Comparative Law, Conflicts of Law, and Family Law.9 Finally, the Louisiana Center for Civil Law Studies is preparing a translation of Rheinstein's early book on Anglo-American contract law, still a standard work in Germany.10 Thanks to Leser and von Borries, writings scattered in various publications and languages now will have a wider audience than would have been possible otherwise.

All who knew Max here at the Law School will recognize that no mere recital of his accomplishments and gifts, larger-than-life though they were, captures or does justice to this extraordinary man.11 That encyclopedic knowledge, made wisdom by his humanity and sense of history, was, through his boundless generosity, always at the disposal of colleagues and students. His legendary working capacity was equaled by his capacity to enjoy the good things in life. He loved mountains, hearty food, German beer, chamber music, opera, and, above all, people. His energy and courage prevailed over the severe bodily afflictions that beset him, two or three at a time, for the past twenty years. He filled the categories of Christian and Jew, American and German, but they did not contain him. His universal spirit transcended these classifications. Surely, for those who knew him, it is his charity above all that will be remembered, stored up, treasured, and, perhaps, even imitated. It may be that Max's life has permitted us a glimpse into the fugitive reality behind the words of the apostle Paul that prophecy, tongues and knowledge will pass away, but Love never ends. He was always there, behind the open door in the sixth-floor office, a figure of order, certainty, and permanence. In some way, for those whose lives he touched, this wise and gentle man will always be there.

NOTES

2. Rheinstein, "Die Rechtshonoratoren und ihr Einfluss auf Charakter und Funktion der Rechtsordnungen," 34 RabelsZ 1 (1970). "Rechtshonoratoren" was a term coined by Weber to designate that group of "law notables" who, in a given social setting, enjoy such prestige and influence that they decisively determine the characteristic features of the legal order of their society. An English version of this lecture appeared as "Leader Groups in American Law," 38 U. Chi. L. Rev. 687 (1971).
6. Quoted by Bendix, id. at xxi.
7. Rheinstein, supra n. 4 at xxxii.
11. There are 297 items in the 1968 bibliography prepared by Adolf Sprudzs. The work of the past nine years must bring the definitive bibliography close to 350 entries. Most of the many honorary degrees, visitorships, and titles that Max held are listed in Duden, "Max Rheinstein: Leben und Werk," Ius Privatum Gentium: Festschrift für Max Rheinstein 1 (E. von Caenmerer, S. Mentschikoff, and K. Zweigert, eds., 1969).
Max Rheinstein with colleagues John Langbein and Gerhard Casper

Mr. Kurland joined the Law School faculty in 1953. In recent years he has taught constitutional law, legislation, legal history, and civil and criminal procedure in the Law School. He has also taught courses in law in the College. Mr. Kurland was named the William R. Kenan, Jr. Professor in the College in 1973.
Edward Levi Named Glen A. Lloyd Distinguished Service Professor

Edward H. Levi returned to the University on January 21, 1977. He had been on leave of absence as the Karl N. Llewellyn Distinguished Service Professor of Jurisprudence since he was named United States Attorney General in February of 1975.

Mr. Levi, who received his Ph.B. in 1932 and his J.D. in 1935 from the University of Chicago, joined the faculty in 1936. In 1950 he was appointed Dean of the Law School. He held this post until he became Provost of the University in 1962. The following year Mr. Levi became President of the University.

Upon his return to the Law School this year Mr. Levi was named the Glen A. Lloyd Distinguished Service Professor. In the Fall Quarter he will teach Elements of the Law to the Law School’s first-year students. During the Spring Quarter Mr. Levi taught an undergraduate course in Jurisprudence.

Antonin Scalia Joins Faculty

Antonin Scalia has been appointed Professor of Law. After graduating in 1960 from Harvard Law School, where he was Note Editor of the law review, Mr. Scalia spent one year traveling in western and eastern Europe as a Sheldon Fellow of Harvard University. He then practiced law with the Cleveland firm of Jones, Day, Cockley and Reavis.

In 1967 Mr. Scalia joined the University of Virginia Law School faculty. He left Virginia in 1971 to become General Counsel of the Office of Telecommunications Policy. Mr. Scalia served as Chairman of the Administrative Conference of the United States from 1972 to 1974. He then was appointed Assistant Attorney General, in charge of the Office of Legal Counsel. In January of this year Mr. Scalia returned to teaching as a Visiting Professor at the Georgetown Law Center and a Visiting Scholar at the American Enterprise Institute.

The principal fields of interest of Mr. Scalia are administrative law and constitutional law. He joined the University of Chicago Law School faculty on July 1.

Visiting Professors: 1977–78

The School will have two new Visiting Professors of Law during the 1977–78 academic year. Gareth Jones will return during the spring of 1978 for the third consecutive year. During the Winter Quarter Samuel Brittan will be a Visiting Professor in Economics. Mr. Brittan graduated with first-class honors in Economics from Jesus College, Cambridge, in 1955.

For the past eleven years Mr. Brittan has been principal economic commentator on the Financial Times. He previously held various posts with the Financial Times, as well as with the Observer, and he also served as adviser at the Department of Economic Affairs. Mr. Brittan was the first winner of the Senior Wincott Award for financial journalists. In 1973–74 Mr. Brittan was a Research Fellow of Nuffield College, Oxford, and in 1974 he was elected a Visiting Fellow of that College.

Mr. Brittan is the author of a number of books and shorter studies. These include Steering the Economy, Left or Right: The Bogus Dilemma, Capitalism and the Permissive Society, and a collection of essays entitled The Economic Consequences of Democracy.

Kenneth Scott will be a Visiting Professor during the Winter and Spring Quarters. Mr. Scott has been a member of the Stanford Law School faculty since 1968. His areas of concentration are administrative law, business associations, financial institutions, and securities regulation.

Mr. Scott received an A.B. in economics from William and Mary College in 1949, an M.A. in political science—international affairs in 1953 from Princeton, and an LL.B. in 1956 from Stanford, where he was articles editor of the law review. In 1956–61 he practiced law in New York City and in Los Angeles. Mr. Scott was Chief Deputy Savings and Loan Commissioner of California in 1961–63 and then served as General Counsel of the Federal Home Loan Bank Board.

Clinical Fellows Appointed

Two persons have been appointed Clinical Fellows during the past year. Both of them are working in the Woodlaw Community Defender Office.

William S. Clark, Jr. joined the Office of the Illinois State Appellate Defender following his graduation from the University of Wisconsin Law School. Mr. Clark began working for the Criminal Defense Consortium of Cook County in 1976 and joined the staff of the Woodlaw office this past winter. Mr. Clark is a graduate of the United States Naval Academy.

Randolph N. Stone began working at the Woodlaw Office during the summer. Previously Mr. Stone had worked at the Evanston Office of the Criminal Defense Consortium of Cook County and had been a Reginald Heber Smith Fellow. During his fellowship he was assigned to the Neighborhood Legal Services Program in Washington, D.C. Mr. Stone received both his B.A. and his J.D. from the University of Wisconsin.

The Woodlaw Community Defender Office is located within a block of the Law School. It is a branch office of the Criminal Defense Consortium of Cook County. The Consortium was designed as a model clinical program for the delivery through neighborhood offices of legal services to indigents charged with crimes.

Thirty students work in this office under the supervision of the other
staff attorney, Robert M. Axelrod, and the office’s director, Frederick F. Cohn. Approximately 1,000 clients a year are served by this facility.

**BIGELOW TEACHING FELLOWS**

The five Harry A. Bigelow Teaching Fellows for the 1977–78 academic year have been appointed. The Fellows are responsible for designing and carrying out the legal research and writing program for first-year students. Professor Anthony T. Kronman will be the coordinator of the program and adviser to the Fellows this year.

Following his graduation with honors from Melbourne University in 1972, Chris Arup worked in an accident law firm for one year and then was admitted to practice in Australia. In 1974–76 he taught at Monash University in Melbourne; last year he lectured at Durham University in England. Mr. Arup has published several articles on labor law.

Upon graduating from Harvard Law School in 1971, William V. Luneburg worked as an enforcement attorney with the United States Environmental Protection Agency, first in Boston and then in Chicago. Mr. Luneburg entered private practice in 1974 with the Chicago law firm of Tenney & Bentley, where he specialized in civil litigation. Mr. Luneburg received his undergraduate education at Carleton College.

Samuel F. Saracino is a June graduate of the University of Chicago Law School. Mr. Saracino was a recipient of the Joseph Henry Beale Prize for excellence in the first-year tutorial program. He was also a winner of the Karl Llewellyn Memorial Cup in the Moot Court competition. Mr. Saracino, who is a magna cum laude graduate of Wesleyan University, will join the Denver law firm of Davis, Graham & Stubbs after his year as a Bigelow.

Jay A. Shulman is a 1977 graduate of Northwestern University School of Law, where he was a member of the editorial board of the law review. Mr. Shulman did his undergraduate work at Cornell.

Michael H. Slutsky returns to the Law School after clerking for one year for Justice Charles L. Levin of the Michigan Supreme Court. Mr. Slutsky, who was an associate editor of the law review, graduated cum laude from the Law School in 1976. He received his undergraduate degree summa cum laude in mathematics and history from Tufts University.

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**IN MEMORIAM**

**MEMORIAL FUND IN HONOR OF GEORGE BOGERT**

A memorial fund in honor of George G. Bogert has been established at the Law School. Mr. Bogert, who was the James Parker Hall Professor, served on the faculty for over 24 years. He died on March 28, 1977, in Florida.

Persons wishing to make memorial gifts should make them payable to the University of Chicago and send them to the attention of Frank Ellsworth at the Law School (1111 East 60th Street, Chicago, Illinois 60637).

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**RHEINSTEIN MEMORIAL**

A memorial fund in honor of Max Rheinstein, who died on July 9 in Badgastein, Austria, has been created at the Law School. Mr. Rheinstein joined the School’s faculty in 1935. Although he had retired from teaching in 1968, Professor Rheinstein remained at the Law School doing research and writing until December 1976, when he and his wife Lilly moved to Palo Alto, California.

Contributions to the Max Rheinstein Memorial should be made payable to the University of Chicago and mailed to the attention of Frank Ellsworth at the Law School (1111 East 60th Street, Chicago, Illinois 60637).
Brief Notes from the Faculty and Staff

Frances A. Allen, who was Visiting Professor of Law during the 1976-77 academic year, has been awarded a Guggenheim Fellowship for 1978.

Robert M. Axelrod, Staff Attorney and Clinical Fellow at the Woodlawn Office, Criminal Defense Consortium of Cook County, Inc., won one of the Illinois Art Council's Annual Literary Awards for Poetry. Mr. Axelrod's award-winning poems, "Boy in Ancient Restaurant" and "Using This Hallucinogenic Pepper," were printed in the Spring 1976 issue of Uzzano.

During the past year Richard I. Badger, Assistant Dean and Dean of Students in the Law School, was President of the National Association for Law Placement. He also served on a Task Force of the Corporation for Legal Services to develop a plan for assisting local legal services programs in finding and retaining staff attorneys, managing attorneys, and paralegals.

Gerhard Casper, Max Pam Professor of American and Foreign Law and Professor of Political Science, and Richard A. Posner, Professor of Law, recently published their study...
of the “Workload of the Supreme Court” as an American Bar Foundation monograph.

Mr. Casper and Kenneth W. Dam, Harold J. and Marion F. Green Professor in International Legal Studies, participated in a symposium of American and German constitutional law professors held in Bonn on July 4, 1976, in honor of the Bicentennial. The symposium was sponsored by the German National Science Foundation.

On June 23, 1976, Mr. Casper testified before the Subcommittee on International Security and Scientific Affairs of the House International Relations Committee on executive agreements.

Mr. Casper’s article “Social Differences and the Law” was published in the Fall 1976 issue of Daedalus.

Ronald H. Coase, Clifton R. Musser Professor of Economics and Editor of The Journal of Law and Economics, was elected an Honorary Fellow of the London School of Economics and Political Science in December 1976. The school’s Honorary Fellows are persons “who have attained distinction in the arts, science or public life, or persons who have rendered exceptional services to the School, or to the arts, science or public life.”

Mr. Coase spent the Winter and Spring Quarters of 1977 at the Hoover Institution, Stanford University, as a Senior Research Fellow.

The film for which Mr. Coase served as technical adviser last year along with Ben Rogge and Edward G. West, “Adam Smith and the Wealth of Nations,” was awarded a silver medal at the most recent New York Film Festival. Production of the film was funded by the Liberty Fund, Inc.

In March Mr. Coase participated in a debate with Nicholas Johnson, a former member of the Federal Communications Commission, on the subject “That the FCC Should Be Abolished.” He also was chairman of a session of a conference on blood policy held in the fall by the American Enterprise Institute.

The second edition of Conflict of Laws: Cases—Comments—Questions by Roger C. Cramton (J.D.’55; Assistant Professor of Law, 1957–61), David P. Currie, and Hema Hill Kay (J.D.’59) was reviewed by Aaron D. Twerski, Associate Dean and Professor of Law at Hofstra University, in 61 Cornell Law Review 1045.

Mr. Twerski calls the book “a masterful piece of work.” He adds, “Even more important than its brilliance is the intellectual honesty displayed by the authors in confronting the difficult, if not impossible, questions presented by interest analysis.”

He notes: “The authors were, and I believe remain, devotees of the mode of governmental interest analysis developed and refined by the late Professor Brainerd Currie. From the first page to the last, the casebook bears the mark of his sharp and uncompromising questions, which penetrate and expose the fallacies not only of traditional doctrine, but also those of the more modern efforts to rescue the old doctrines by dressing them up in more fashionable clothing.

“The authors, however,” Twerski continues, “do not reserve the tough questions for the enemy camp alone. With brutal honesty the authors have exposed the weaknesses and inconsistencies of their adopted doctrine of interest analysis.”

Besides the casebook, Mr. Currie has also published in recent months the following articles: “Judicial Review under Federal Pollution Laws” (62 Iowa Law Review 1221), “OSHA” (1976 American Bar Foundation Research Journal 1107), and “The Supreme Court and
Allison Dunham has been appointed General Counsel of the University and Secretary of the Board of Trustees. Mr. Dunham, a member of the faculty since 1951, will continue teaching at the Law School. A specialist in probate and property law and laws affecting the growth and development of cities, he was named the Arnold I. Shure Professor of Urban Law in 1971.

Ralph B. Gibson, a Harry A. Bigelow Teaching Fellow during the 1948-49 academic year, was recently made a High Court Judge in England. On this appointment, he was knighted by the Queen.

Walter Hellerstein was on the faculty of the ALI-ABA Course of Study on Financing State and Local Government: Trends, Policies, and Law held in Chicago on June 3-4, 1977; his presentation covered recent Supreme Court and state court decisions in the state tax field. He was also on the faculty of the Tax Executives Institute State and Local/Property Tax Course held at the Graduate School of Business of the University of Indiana at Bloomington on July 5-15, 1977; his presentation covered the constitutional law background of state and local taxation.

Mr. Hellerstein was recently appointed to serve on the Council of the State Taxation Section of the Illinois State Bar Association.

Gareth H. Jones will be a Visiting Professor of Law in the spring of 1978. It will be his third year on the faculty. Mr. Jones, who in January of 1975 was elected into the Downing Professorship of the Laws of England at Cambridge and became an Honorary Bencher of Lincoln’s Inn, will teach the second quarter of Property.

Mr. Jones recently completed the second edition of The Law of Restitution, which he coauthored with Robert Goff in 1966.

Stanley N. Katz, Professor of Legal History and Associate Dean, was appointed Chairman of the University’s Committee on Public Policy Studies. He assumed this post on July 1, 1977.

Mr. Katz has been elected to office in two historical associations: for a three-year term as a member of the Executive Board, Organization of American Historians, and for a three-year term as a member, Research Committee, American Historical Association. He was also elected Vice-President of the American Society for Legal History.

In November 1976, President Ford appointed Mr. Katz a member of the Permanent Committee on the Oliver Wendell Holmes Devise; he will serve on this committee for 8 years.

Mr. Katz and Barry Karl (Professor in the Department of History and College) have received a planning grant from the Ford Foundation for a projected two-volume study: Philanthropy and Public Policy Formulation in the United States, 1890-1970.

During the month of March, Edmund W. Kitch was a Visiting Professor at the Law and Economics Center of the University of Miami Law School. While there Mr. Kitch spoke at a workshop of the Law and Economics Center on the Nature and Function of the Patent System. He also talked to Law School alumni in Miami on “The State of the Law School: 1977” and to the Public Choice Society in New Orleans on “New York City: The Hidden Constitutional Issues.”

Mr. Kitch recently was appointed to the Committee on Law and Social Science of the Social Science Research Council.

Philip B. Kurland, William R. Kenan, Jr. Distinguished Service Professor, was awarded an honorary degree by the University of Notre Dame on May 22.

Torture and the Law of Proof: Europe and England in the Ancien Régime will be published by the University of Chicago Press in the fall. This book by John H. Langbein, Professor of Law, traces the history of judicial torture, showing that the system arose to serve the needs of the medieval law of proof and that it came to an end when that body of law was eroded in the judicial practice of the seventeenth and eighteenth centuries. Mr. Langbein shows how a new law of proof, which enabled the courts to convict criminals without their confessions, liberated European criminal procedure from its dependence on torture.
Torture and the Law of Proof also recounts the very different history of torture in England, where the medieval jury system prevented the common law from emulating the European law of proof.

Mr. Langbein has been on a leave of absence from the Law School while he is a Visiting Fellow of All Souls College, Oxford.

Douglas Laycock lectured on "The Supreme Court and Civil Rights" at St. Xavier College in Chicago on January 29. The lecture dealt with the Court's racial discrimination decisions and emphasized the school desegregation cases. The lecture was part of a course on the Supreme Court at St. Xavier.

On April 23 Mr. Laycock participated in a seminar on the ethical limits of the lawyer's duty of zealous advocacy. The seminar was part of a continuing program on professional ethics at Calvert House, the Catholic Student Center adjacent to the University.

On September 7, 8, and 9 Mr. Laycock will participate in a seminar on Motion Practice for Illinois trial judges.
Edward H. Levi, Glen A. Lloyd Distinguished Service Professor, has been named the Herman Phleger Visiting Professor for the spring of 1978 by Stanford University. Mr. Levi will teach one course and deliver a public lecture as the Phleger Professor.

The second edition of Bernard Meltzer’s Labor Law: Cases, Materials and Problems was published this summer by Little, Brown & Company. The first edition was printed in 1970.

Norval Morris, Dean of the Law School and Julius Kreeger Professor of Law and Criminology, was named to a special subcommittee of the Governor’s Commission for Revision of the Mental Health Code.

Dean Morris has also been named to an eight-member commission of the Police Foundation in Washington, D.C. The National Advisory Commission on Higher Education for Police Officers will examine the purpose and future of college courses for policemen.

In November Mr. Morris delivered a United States Department of Justice Bicentennial Lecture at the University of Denver. His address was entitled “Punishment, Deserts and Rehabilitation.” He also gave the Soper Lecture in March at the University of Maryland.

Dean Morris’ latest book, Letters to the President on Crime Control, which he wrote with Gordon Hawkins, was published in January by the University of Chicago Press.

A dinner honoring their most senior colleague was given by the faculty on May 24, 1977, for Professor Emeritus Ernst W. Puttkammer and his wife, Helen. Among the guests were their daughter Lorna and her husband Francis Straus II, both members of the University faculty, their son Charles and his wife Cordelia, and their grandchildren, Francis Straus III and Helen Straus.

Dean Norval Morris was the master of ceremonies for the occasion and spoke on behalf of the faculty. He noted: “It took me the best part of two years as dean to discover that there is only one Professor Puttkammer and not three. Alumni all over the country talked to me in knowing terms of ‘Ernst’ or of ‘Wilfred’ or of ‘Putt’ or ‘Putty.’ Their correspondence compounded the confusion. Ultimately, putting the three together, I came to realize what a formidable role this much-named man has played in the life of the School—and in what warm and high regard he is held by our alumni and by his colleagues.”

Dean Morris added: “Criminal law is, of course, Wilfred’s field. As a scholar and commentator he was years ahead of the pack, seeing the need for inclusion of the work of the police and of the administration of the criminal law in the scholarly range of the criminal lawyer—an insight still far from common and still grossly neglected.” He then read a letter sent by James Rochford, Chicago’s
Superintendent of Police, for the occasion.

Ernest Samuels, J.D.'26, Professor Emeritus of English at Northwestern University, spoke on behalf of Professor Puttkammer's students. Mr. Samuels said: "All that I ever knew about criminal law I learned in his class perhaps eked out by a Hornbook. I recall those wonderful contests in the classroom, when primed with our five or so cases, we matched wits with Professor Puttkammer, who with unfailing courtesy and good nature taught us to discriminate and distinguish and, so to speak, to proceed on all fours. It was a training in logic and evidence that proved invaluable to me when I later embarked on literary research."

Mr. Samuels, whose career as scholar, teacher, commentator, and biographer of Henry Adams has been a most distinguished one, bringing him many academic honors and prizes including the Pulitzer Prize, concluded his remarks by saying: "[Professor Puttkammer] has helped ensure that the crooked shall always be seen to be crooked and the straight, straight, that innocence and guilt shall be humanely discriminated and law and order be terms of praise and not of reproach."

The evening's other speaker was Livingston Hall, son of James Parker Hall, who was the dean who persuaded Mr. Puttkammer to join the Law School faculty, in 1920.
In August James B. White directed a seminar for practicing lawyers and judges at the Law School. Seminar participants examined the nature of argument about matters of public value. They studied the literature of ancient Greece, eighteenth-century England and America and drew connections to the ways in which modern lawyers and judges function as users and makers of public language. The one-month seminar was sponsored by the National Endowment for the Humanities.

Mr. White addressed a Yale faculty seminar in November. The paper which he delivered on this occasion was "Cultures of Argument."

A casebook by Mr. White, Constitutional Criminal Procedure, which he coauthored with James E. Scarboro, was recently published by Foundation Press.

On March 18, 1977, Hans Zeisel addressed the Fifteenth Annual Institute on Patent Law of the Southwestern Legal Foundation on "Survey Evidence in Trademark Cases." Mr. Zeisel, Professor Emeritus of Law and Sociology, was elected a Fellow of the American Statistical Association in the spring.

Franklin E. Zimring, Professor of Law and Director of the Center for Studies in Criminal Justice, is serving as rapporteur for the 20th Century Fund Task Force on Sentencing the Young Offender.

In March Mr. Zimring received a Distinguished Alumni Award for 1977 from Delta Sigma Rho-Tau Kappa Alpha. He was selected as a recipient for his scholarly contributions to the law, especially in the areas of gun control and deterrence in crime control.

Mr. Zimring was named as one of the ten outstanding teachers who shape the future in the March 14, 1977, issue of Time. The article on him noted that: "Zimring prefers the classroom, where he walks a tightrope between 'bullying and pushing benignly,' always wary, he says, 'of infecting students with my biases.'"
CAMPAIGN FOR BOOKS

In the fall of 1976 the Law School launched a Campaign for Books for the Law Library. This unique appeal to the libraries, rather than pocketbooks, of the Law School's graduates was based upon the Law Library's needs for funds and the opportunity some graduates might see for the disposition of the less used portions of their collections. To date the Campaign has been very successful. Many volumes have been added to the Law Library's collection which might otherwise have had to be purchased. A few volumes of rare books have been received. These might otherwise not have been available at all.

By far the most important part of the Campaign is the ability to exchange the many items not needed by the Law Library for new books needed in the collection. This portion of the Campaign functions almost like the addition of a new book fund for the Law Library and has been very helpful in getting it through another year of severe financial stringency.

Spurred on by the initial success of this Campaign, a new appeal is planned for this fall. In the meantime anyone wishing to donate books to the Law Library should contact: Richard L. Bowler, University of Chicago Law Library, 1121 East 60th Street, Chicago, Illinois 60637 (312-753-3421).