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Gerhard Casper Becomes Dean

Gerhard Casper, Max Pam Professor of Law, has been appointed Dean of the Law School. The appointment is effective January 1, 1979. As Dean he will succeed Norval Morris, the Julius Kreeger Professor in the Law School, who has been Dean since 1975. Hanna Holborn Gray, President of the University, appointed Mr. Casper after receiving the report of a search committee which was convened early this summer at Mr. Morris's request.

Mrs. Gray commented: "The Law School at The University of Chicago, while maintaining the most rigorous standards of professional training, has pioneered in the integration of legal studies with other intellectual disciplines, particularly in the social sciences. Mr. Casper's academic experience and intellectual interests suit him perfectly to lead the school. In addition to being a noted constitutional authority, he has done important work which has illuminated significant issues of law and public policy. Mr. Casper's appointment as Dean reflects the breadth and vitality of the Law School. I look forward enormously to working with him."

She added: "The University is deeply indebted to Norval Morris for his superb and energetic service as Dean during the past several years. The faculty has been given additional strength by the appointment of some splendid younger scholars. Norval's own work on criminal law and prison reform has contributed to knowledge and practice in these areas and has inspired colleagues and students to new inquiries."
Gerhard Casper joined the faculty of The University of Chicago Law School in 1966.

Mr. Casper was born in Hamburg, Germany in 1937. He studied law at the universities of Freiburg and Hamburg, where in 1961 he earned his first law degree. He then studied American law at Yale Law School and received a Master of Laws degree in 1962. He returned to Germany to write his doctoral dissertation and was awarded the Doctor juris utriusque by the University of Freiburg in 1964. From 1964-66 he was a member of the faculty of the Political Science Department at the University of California at Berkeley. He was Visiting Professor of Law at the Catholic University of Louvain, fall 1970.

Mr. Casper's books and articles in the fields of constitutional law, constitutional history, comparative law and jurisprudence have been extensive and influential. His recent books include The Workload of the Supreme Court, with Richard A. Posner (1976), and Lay Judges in the Criminal Courts: Empirical Studies in Comparative Law, with Hans Zeisel (to be published in 1978). He, with Philip B. Kurland, is editor of The Supreme Court Review.

Mr. Casper has been teaching constitutional law, constitutional history, and the law of the European community, and has given seminars in jurisprudence and in comparative law.

A member of the American Law Institute and the American Political Science Association, Mr. Casper is also a member of the Chicago Council of Lawyers, on whose Board of Governors he served from 1973-75. He has frequently been invited to give congressional testimony on constitutional issues.

He is married to Regina Casper, M.D., who is Associate Director of the Department of Research, Illinois State Psychiatric Institute, and Associate Professor in the Department of Psychiatry, University of Illinois Medical School. The Caspers and their daughter, Hanna, live in Hyde Park.

The symbols of decanal office, a hard hat marked DEAN and a small sledgehammer, were passed on by Mr. Morris to Mr. Casper at the traditional Entering Students Dinner held in the Harold J. Green Lounge at the Law School on October 5.
The Emerging Constitution of the European Community

Gerhard Casper*

On January 1, 1958 the European Economic Community came into existence. Together with the older European Coal and Steel Community and the European Atomic Energy Community, it constitutes what is often referred to as the European Community or the European Common Market. Originally composed of six member states (Belgium, France, the Federal Republic of Germany, Italy, Luxemburg, and the Netherlands), it was enlarged in 1973 by the accession of Denmark, Ireland, and the United Kingdom. At present, the membership applications of Greece and Portugal are under consideration. The European Community has become an important factor in international trade and politics.

Internally, its jurisdiction extends to a whole range of matters familiar to the American student of federal powers under the Constitution, in particular its interstate and foreign commerce clause. The European Community, however, does not operate under a constitution. Instead it is governed by international treaties, albeit with common law making institutions, including a Court of Justice in Luxemburg.

The thesis of this paper is a simple one and hardly novel. The paper maintains that the treaties (the emphasis here is on the so-called Treaty of Rome establishing the European Economic Community) are increasingly functioning in the manner of a federal constitution. By this characterization I mean to point to (1) vertical, rather than horizontal, authority structures, (2) partial integration of law, and (3) considerable reliance on formal rather than informal mechanisms for dispute resolution. The proof offered for the thesis is the jurisprudence of the Court of Justice on the supremacy of Community law. As any student of American constitutional history knows, the subject of supremacy is important in terms of jurisdiction, practical politics, and political theory. I argue that the most striking features of the Court's decisions in this area, rendered over a period of less than fifteen years, have been the swiftness, boldness, and forcefulness with which the Court of Justice has pronounced the primacy of Community law. That jurisprudence has mostly eschewed the opportunities, frequently offered by the member states, to view the Treaty of Rome in an "international law" mode, rather than a constitutional one.

*I am not sure if this is correct. It seems like there is a mix-up in the names.

"I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could..."
not make that declaration as to the laws of the several states.\textsuperscript{1}

Holmes's famous remark suggests that he viewed judicial enforcement, in particular enforcement by the Supreme Court, of the supremacy clause in Article VI as the cornerstone of American constitutionalism.\textsuperscript{2} In the early years of the federation, judicial review of state legislation served to consolidate the understanding, expressly put forward by Article VI, of the American constitution as \textit{law}. Likewise, though with a slightly different twist, the treatment by the Court of Justice of the Treaty of Rome and secondary Community law as supreme law has served to consolidate the status of the Treaty as the Community \textit{constitution}.

A caveat is in order. My comments do not imply any views about the political stability and economic survival of the European Community. The following observations concern certain legal developments which I believe to be important and to possess some independent weight. To a modest extent the jurisprudence of the Court of Justice may be viewed as an autonomous factor in the development of the Community.

Holmes referred to the power of the Supreme Court to declare state laws void. We know, of course, that in theory this power of the United States Supreme Court is not as far-reaching as the power of the German and Italian constitutional courts to make such declarations with a “repeal” effect. Nevertheless, the practical consequences of American court decisions holding statutes unconstitutional are often indistinguishable from judicial “repeal.”

The Court of Justice of the European Community possesses no such power with respect to national legislation, not even in the case of proceedings under Articles 169 and 170.\textsuperscript{3} As a matter of fact, the Treaty does not even know the equivalent of the express supremacy clause in Article VI of the United States Constitution. While Article 189 does clothe certain Community measures with a binding effect and makes them directly applicable, it fails to state their supremacy.\textsuperscript{4}

More importantly perhaps, the Court of Jus-

\begin{enumerate}
  \item O.W. Holmes, Jr., \textit{Collected Legal Papers} 295/96 (1920).
  \item U.S. Constitution, Article VI, clause 2:
    \begin{quote}
      "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."
    \end{quote}
  \item Article 169, Treaty Establishing the European Economic Community:
    \begin{quote}
      "If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

      "If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice."
    \end{quote}
  \item Article 170, Treaty Establishing the European Economic Community:
    \begin{quote}
      "A Member State which considers that another Member State has failed to fulfil an obligation under this Treaty may bring the matter before the Court of Justice."
    \end{quote}
  \item Article 189, Treaty Establishing the European Economic Community:
    \begin{quote}
      "Before a Member State brings an action against another Member State for an alleged infringement of an obligation under this Treaty, it shall bring the matter before the Commission.

      "The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party’s case both orally and in writing.

      "If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court of Justice."
    \end{quote}
\end{enumerate}
tice does not possess the appellate jurisdiction conferred by means of Article III of the United States Constitution and federal legislation on the American Supreme Court. Quite to the contrary, one could argue that the interlocutory powers granted the Court of Justice in Article 177 were so designed as to eschew any notion of plenary appellate power over questions of Community law.9

As one looks back over the very short period—a mere twenty years—the Community has been in existence, one of the most striking features of the Court’s decisions concerning the supremacy of Community law has been the swiftness, boldness, and forcefulness with which the Court of Justice has pronounced the primacy of Community law.

Commenting on van Gend & Loos, in 1964, Professors Riesenfeld and Buxbaum stressed the caution with which the Court had avoided any direct statement on the question how national courts should resolve a conflict between national law and the Treaty.7 Riesenfeld and Buxbaum pointed out how the Court “must work with materials much less robust than those that were available to the Supreme Court of the United States for its great blueprint cases.”8

A reference under Art. 177, van Gend & Loos involved a clash between a Benelux customs agreement and a Dutch statute on the one hand and the Treaty on the other. The Dutch law had been enacted after the Treaty of Rome went into effect. In its decision, the Court of Justice referred to the Community as “a new legal order of international law,” emphasized that the members had limited their sovereignty, and that the Treaty conferred rights and imposed obligations directly on nationals of the member states. In identifying the nature of this “new legal order,” the Court made one argument reminiscent of McCulloch v. Maryland,9 and, one might add, as tenuous in this context as it was in John Marshall’s great poem. In explicating its view that the Treaty was more than an ordinary international agreement creating mutual obligations between the contracting states, the Court said: “This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples.”10

Perhaps more to the point was what I would call the “jurisdictional” interpretation of Article 177. The Court saw in Article 177 an acknowledgment by the member states “that Community law has an authority which can be invoked by their nationals” before national courts and tribunals.11 While the Court formally declined to pass on the collision problem, its actual ruling told the Dutch tribunal that it “must protect” the individual rights created by the Treaty.

Whether one views van Gend & Loos as a diplomatic masterpiece in the art of directing and avoiding or as a “great blueprint” case is, in retrospect, not very interesting. The fact of the matter is that, within a little more than a year, the Court of Justice was prepared to turn

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9. Recommendations and opinions shall have no binding force.
5. Article 177, Treaty Establishing the European Economic Community:
   “The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
   (a) the interpretation of this Treaty;
   (b) the validity and interpretation of acts of the institutions of the Community;
   (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.
   “Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
   “Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.”
8. Id. at 158.
9. 4 Wheat. 316 (1819).
11. Ibid.
Article 189 into a supremacy clause and to direct national courts in no uncertain terms to treat Community law as supreme.

With respect to the Treaty, Costa v. ENEL involved a spurious claim. Again a submission under Article 177, the case challenged the nationalization, in 1962, of the production and distribution of electric energy in Italy. What was important about the case was its history. The substantive question had, a few months earlier, led to a decision of the Italian Corte Constituzionale. That court had refused even to consider whether the Italian statute violated the Treaty of Rome, because the 1962 statute was subsequent to the statute approving the Treaty.

The Court of Justice reacted by ruling that a subsequent unilateral measure cannot take precedence over Community law, thus holding the submission by the Milan court admissible. Justifying this supremacy, the Court again contrasted the Community system with ordinary international treaties and found it to have "created its own legal system which ... became an integral part of the legal systems of the Member States and which their courts are bound to apply." The Court also saw the precedence of Community law confirmed by Article 189.

Thus, within six years of the entry into force of the Treaty, the Court had (1) demonstrated the ease with which Article 177 could be turned into a vehicle for appellate review, (2) asserted the supremacy of Community law as in the nature of things, (3) found Article 189 to be a supremacy clause—though unnecessary, (4) expressly stated that even subsequent national legislation had to yield in case of conflict, and (5) left no doubt about the obligations of national judges.

The American constitutional historian is reminded of Justice Story's commentary on the supremacy clause in Article VI:

"The propriety of this clause would seem to result from the very nature of the constitution. If it was to establish a national government, that government ought, to the extent of its power and rights, to be supreme. It would be a perfect solecism to affirm that a national government should exist with certain powers; and yet, that in the exercise of those powers it should not be supreme. What other inference could have been drawn than of their supremacy, if the constitution had been totally silent?"

To be sure, I am not arguing that the Court of Justice had to adopt the constitutional law model of the Treaty rather than a more "horizontal" one. Indeed, even in Costa the Court conceptualized its solution in not altogether hierarchical terms. I am referring to the identification of Community law as "its own legal system," though integrated. The language the Court used was close to, but not identical with, the opinion of the Advocate General, Lagrange, who had attempted to show "that the system of the Common Market is based upon the creation of a legal system separate from that of the Member States, but nevertheless intimately and even organically tied to it ... ." On the one hand "separateness" is a troublesome concept, on the other hand nothing follows from it as concerns supremacy. Probably, it represents no more than the often encountered discomfort of lawyers vis-a-vis a new phenomenon that does not fit their previously established categories.

It could be argued that the conceptualization has not been quite as harmless as I have made it out to be, because doubters and cunctators may use it for their own legal and political purposes. Thus, the German Federal Constitutional Court began its famous opinion in Internationale Handelsgesellschaft by invoking the "separate legal systems" conceptualization. The

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15. Id. at 594.
case concerned the constitutionality, under the German Basic Law, of a deposit required by Community law to secure the actual performance of exports for which a license had previously been obtained. The German constitutional court held that the requirement did not violate the German constitution. Nevertheless, it made use of the opportunity offered to state the position that, given the incomplete state of European integration, it had the power to review Community regulations, even those upheld by the Court of Justice, for violation of basic rights guaranteed by the German constitution. The German court claimed that power for as long as the European parliament had not enacted an adequate bill of rights.

The decision was poorly reasoned, though by no means as obviously wrong as most commentators seem to believe. However this may be, it has probably been taken much too seriously, and the dispute may indeed amount to no more than, to use Judge Donner's characterization, a "querelle allemande." For our purposes, it should simply be noted that the Federal Constitutional Court began by reaffirming its jurisprudence that Community law was part neither of the national legal system nor public international law, but was an "autonomous" legal system. The judges stressed that this view was "in accord with the jurisprudence of the Court of Justice." The irrelevance of the "autonomous" legal system argument for the supremacy point is perhaps best illustrated by the fact that the dissent of Judge Rupp used the same concept for reaching the opposite result.

The Court of Justice, for its part, had previously rejected the claim that the German constitution was relevant to the determination whether the incriminated Community regulations were legal. The Court had stressed that recourse to national constitutions would have an adverse effect on the uniformity and efficacy of Community law and could not be reconciled with the very nature of law stemming from the Treaty, which it, too, characterized once again as "an independent source of law."

In short, the Court of Justice came to the conclusion that maintenance of a uniform Community legal system mandates a hierarchical authority structure which supersedes even national constitutions. In view of these developments it seems to me preferable to drop the notion of "separate" systems. To the extent of supremacy, Community law and national legal systems appear to be fully integrated. Put differently, the Court of Justice has adopted the last part of the supremacy clause of Article VI of the United States Constitution, which after defining the supreme law of the land continues that "the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." [My emphasis.]

Almost two hundred years ago, the Federalist No. 44 had made most of the relevant arguments. Defending that part of the clause which proclaims the supremacy of federal law over state constitutions, Madison said:

"[A]s the constitutions of some of the states do not even expressly and fully recognize the existing powers of the confederacy, an express saving of the supremacy of the former would, in such states, have brought into question every power contained in the proposed constitution . . . [A]s the constitutions of the states differ much from each other, it might happen, that a treaty or national law, of great and equal importance to the states, would interfere with some, and not with other constitutions, and would consequently be valid in some of

19. Quoted in Ipsen, BVerfG versus EuGH re Grundrechte, 1975 Europarecht 1, 3. Charmingly enough, the French use the phrase "a German quarrel" to characterize the picking of a fight.
20. BVerfGE 37, 271, at 277.
21. Id. at 291.
the states, at the same time, that it would have no effect in others. In fine, the world would have seen, for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members.  

The Court of Justice has made it clear that the Treaty cannot suffer such inversion. To that extent the Treaty is indistinguishable from the constitution of a federal state such as the United States.

How radical all of these developments have been, can perhaps best be judged by the fact that the constitutionalization of the Treaty of Rome has led to the introduction of judicial review, or what one might more appropriately call Community review, into those countries which do not recognize the power of their courts to pass on the constitutionality of legislation. Indeed the Court of Justice has recently ruled that national courts are not even free to follow their ordinary procedures for determining the inapplicability of national law.

The problem had been posed by the Italian Corte Costituzionale. While the highest courts of countries such as Belgium and France had given precedence to Community law over subsequent national legislation in the context of deciding specific cases or controversies, Italy had embarked on an obstacle course. Though the Italian Constitutional Court has abandoned Costa and accepted the supremacy of Community law, it also has attempted to extend its monopoly to declare Italian legislation unconstitutional to alleged violations of Community law. Italian courts finding a conflict between Italian law and Community law were thus forced to delay adjudication until an interlocutory decision of the Constitutional Court could be had. When an Italian court made use of Article 177 to have the Court of Justice review this ruling of the Corte Costituzionale, the Court of Justice responded by requiring the Italian judges to disregard national law, without waiting for an adjudication by the Constitutional Court.

"Querelles allemandes et italiennes" aside, it seems to me clear that the Court of Justice has treated the question of supremacy as one to be decided exclusively in terms of the Treaty of Rome. If speaking of the Community legal

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23. The Federalist (Cook, ed.) p. 306.
24. In the case of the Netherlands, Community review was granted by means of an express constitutional provision, Article 66.
27. For an earlier example, see the following sequence. In 1968, the Court of Justice had found that a 1939 Italian law levying an export tax on the export of art treasures was in violation of Article 16 of the Treaty of Rome. When Italy did not effect a repeal of the law, a Turin court asked for a preliminary ruling under Article 177, and the Court of Justice held that national courts must protect the rights conferred by Article 16. The Turin court then decided in favor of the plaintiff and against application of the 1939 law. The Italian government apparently appealed that decision, whereupon the Commission brought its second Article 169 proceeding, this time claiming a violation of Article 171. Before the decision of the Court of Justice in favor of the Community mission was announced, Italy informed the Court of its repeal of the law, effective as of January 1, 1962, the date the Court had previously determined as the starting point of the violation. Case 7/68, Commission of the European Communities v. Italian Republic, [1968] E.C.R. 423; Case 18/71, Eunomia di Foro eC. v. Ministry of Education of the Italian Republic, [1971] E.C.R. 811; Case 48/71, Commission of the European Communities v. Italian Republic, [1972] E.C.R. 587. In this last case, at 534, the Advocate-General, Roemer, offers a detailed discussion of the sequence.
28. See text at note 13 supra.
32. Ipsen, supra note 19. There is now the potential for a "querelle française" as well, centering on the notion of French sovereignty. Cf. the decision of the Conseil
system as independent and autonomous made that task easier, so be it. John Marshall used a similar approach. What seems not merely misleading, but false, is to assert “separateness,” as legal commentators continue to do. The proposition of the German Constitutional Court that Community law is “not part” of the national legal system is outright nonsense. The fact of the matter is that, where the Community is competent to act, its law is also supreme. Period. At least this is the “constitutional” view taken by the jurisprudence of the Court of Justice.

It might be noted, in passing, that the Court has recently added the temporary restraining order to its (admittedly still limited) arsenal of remedies against state law alleged to be in violation of Community law. The United Kingdom had ignored a decision of the Commission rendered in accordance with Article 93 and had continued state aid measures for pig producers. When the Commission referred the case to the Court of Justice, the Court granted an interlocutory decision ordering the United Kingdom to “forthwith cease to apply the aid measure which it has been operating since January 31, 1977.”

The overall development has been marked by surprisingly few concessions to the member states. Some of the concessions which have been made have had the ironic effect, for better or for worse, of strengthening the judicial review power of the Court of Justice. I am referring to the protection of basic rights by the Court of Justice within the context of the Court’s jurisdiction. The Court, as it were, has responded to German and Italian critics by saying: your position is not only doctrinally wrong, but also unnecessary. This, in connection with the Court’s expansive view of the direct effect of Community norms, shows the extent to which penetration, including interpenetration, has taken place. The direct effect of Community norms may now be invoked even in litigation between private parties. For instance, what the United States has been trying to do by means of federal civil rights legislation, the Court of Justice has attempted to accomplish by giving direct effect to Article 119, which provides that member states “shall ensure” application of the principle of equal pay for men and women.

The American constitutional historian cannot help but view some aspects of this “constitutionalization” of the Treaty of Rome with concern, if not alarm. The spectre of substantive due process seems to loom over the Community. The former President of the Court of

33. See note 20 supra.
34. Article 93, Treaty Establishing the European Economic Community:

“1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 92, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission. . . .”

36. An excellent overview of and commentary on the problem can be found in E. Stein, P. Hay and M. Waelbroeck, European Community Law and Institutions in Perspective 274 ff (1978).
37. Contrary to the express wording of Article 189, the Court has gone as far as giving direct effect to directives. See, e.g., Case 41/74, Yvonne van Duyn v. Home Office, [1974] E.C.R. 1337.
Justice recently complained that there is much talk about a Europe of agriculture, even a Europe of technocrats, “but nobody talks about the Europe of judges”. It is about time that this deficiency be remedied. In less than twenty years, the constitutionalization of European Community law has led to the point where, as in the United States, the supremacy of law seems to mean, at least to some extent, the supremacy of judges.

The purpose of this essay is to examine the political economy of drug innovation and apply it to an evaluation of the Food and Drug Administration. Particular emphasis is placed on an overlooked problem—that of the efficient management of innovational resources. This essay applies an analysis developed in a more general context in my recently published paper "The Nature and Function of the Patent System" to the problems of drug technology.

The traditional political economy of innovation has started with the fact that an innovation can be copied. Copying will keep the innovator from capturing the full social value of his innovation. As a result, investment in search for innovation will be less than the anticipated value of innovations, the resulting underinvestment will be a social loss.

At this point the analysis has followed two lines.

One line suggests the use of tax revenues to subsidize the process of investment in innovation. This subsidy will increase the amount of investment in innovation in the direction of the socially optimum amount. Since the ability of an innovator to capture the returns from an innovation is less, the more basic and fundamental it is, the analysis suggests that the proportion of tax subsidy should be higher the more basic the research being undertaken. Doubtless this analysis has something to do with the generally high level of support for government subsidy of research, particularly (at least among intellectuals) of basic research. For government subsidy to improve the situation, however, it must be managed with sufficient skill so that the returns are positive. Government subsidy will raise the cost of specialized inputs to the research process (because total end demand for these inputs will rise) and thus reduce the amount of non-subsidized research that would otherwise occur. If the return from the government subsidy is not sufficiently positive to

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*Professor of Law.

This is an abridged version of a paper delivered to a conference on The International Supply of Medicines, sponsored by the American Enterprise Institute, on Friday, September 15, 1978, in Washington, D.C., under the title: "The Political Economy of Innovation in Drugs and the Proposed Drug Regulation Reform Act of 1978".

offset this loss, it will not improve the situation. If the government is a poor manager of its subsidy because of an inability to separate promising from unpromising projects, to allocate funds in proportion to the promise of projects, or to obtain the appropriate match of project and personnel, the tax subsidy will not result in a social gain.

The second line that has been followed in analysis of the political economy of innovation is the possible use of a rights system to overcome the problem of underinvestment. The patent system, which evolved long before the systematic analysis of these problems was undertaken, has been considered to be such a system. An inventor is entitled to a patent on his invention, and the invention gives him the right, for a limited time, to keep others from using his invention. The patent solution will not be completely effective because some gains from an invention will fall outside the reach of patent claims. For instance a patent on a particular compound which reveals therapeutic properties of the compound may suggest to others the possibility that related compounds have those properties, but those related compounds will not fall within the patent claim. The tendency of the patent, however, will be to increase the return to innovation and overcome the underinvestment problem.

A patent introduces other problems. During the life of the patent its owner will charge the monopoly price for the product subject to the patent. If the critical assumption is made—and it has usually been made in the literature—that other firms could acquire and use this information without cost, then the existence of the patent generates a social loss. Persons who would purchase and use the product if its price were lower, and who could be provided the product at no additional cost to anyone, are denied the product. In the case of drugs, it has been common for observers to comment on the high price margins over manufacturing costs enjoyed by some patented drugs and to bemoan the loss that the high prices cause. Ideas from the theoretical literature have found their way into the political debate about drugs. Provisions designed to introduce compulsory licensing were a dominant feature of the early Kefauver proposals, and his hearings focused on the high profit margin of some patented drugs. The thalidomide episode carried the drug legislation off in another direction toward a focus on safety. The government has the power to confer a compulsory drug license upon itself under the existing statutes and has from time to time made use of this power. And there has been much support for government subsidy for medical research, on condition that the fruits of the research are not subject to exclusive appropriation.

Analysis of institutions shaping innovation in the drug industry in the United States is greatly complicated by the role of the Food and Drug Administration. Whether or not to market a new drug product, and indeed, whether or not to begin human testing on a new drug product, is a decision made not by the firm making the investment in the innovation but by the Food and Drug Administration. There is some reason to think that at least since the early 1960s the FDA has been more cautious than the firms, free of regulation, would have been—although the striking rise in judicial product liability standards would have had effects in the same direction as the FDA regulation. What is clearer is that the FDA, driven by the logic of its own regulatory needs, has imposed upon the process of research and marketing a set of general procedures and standards applicable to all new drugs, which are probably not optimum in the case of many particular drugs. The flexibility that a firm would otherwise have to adapt its own procedures has been lost. Most importantly, the ability of the firm to control the timing of its research and marketing has been handed over to the FDA, where the operation of regulatory resource constraints and uniform procedures causes delays unrelated to drug specific cost benefit relationships.

Yoram Barzel’s essay “The Optimal Timing of Innovation” persuaded me that the problems of innovation are more complicated than simply equating the marginal investment in innovation

2. 50 Rev. Econ. & Stat. 346 (1968).
with the marginal social return. It is important to consider not only the relationship between inputs and outputs, but also the process by which resources are brought to bear on possibilities for innovation. This focus suggests conclusions strikingly at odds with the traditional analysis and puts forward another set of problems which should be confronted by those who would reform the controlling institutions.

In his essay, Barzel pointed out that the exploitation of technological information has much in common with fisheries, public roads, and oil and water pools—they are all resources not subject to the exclusive control of an owner. Under a rule of first appropriation, there will be inefficiently rapid depletion of the resource.

It has long been a conventional point of welfare economics that a rule which bases ownership upon first use creates an incentive for use of the resource at a rate faster than that which optimizes the social value of the resource. This is because each competitor in the race for ownership will have an incentive to accelerate the time of his use in order to be first, and this process will continue until the costs of being first are equal to the value of being first. Thus if a fisherman owns a fish only if he catches it, he has an incentive to catch it before his neighbor. Even though this will result in fishing (or hunting—another common example) at a rate that depletes the stock, no one in the process has an incentive to stop. Similarly, if the right to drive on the public road is conferred in order of arrival, everyone will have an incentive to hurry out onto the road, even though this causes a traffic jam, until the time that traffic slows to the point that the value of being on the road is equal to the gain from using it. This is so even though the traffic then moves at a rate which reduces the capacity of the road to carry traffic. And in the case of oil, a rule that gives ownership to the first owner to pump the oil out gives each owner of land over the pool an incentive to pump as fast as he can, even if the effect is to reduce the total amount of oil that can be extracted and to supply the oil to the market in a time pattern that reduces its total social value.

Because, unlike fish, bears, roads and oil, technological information is not something that can be physically appropriated, the analogy is not immediately obvious. The fact that I take "some information" does not mean that you can't have it too. The fact that I have read Barzel's article does not mean that you can't read it too, and even if we both read it—and indeed if we both read it with inefficient haste—the article will still be there. Or in the drug area, the fact that one firm is exploring the therapeutic properties of compound X does not mean that another company cannot explore those properties, and it certainly does not mean that if both explore them, the properties, whatever they are, will be used up.

Barzel's point, and the point of the analogy, is more subtle. There are two resources involved in fishing, driving, and pumping oil. One is the fish, et cetera. The other is the resources used to acquire the fish, et cetera. An appropriation system causes those resources to be used at an inefficiently rapid rate. Thus in the case of a fishery, the problem is not only that the fish are depleted at an inefficient rate. The fishing boats are also used inefficiently. Since ownership is based upon speed, there is an overuse of resources which produce speed. The number of boats will be inefficiently high in relation to the number of fish. For instance, if 30 boats would be the socially efficient way to exploit a fishing ground, a rule of appropriation may produce a fleet of 60.

In the area of innovation, the key loss of an appropriation rule is the inefficient deployment of the resources used to locate and develop an innovation. For instance in the drug area, if several firms were competing to be the first to prove that a chemical entity has a therapeutic effect, under a rule that the first to demonstrate the effect was entitled to market the drug, the following things would happen. Each firm would emphasize speed in its work, even though the most efficient way might be to proceed more slowly. Each firm would have to limit its commitment by the estimate of the value of the product less its estimate of the chance that some other firm will be first. And each firm will have to duplicate work of others since there are no exclusive rights in the infor-
mation until the effect has been demonstrated. Firms would tend to crowd their resources on possibilities they considered close and to duplicate each other's work. Because there would be inefficient allocation of the resources both over time and the set of innovation possibilities, the output from the resources used for drug research would be less than it otherwise could be.

This analysis can be used to argue against a patent system because a patent system is a first appropriation system. Its basic rule is that the patent on the invention goes to the first inventor. However, such an argument turns on confusion about the meaning of the term invention. In common usage the term invention has a meaning quite different from its meaning in patent law. When we speak of an inventor's invention in everyday speech, we are thinking of the commercial product that the inventor made possible: Alexander Graham Bell's telephone, Edison's light bulb, Land's polarizer, and so on. But something can be patented long before it has any commercial feasibility at all. For instance, patents issue on chemical entities based not upon a demonstration that they are wonder drugs, but upon a demonstration that they have some possible therapeutic effects. After the patent is applied for, the patent owner can search for the information about the therapeutic significance of the entity. Since he has the exclusive right to market the drug, he is the only one with an incentive to find the effect. The patent will eliminate the race to be first. Thus patents can and do issue on the basis of "first results," and the issuance of the patent (and for the most part the application) can stop the race to be first.

Because trade secrecy—whether based upon legal recognition of trade secret doctrines or upon the natural ability of the possessor of information to control its dissemination—is the principal alternative institutional arrangement to the patent system, I was led in "The Nature and Function of the Patent System" to compare the systems in some detail. I identified six ways in which a patent system is superior to a trade secrecy system. One—the ability of the owner of a patent to control the allocation of resources to its development without the misincentives caused by competitive appropriation—has already been developed at length here. Two others are of particular importance.

One is the transaction effect which has long been a commonplace of the applied legal literature but has not been noted in the theoretical literature. To quote from "The Nature and Function of the Patent System":

A patent system lowers the cost for the owner of technological information of contracting with other firms possessing complementary information and resources. A firm that has a design for a new product or process needs to be able to obtain financing, knowledge about or use of complementary technology, specialized supplies, and access to markets. Unless the firm already possesses the needed inputs, it must enter into contracts. The practical difficulties of entering into contracts concerning trade secrets are spelled out in the applied legal literature. Disclosure of the secret imperils its value, yet the outsider cannot negotiate until he knows what the secret is. Disclosure under an obligation of confidence strengthens the discloser's legal position but may prove costly to the receiver, who must accept the obligation before he knows the secret. The patent creates a defined set of legal rights known to both parties at the outset of negotiations. And although the patent will seldom disclose the real value of the patent, the owner can disclose such information protected by the scope of the legal monopoly. Indeed, most know-how or trade-secret licensing takes place within the framework of patent rights, the agreement involving both a license of the patent and an undertaking to disclose how to apply the technology efficiently. This reduced transaction cost increases the efficiency with which inventions can be developed.

A second advantage of a patent system is that it allows firms to space themselves across the set of innovation possibilities in a more efficient manner. A striking problem with trade secrecy

3. 20 J. Law & Econ. 277-8.
is that during the period of the secrecy other firms have an incentive to invest in the search for the very information that is already known. This duplicate search is economically wasteful if the patent system provides a way that the information already known can be transmitted to other firms. It does. To quote:

A patent system enables firms to signal each other, thus reducing the amount of duplicative investment in innovation. Once a patent has been issued, other firms can learn of the innovative work of the patent holder and redirect their work so as not to duplicate work already done. Indeed, the patent gives its owner an affirmative incentive to seek out firms and inform them of the new technology, even before issuance, if the most efficient and hence patent-value-optimizing way to exploit the invention is to license it. Under a regime of trade secrecy, the competitive firm might never learn of a competitor's processes and would not learn of the technology incorporated in a new product until it was marketed. During this period, the investments made in a search for technology already invented by others is wasted. This private incentive to disseminate information about the invention should be distinguished from the reward for disclosure theory traditionally discussed. That theory assumes that the disclosure effect of the patent system comes from the disclosure on the public record.4

To illustrate in the context of drug technology, suppose that a firm is considering the possibility that a compound will act as an anti-histamine. It runs a series of tests on animals and finds that the compound causes a serious undesirable side effect. It drops the project. When another company considers the possibility of pursuing the same project, it will not know of the negative results obtained by the first company and will be led to repeat the same tests to obtain the same information. However, if there was a patent issued on the compound, then the second company would know to explore with the owner of the patent the status of work on the compound before it began work itself. This would save the resources involved in a repeat of the same tests.

Conversely, if the first company obtains positive results and does not have a patent, it will not want to publicize the existence of its work. But if it has a patent, it will want to publicize the fact of positive results disseminated in order to increase the value of its patent rights. This information will then become available to others and they can avoid duplicating the work.

What, then, do these points have to suggest for the problems of evaluating the role of the Food and Drug Administration in drug technology development?

They highlight the fact that the FDA has become a regulator of the research process. How it carries out that task is an important part of evaluating the regulation. The statute does not formally do this. It is modelled on the assumption that firms control their research and the FDA approves or disapproves. But given the multistage regulatory process that has evolved, and given the existence of regulatory queues, the FDA is in fact influencing the time flow of projects and this is an important matter. The statute and regulations do not address this problem, although doubtless in a world of sometimes practical men there are ways that a firm can inform the FDA of its sense of the priorities and the FDA can readjust timing and resources. But these are awkward, costly, and sub rosa processes.

The regulatory problem is particularly difficult because in the process of research and development resource allocation should be constantly reiterative—each new piece of information alters the desired portfolio. These adjustments are hard enough for firms to manage, but when the readjustments must also be taken through the regulatory process, the difficulty becomes staggering. Can you imagine a firm that has just told the FDA that the processing of drug X should be expedited because it is enormously promising for the treatment of an important disease, later trying to persuade the

4. 20 J. Law & Econ. 278.
FDA that in light of information which became available a month later, some other drug is really what is now urgent? Research is an exploration of the unknown, yet the regulatory process requires firms to appear consistent in the positions they take.

These problems are greatly aggravated by the Administration's reform bill. The bill proposes to substantially increase the degree of control that the FDA can exercise over the research process. It is a logical response to much of the criticism of the existing regulatory scheme. But since that criticism has not considered the problem of regulating the research process, it could not take these problems into account. One of the important criticisms of the regulatory scheme that has been made is that it confronts the FDA with an all or nothing choice. Either a drug is approved for general marketing subject only to the constraints of the label limitations, or it is not approved for marketing. And once it is approved for marketing, the formal regulatory review of safety and efficacy ends—at the very time when the commercial sales, much higher in volume than experimental use and production could ever be—are generating much more information of potential regulatory value. Since the FDA has an all or nothing choice, it tends to be very cautious before it says yes. The suggested solution—and a solution adopted in the administration bill—is to give the FDA a much greater range of choices, making possible stages of controlled release with a wide range of cautionary monitoring and information feedback procedures.

To deal with one of the anomalies generated by the present regulation, the bill also contains a provision empowering the FDA to order a firm to do research. The anomaly is the fact that a drug now released for use under labelling for one condition, may come to be used for another condition. At this point the firm that sells the drug has strong incentives to ignore the second use. If it recognizes the use, it will be open to the charge that it is violating the act by encouraging the use of the drug for a condition not permitted. It has little incentive to undertake the research necessary to expand the labelling since an expansion in labelling will not expand the market—the drug is already being used for that condition. Or even if the existing illicit use is limited, the potential market may still be too small to justify the regulatory expense. The solution of the bill is to empower the FDA to order firms to do the research. Exactly how one orders a firm to do research in a meaningful way is an interesting problem—doubtless the drafters have in mind a combination of threat and grant. But when the FDA exercises this power, it will be explicitly ordering the research priorities of the firm. How is it to acquire the information necessary to do this?

The cumulative effect of these provisions would be to greatly increase the scope of FDA involvement in the allocation of resources to research, and thus to make even more important concerns about the efficient management of research resources in evaluating the regulation. From this perspective, the advantage of the present system is that it at least limits the form and number of potential FDA interventions and probably makes the FDA responses, although inflexible, more mechanical and predictable.

There are various ways that might be explored to ameliorate the problem of the firm-FDA interface in research. Firms could be permitted to exchange queue positions, to purchase regulatory speed with money, or with chits. Such a system would have to be flexible enough to permit firms to change their designations over time as they obtained new information. Some explicit recognition of the difficulty of the problem would itself make it easier for the agency to face it and attempt to fashion procedures to deal with it. The prospects for any solution, however, are very dim because the whole problem of procedures for the allocation of regulatory resources among items on the regulatory agenda is one that has defied satisfactory resolution. The complex, multifaceted nature of the problem has caused agencies and critics all too often to simply ignore it. I would not be surprised if full study of the problem

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5. S. 2755, 95th Congress.
would lead to the conclusion that the agency should be held to a first come, first served principle with the right given to firms to exchange places in the queue with side payments permitted.

The basic problem is: who is to manage the process of research. The present statute adopts a simple minded model—the firms research and the FDA checks. The agency has limited and inflexible powers. The critics have then pointed out that the FDA manages poorly, because it really doesn't have the range of flexible powers the management job requires. The response is to give the FDA the powers the management job requires. But no attention is paid to the question as to how the FDA acquires the personnel skills and information base necessary to exercise these powers well. It is quite possible that the FDA as flexible manager will be considerably more wasteful than the combination of firm as manager and FDA as arbitrary check. If one thinks that the prospects for improvements in drug technology are significant, and the resources for making those improvements scarce, their wasteful management is an important problem.

Norval Morris*

Edward Levi, on his recent retirement from the U.S. attorney generalship, expressed "wonder at the anomaly of a modern country which seems to be unable to agree upon a federal code of criminal law." He doubted, too, that "faith in the administration of criminal justice can be restored if our present sentencing system continues."

Criminal law governs the greatest power that the state exercises over a citizen; punishment for crime is the strongest expression of that power. Thus, it is indeed extraordinary that for nearly 25 years the effort to bring order and principle to federal criminal law has been a failure, especially since this is a country dedicated more than any other to the rule of law.

But at last a gleam of light has appeared at the end of this long tunnel—a gleam other than the lights of an approaching train. The proposed Federal Criminal Code, Senate Bill 1437, has been accepted by the Senate Judiciary Committee, and has since been passed by the Senate. Similar legislation pending in the House lapsed in the 95th Congress and will be reconsidered in the 96th Congress.

S 1437, like many other legislative proposals, is not free from compromise. Its joint sponsorship by Sen. Edward M. Kennedy (D-Mass.) and the late Sen. John L. McClellan (D-Ark.) speaks clearly to the reality of compromise. But it would provide a mechanism by which the present anarchy in federal sentencing could be reformed, over time, into a principled and just common law of sentencing.

That mechanism is the Sentencing Commission, an idea conceived by then Judge Marvin Frankel of the U.S. District Court for the Southern District of New York, which he offered in a 1973 book, Criminal Sentences: Law Without Order. Sen. Kennedy liked the idea, and has vigorously brought it to the threshold of legislative acceptance. This is no minor achievement. Sentencing reform of this type, though of central importance to criminal justice, is hardly a popular task.

What, then, is the basic problem, and how does a Sentencing Commission promise a remedy?

Compelling evidence exists that America's

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disposition of convicted criminal offenders is capricious and inconsistent. Decisions about the nature and duration of punishment flow from a complex and unprincipled network of legislatively authorized sentences and an even more complex division of sentencing power between prosecutors, defense counsel, judges, parole authorities and correctional administrators.

Thirty years of careful research has demonstrated that the federal sentencing system, like those of the states, is characterized by unjust disparities.

Each judge may well have his own consistent and orderly views on fair and effective sentencing. But no agreed-on principles exist to guide him, no controlling mechanisms relate his views to those of his brother judges, and no established system provides one judge with the considered views of his colleagues. As a result, appeals against criminal sentences where available—and they are not available in the federal system—cannot be decided in the frame of reference of formulated and published principles.

The empirical literature on sentencing disparities is extensive and reliable. Put curtly, like cases are not treated alike; sentencing is a random lottery.

As of this writing, four states—California, Indiana, Maine and Oregon—have adopted determinate-sentencing laws, and many other states are considering doing so. There is a strong national movement away from indeterminate sentencing, away from the hypocrisy of parole decisions in which it is pretended against the evidence that behavior in the cage is a reliable guide to behavior in the community.

But to shift from the indeterminate to the determinate sentence—and California’s recent change is the most dramatic—does not in itself provide a remedy for the current anarchy of sentencing. It leaves open the difficult issue of who should fix the determinate sentence, and how it should be fixed.

Can we rely on legislatures? I think not. Every pressure on the legislator is to inflate punishment, to protract prison terms, because no votes are lost by the forceful advocacy of severity. Our already-overcrowded prisons would almost surely burgeon further. Certainly we do not want a mindless severity that, in any event, is likely to be nullified by the realities of charge and plea bargaining in our cluttered courts of first instance.

Rather, we need a discriminating sentencing practice, graduated carefully to social harm and to social need—a just and orderly system, severe where it should be, lenient where it should be.

The proposed Federal Criminal Code would go about that task as follows. As stipulated in the Kennedy-McClellan bill, it would divide all federal crimes into nine levels of gravity: five of felony, three of misdemeanor, one of infractions. The maximum sentences for felonies would be: Class A, life; Class B, 25 years; Class C, 12 years; Class D, 6 years; Class E, 3 years. The three classes of misdemeanors would have as maximums 1 year, 6 months and 30 days, respectively. An infraction would be a petty offense punishable at most by a 5-day term, but normally by a fine or probation. These would be the defined maximums; within their limits, the judge would set the term to be served.

The bill would establish a Sentencing Com-
mission to promulgate sentencing guidelines and policy statements to assist the judge in imposing sentence. The commission would be charged with taking the legislative categories of crime and the legislative criteria of sentencing offered by Congress and then shaping them into an extensive, reasoned, probably lengthy and complex, system of offense-offender-punishment categories, giving reasons for each. From the congressional signals and within the legislative maximums of punishment, the commission would have to fashion a reasoned Code of Sentencing.

Would the sentencing judge be bound by the commission? No, he would be only guided. If the judge disagreed with a guideline or policy statement in a case before him, he could impose whatever legislatively authorized sentence he thought appropriate—but he would have to set out his reasons in the record.

If the judge were more severe than the Sentencing Commission recommended, the convicted criminal could appeal; if more lenient, the U.S. attorney could appeal. An appeal by either party would result in a properly justiciable issue: the published reasons of the Sentencing Commission would confront those in the record offered by the trial judge. The appeal decision would feed back into the work of the Sentencing Commission, and in this way legal principles, now lacking in sentencing, could emerge under the Kennedy-McClellan bill. Thus could a compass to justice in punishment be designed—at last.

Of course, the measure could conceivably make the present chaos worse. It could increase sentences. The Sentencing Commission could be inept or excessively punitive—much would depend on the qualities of mind and ranges of knowledge of the seven commissioners. But the bill contains a couple of built-in safeguards. For one thing, it would set up a two-year lead time between its signing by the President and the implementation of its sentencing provisions. Also, the emerging guidelines and policy statements would have to be published, and would inevitably be subject to the closest criticism of Congress, judges, practitioners, academics and concerned citizens—to say nothing of prison administrators and their understandably interested flock, the prisoners.

So there is a good chance that the Sentencing Commission could—indeed, I hope it will—gradually bring order to judicial sentencing. Further, if its work attracted the support of U.S. attorneys, it might even in time bring justice to that other area of sentencing anarchy—charge and plea bargaining.
The AILJ Reborn Again! Recycling
The Reform

Walter J. Blum* and Willard H. Pedrick

The American Institute of Legal Jurimetrics—the AILJ—is virtually unknown outside the world of estate planners. Co-founded by Professors Walter J. Blum and Willard H. Pedrick some thirteen years ago, the Institute has adhered tenaciously to its announced mission—"formulating reform proposals that would make the federal estate and gift tax laws bear more equally on donors and decedents." The spirit that has motivated the AILJ can be discerned from its maiden pronouncement: "When total even-handed equality begins to operate in the field of federal estate and gift taxation, all donors and decedents will fare exactly alike without regard to how their affairs have been arranged. At that point a vast amount of human energy presently employed in tax planning will be freed for less rewarding tasks."

The following is an excerpt from the latest Institute publication, entitled "The AILJ Reborn Again! Recycling the Reform." The wisdom purveyed obviously transcends the boundaries of estate planning.

Tax Expenditure Approach and Funeral Expenses

A stellar item on our agenda is applying the tax expenditure concept to the estate tax. This concept was developed in connection with the income tax. It is intended to deliver a message that carries a great deal of political freight. It presumes to tell us that, if by virtue of a deduction, or credit, or exemption, or bargain rate, some taxpayer is taxed less than he would be under a "pure" version of the income tax, the amount of tax dollars foregone are realistically to be viewed as though they were collected and then expended by the government.

While the AILJ has great reservations about the validity and utility of the tax expenditure concept, the Institute maintains that if the idea is sound in the income tax area it is equally sound in the area of death taxes. Once this is granted, a number of expenditures by government effectuated through the estate tax might seem slightly outrageous in our society. To take but one item, consider the deduction allowed for funeral expenses. According to the tax expenditure concept, the tax saved by virtue of that deduction is nothing more than a payment by the federal government made for the purpose of celebrating the departure of the decedent.

Now the important thing to observe is that
there is no ceiling on the deduction for funeral expenses. This means that the ceremonies can be lavish and extravagant—including, presumably, application of the wraparound technique as part of mummification, if desired. Under the income tax, we expressly would not allow the departed, during lifetime, to deduct for living lavishly while away from home in the pursuit of business. Can it be that the federal government is expressing a preference for Forest Lawn over the Ritz! In passing, it must be remembered that the higher the marginal estate tax bracket, the larger is the government expenditure that goes to subsidize funeral activities. If the rate of inflation does not abate, we can expect to witness ever more monumental departures by the rich. Maybe there will then be a sharper point in the observation that the estate tax is pyramidal in shape.

Aside from its glaring shortcomings, one other aspect of the departure subsidy is notable. This tax expenditure operates directly counter to societal efforts designed to conserve on energy. Everybody is aware that staging large burial processions and erecting elaborate mausoleums unavoidably consume gasoline and other fuel. The disallowance of funeral expenses, at least any that exceed some very modest amount, would seem to be in keeping both with the national energy policy and the aspirations of those who are enthusiastic about the tax expenditure approach to tax reform.

Estate Planning Malpractice

Another long-range AILJ study stems from the marked growth of malpractice claims brought against lawyers. Malpractice suits involving tax lawyers, especially estate planners, were not unknown in the past, but they were comparatively rare (and not well publicized). Under the new dispensation in the tort world all this seems to be changing. Estate planners are vulnerable, and their exposure to liability is likely to be of relatively long duration and to implicate substantial sums.

The AILJ suspects that hidden in this development lies the germ of a new format for creative estate planning. Under some circumstances a recovery, perhaps including punitive damages, for negligence on the part of an estate planner might not be an asset includable in the estate of a decedent for estate tax purposes. If that is the case the improved scenario for estate planning almost writes itself: the man of means need only select an incompetent estate planner and then rely on his survivors to bring a malpractice action that will generate a recovery that escapes both gift and estate tax! Who knows, private enterprise may yet be saved by tort law.

Closely related to the malpractice study is an Institute project erected on the newly discovered constitutional right of lawyers to advertise. The limits to such advertising, of course, have not yet been determined. Fees clearly can be made known, and a statement of experience and other qualifications will likely be permissible. It is to be assumed that the evolving rules will be fully applicable to estate planners. We can look forward to refreshing messages as lawyers try to catch up with trust and life insurance companies in competing in the estate planning world. Who could resist such gems as these:

Death planning guaranteed for life.

Satisfaction guaranteed or your money back.

Not a single complaint from any decedent in over half a century.

Furthermore, some interesting relationships between advertising and malpractice actions can be expected to develop. The lawyer who advertises himself as a highly skilled expert in estate planning would seem to expose himself to greater vulnerability for malpractice claims should there be a failure to minimize taxes under the circumstances with which he was dealing; conversely, the lawyer who holds himself out as an amateur in estate planning would seem to provide himself with a higher level of immunity from successful malpractice suits. On the surface, this combination appears to be a very subtle form of income equalization of a type that the Institute is just beginning to explore. Indeed, the whole business is similar to progressive taxation in that proportionately less
is to be extracted from those who are of smaller means.

Disclosure and Equalization
The prospective malpractice and advertising projects are both brought into better focus by another possible AILJ study, inspired by a provocative suggestion roughed out by the present Commissioner of Internal Revenue. It is widely believed that well-advised persons of affluence are now able to avoid income taxes by taking advantage of the IRS’s inability to probe deeply behind whatever appears on the face of returns. To deal realistically with the situation, the Commissioner has floated the idea that those who prepare returns for elite taxpayers be required to specify which doubtful issues had in effect been resolved in favor of the taxpayer in calculating tax liability. The crux of this notion is that the tax advisors know, while the IRS cannot know from a mere inspection of returns, to what extent taxpayers were given the benefit of the doubt. The suggested solution in essence is a call for invoking the newest natural law—full disclosure.

Without either accepting or rejecting this novel approach to administering the income tax, the AILJ is prepared to consider the consequences that might be expected to follow if it were applied to gift and estate tax returns. Fore­sight at the moment admittedly is rather murky but at least one distinct possibility can be envisaged. This disclosure scheme perhaps is the ultimate avenue for dealing with the very common complaint that the law is so complex that only a few top-flight estate planners can utilize it to best advantage. Under a rule requiring disclosure of doubt, the most sophisticated estate planners will be properly handicapped in competing with those who are less skilled.

The “hidden handicapping hand” presumably would tend to work as follows: The more knowledgeable the advisor, the more he will perceive doubtful issues, and thus the more he will be required to disclose. Conversely, the less knowledgeable the advisor, the fewer doubts he will encounter and thus the less he will be under obligation to disclose. A person seeking an advisor will accordingly be faced with a nice choice: On the one hand, he can opt for brightness and a high probability of costly controversy with the IRS; on the other hand, he can seek dullness, a low probability of such controversy and stupid exposure to heavier transfer taxes.

Freedom of choice by the consumer is a hallmark of our society. To facilitate it, every firm engaged in estate planning might have to employ at least one stupid lawyer.

The intriguing linkage between advertising and disclosure of doubt should not go un­marked. One can imagine estate planning notices that read: “When in doubt, see us because we never are.” Or: “Not a doubt in a caseload.” The possibilities are virtually limitless. For the most part they appear to turn on a modified version of an old theme: “Less is more—especially if it is in the right places.”

Compulsory disclosure of doubt, along with malpractice vulnerability geared to advertising by lawyers, will be a grand sub-rosa device for achieving “vertical equity” among tax planners. It could turn out to be a giant step in levelling society.

Death Taxes and Land Use
One other project on the AILJ drawing board is deserving of mention. The Institute is keeping a sharp lookout on the use of taxation to improve the environment and conserve the use of irreplaceable natural resources.

But, it must be asked, is the estate tax adaptable to the new goals? Preliminary research has convinced the Institute that the project is most promising. The results of a test boring, already analyzed, should silence the skeptics. It stands to reason that we must maximize the efficient use of land in a world that is short of food. To achieve this end, all unproductive uses of available land must be discouraged. Estate planners are well acquainted with a striking instance of waste—turning land into burial plots. The estate tax is surely an ideal vehicle for reducing this awful brake on efforts to accelerate food production. All that is needed, it seems, is a credit for nonuse of land for burial purposes.

Reflect briefly on how such a credit would be amenable to fine tuning by agrarian economists.
A sliding scale arrangement is obviously appropriate. A small credit might be given for burial in tiers (a pattern that should be particularly congenial to estate planners), a larger credit for vertical interment, and perhaps a full credit for cremation.

Encouragement of cremation of course raises the specter of atmospheric pollution. Needless to say, the AILJ will not ignore this problem. Indeed, we might be confronting the ultimate case for application of the economist's dream—a tax on discharge of effluent into the atmosphere. (And who knows, we might also be sensing the dangers that lurk in a union of estate planners and economists.)
During the fall semester of 1928, Karl Llewellyn served as a visiting professor at one of the (then) most distinguished German law schools, that of the University of Leipzig. His lectures on precedents and courts in the United States were given in German, which Llewellyn spoke and wrote fluently. They were subsequently published with the financial assistance of the Leipzig law faculty: K. N. Llewellyn, *Präjudizienrecht und Rechtsprechung in Amerika, Eine Spruchauswahl mit Besprechung*, Leipzig: Verlag von Theodor Weicher, 360 p. (1933).

In the fall semester of 1931 Llewellyn paid a return visit to Leipzig, this time to lecture on the sociology of law. Once again, his lecture notes were prepared for publication. By 1932, the financial situation of German law publishers and German universities had deteriorated so badly that no publisher could be found who was prepared to risk the investment without a substantial subsidy. No subsidy could be found.

The German language manuscript on “Law, the Life of the Law, and Society” remained effectively hidden among the Llewellyn Papers until Manfred Rehbinder of the University of Zürich found a reference to it in William Twining’s careful and perceptive study on *Llewellyn and the Realist Movement*, published in 1973. As he did not know German, Professor Twining could do no more than mention the existence of the manuscript. His curiosity awakened, Professor Rehbinder contacted me, the manuscript was located (of all places, at the Max-Planck-Institute in Hamburg, Germany, where it had been sent on loan from the University of Chicago Law Library), and Dean Mentschikoff’s permission for posthumous publication was secured. Edited by Professor Rehbinder, the book has now appeared in print: Karl N. Llewellyn, *Recht, Rechtsleben und Gesellschaft*, Berlin: Duncker & Humblot, 198 p. (1977).

The book, while disclaiming to be systematic, is perhaps the most comprehensive statement of the early Llewellyn’s sociological approach (the lectures were written one year after publication of *The Bramble Bush*). In it, Llewellyn carefully defines his own position by comparison and in contrast with Eugen Ehrlich and, in particular, Max Weber, whom he identifies
as the “master.” Never shy about the creative use of language, Llewellyn invented a new German word to employ as his central concept. His interest, he wrote, was in the behavior of officials as they decide and channel disputes arising out of the acts of laymen, not primarily in the normative aspects of law. To express this focus, Llewellyn coined the term Trecht, a neologism composed of the German words Tat (act, action, deed) and Recht (law).

In addition to methodological questions, Llewellyn discusses the general relationship between order and society, leeways and norms, the whole and its parts, and illustrates many of his thoughts by a marvelously lively, rich, and learned discussion of marriage as an institution in the modern world. Overall, Llewellyn’s approach in this book is perhaps most accurately characterized as “institutional”. In his English language writings, this emphasis was most fully developed in his 1934 Columbia Law Review article entitled “The Constitution as an Institution.”

Llewellyn’s second German book, addressed to an audience unfamiliar with and, most likely, uninterested in the partisan passions of the then ongoing American debate over legal realism, may strike the reader as a more detached contribution to the sociology of law than some of the realist literature appearing in the United States during the early thirties. Responding, as it were, to listeners with different preoccupations and different canons of legal scholarship, Llewellyn succeeds in combining the best of two worlds, that is, American disrespect for stifling conceptualism with German preferences for systematic exposition.

Gerhard Casper
Ernst Wilfred Puttkammer (1891-1978)

Ernst Wilfred Puttkammer died March 2, 1978, aboard ship in the Indian Ocean, while on vacation with his wife. He was 87. A memorial service was held in Bond Chapel May 3, at which Walter J. Blum delivered the remarks reprinted below.

Mr. Puttkammer joined the law faculty in 1920 and taught here until his retirement in 1956. His field was criminal law. During the 1940's he was a special investigator for the Chicago Crime Commission and served as director of the Chicago Crime Commission and chairman of the Commission's committee on police, sheriff, and coroner. He was for a time assistant chief of the Illinois State Police.

Mr. Puttkammer did undergraduate work at Princeton and received a J.D. from the University of Chicago in 1917. He was a member of Phi Beta Kappa and the Order of the Coif, which he later served as national treasurer and president. He served in World War I and stayed on in France after the armistice to study at the University of Clermont.

He became faculty editor of The University of Chicago Law Review at its founding in 1933 and served as faculty advisor from 1936 to 1956.

He is survived by his wife Helen; a daughter, Lorna P. Straus, Associate Professor of Anatomy at the University of Chicago, who also serves as Dean of Students in the College, Associate Dean of the College, and Dean of College Admissions; a son, Charles, in Washington, D.C.; and seven grandchildren. Mrs. Puttkammer's home address is 1221 East 56th Street, Chicago, Illinois 60637.

Remarks by Walter J. Blum*

It was in my second year in the University of Chicago Law School, autumn of 1938, that I was enrolled in a course taught by Wilfred Puttkammer. The course, which ran for several quarters, dealt with criminal law and procedure and the problem of crime in our society. Putt, as he was always called, had written and taught in the field of crime for almost two decades. His extra-curricular activities on the Chicago Crime Commission and his services as consultant to the Chicago Police Department and other such organizations were well known. The insiders said that he was one of the front-line observers of our system of criminal justice.

For most of the class, crime was somewhat remote from our personal lives, yet a continuing presence of which we were reminded by the daily newspapers. Though few of us expected to deal with criminal affairs in our work as lawyers, all of us were aware that they constituted a most significant part of the legal system. My own attitude, I suppose, was typical: it was good, but not vital, to know something about the technical rules of criminal law; it was important, however, to come to grips with the problems confronted by society in applying the law of crimes and invoking criminal sanctions. Putt was admirably suited to guide us through and nourish our interest in this area of the law.

The course was a combination of a rigorous exercise in defining various crimes and a wide exposure to the practicalities of the criminal justice process. It succeeded admirably in impressing upon us a unifying approach to the whole of criminal law. He made us explore not only what the law purports to be and do, but

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*Wilson-Dickinson Professor of Law.
also how the rules bear upon the attitudes and conduct of those who are affected by them, including the accused, the prosecutors, the defense lawyers, the police, the jurors, the judges, the jailers, and the public at large. The success of the course was in part due to the teacher's great knowledge of his subject. It was also due to his personality and style.

Putt at all times was completely in control of his class. When he lectured, his thoughts were flawlessly communicated in artfully constructed sentences, each neatly tailored for the context. These sentences invariably were combined into well-organized sequences, so there was no mistaking the structure that he had designed. Listening in class was not unlike hearing a superbly crafted essay being read. There was always a beginning, a middle, and an end, with all the parts fitting together harmoniously.

When Putt asked questions, they were put crisply and succinctly. They almost obliged the student to attempt a response in a similar fashion. Class discussions always seemed headed in a direction that Putt had carefully mapped out in advance. The profile of a discussion could be seen to rest on the minute and logically arranged distinctions that Putt managed to impart to or draw out of his students.

The course also was distinguished by the overall sense of order that was imposed on a large and sprawling subject. Putt was meticulous in adhering to a schedule announced at the very outset. It was generally thought that he could tell in advance of opening day exactly which page in the materials we would reach by the end of each class session. Indeed, this was one of the few courses during my four years as a law student in which every piece of the assigned readings was covered as intended by the instructor.

At all times in class Putt was dignified and yet not distant from his students. In carrying on discussion, he was always patient and gracious—putting students at ease. Even his mannerisms, including some arm motions that may have been derived from watching baseball players in action, were comforting. The concept of old-world courtliness perhaps best captures the ambience that Putt generated in the class-

room.

In my senior year I became further acquainted with Putt through contacts arising out of my position as Editor-in-Chief of the Law Review. Putt was then faculty adviser to the Review, as he was for the first 26 volumes, and he continued to take an interest in its development. (In fact, during some of the lean and difficult years for the school in the World War II period, when the staff at one time was only two students, Putt almost alone kept the Review going.) When I was editor, Putt still engaged in the practice of giving the proofs a final inspection—largely, I think, because of the great pride he took in the enterprise. His attention to detail again was evident. There never was a set of proofs on which Putt did not discover printer errors that the rest of us had let go by. The present suite of offices in the Law School that houses the Law Review is most appropriately named in his honor.

All of these early impressions as a student were strengthened when, soon after the close of World War II, I became a member of the Law School faculty and could enjoy having Putt as a colleague. On all occasions he tried to make the faculty environment comfortable for his juniors. In doing so, he often would call upon his sense of humor and marvelous skill as a narrator. Anyone with even the slightest inclination to see the world was bound to be spurred on by his stories of travels on which the Puttkammers had embarked. These accounts were prose at its best, and they enlivened numerous lunches of faculty members at the Quadrangle Club.

In faculty meetings Putt was ever a model discussant. He expressed his own position skillfully but gently. He never raised his voice and he never incited others to do so. Whether he was with the majority or minority, his conduct tended to keep the exchange of views on a high level of civility. In every respect, his standard was that of good decorum.

But what distinguished Putt most as a colleague was his attitude toward the Law School. He was impressed with the background of the institution and understood the sources of its strength. He was both enormously appreciative
of, and dedicated to, the ideals and aspirations of the school. Clearly, he saw himself as carrying on its traditions.

All these qualities of mind and character can be readily detected in reading his most durable work—his book *Administration of Criminal Law*. It is a splendid amalgam of critical analysis, sound policy orientation, humility in the face of difficult problems, and moderation in pressing a point of view and in offering a prescription. The book is pervasively marked by prudence and balance. Its author comes through as the Putt I knew: a very knowledgeable man trying to be helpful in solving important problems in a disciplined and decent manner.
Hans W. Mattick died on January 26, 1978 at his home in Hyde Park. He was 57. He had been Professor of Criminal Justice and Director of the Center for Research in Criminal Justice at the University of Illinois Chicago Circle campus since 1972. He was an expert on jails, prisons, and penal reform.

Mattick was Associate Director, and later Co-Director, of the Center for Studies in Criminal Justice at the University of Chicago Law School from 1966 to 1972. Previously he had been director of the Chicago Youth Development Program, assistant warden of the Cook County Jail, and a sociologist working with the Illinois Parole and Pardon Board.

Mattick entered the University of Chicago in 1946, and received a Bachelor's degree in liberal arts in 1948. From 1949 to 1951 he did graduate work in sociology, criminology, and psychology, receiving a Master's degree in 1956.

He is survived by his wife June and his mother.

Reprinted below are excerpts from Norval Morris's remarks delivered at the memorial service held in Bond Chapel on March 31.

Remarks by Norval Morris*

Hans W. Mattick spent two periods of his life at this University—from 1946 to 1951 and from 1965 to 1972. We gave amply in the first; we received abundantly in the second.

A wandering childhood, six grade schools, three high schools, periods on and off welfare, periods on the road in the sense known to a young hobo of the Depression, four years in the Army, of which two were in the European theatre, all brought an unusual first sergeant to the College, to the Department of Sociology, and to the Committee on Social Thought. It is a sobering aside that another Hans Mattick—if we were blessed to find one—probably would not be admitted to our University, and certainly would lack the accelerated opportunities that greatly helped to shape Hans's mind. We should have more wild cards to play.

For Hans, the wild card was held by Joseph Lohman; it came into Lohman's hand because he had the perception to be fascinated by a chunky youth he met by chance one night, behaving aggressively on the uncertain edge of delinquency but with a copy of The Origin of Species poking out of his hip pocket. Why did he have it, Lohman enquired? For the compelling reason that the young Mattick liked it,

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*Dean of the Law School and Julius Kreeger Professor of Law and Criminology.
and what business was that of anyone else? And Lohman had the sensitivity to understand Mattick's potential, and later the energy to support his growth.

When he came to us, Hans had already read widely, but with complete lack of direction. Very difficult times and his voracious energies had combined to give him a diversity of experience, street wisdom and understanding far beyond his years. This University in its vigorous and ranging post-war years taught him to cultivate his enquiring and independent mind, taught him to harness and direct his intelligence, taught him the grind and the joy of scholarship. He wrote Parole to the Army as the culmination of that period and was launched on a career as a professional criminologist, a professional criminologist with a most unusual personality and an extraordinary range of interests.

Hans Mattick mastered one subject better than anyone else in the world—the American jail. He came to know it from administrative experience (again under the influence of Joseph Lohman), from earlier brief visits as a client to an occasional lock-up, from research, and from study. It was a subject appropriate to Hans's pervading concern for the diminution of human suffering. In the jails is collected, as he often told us, a vast array of the victims of adversity, the socially incompetent, the physically and mentally ill, the retarded, the luckless waifs and strays of a harsh society, as well as a powerful admixture of the wicked and the evil. He was moved by his heart, of course, but his mind always held a steady regard for political and social realities and achieved a firm adherence to scholarly range and precision. His Illinois Jails Survey is a model of these qualities, carrying forward the great traditions of accuracy and controlled fervor for reform of John Howard, the first of the penal reformers outside the Church to care for minimum decencies even in the jail cell.

Few feel the lash on another's back; we all have blinkers to the suffering of others; but Mattick more than anyone I have ever known managed without sentimentality to empathize with the downtrodden. He often risked himself on the line of principle—his resignation offered if the child remained in the jail; his resignation completed as a protest against executions at the jail. And one always knew in dealing with Mattick that he expected similar behavior from you; hence he elevated and developed his colleagues and friends as carping critics never can.

When he returned to this University, he taught us daily for over six years at the Center for Studies in Criminal Justice. His formidable intellectual and aesthetic range of interests, combined with an utter seriousness of purpose, made him a great teacher. He launched a series of studies which shaped the lives of more than a few of us in this chapel this afternoon; they will continue to dominate our scholarly and community efforts—studies in violence, in sentencing, in the work of the police, in prisons and, of course, in jails. He was, for those graduate students and colleagues who fell within his powerful concern, a lasting influence. He
was exhaustive but never dull, a tough critic but one who always suggested a way out or a way around. He knew a very great deal and what was constantly surprising was that so much that he knew turned out to be true!

By precept as well as preachment, action as well as advice, he led us, his students, in this chapel today and elsewhere. We were privileged far beyond our deserts; none of us would wish ever to be free of his tutelage. And none of us will. Hans was no one for dreams of immortality; but it is certain that all who related more than transiently to him will be influenced throughout their lives by him. And so the ripples of decency and informed humanism of his life will spread.

Our present sense of grievous loss should not obscure the fact that Hans was a joyous man. He took great pleasure in the senses, delighted in wit, had a developed taste and knowledge of jazz, a trained feeling for art and poetry. What a tumultuous delight he must have been in his rapscallion early manhood—not at all easy to keep up with but a jewel of a companion if one could.

Let me close this memorial meeting by reading a poem to you—“Dover Beach” by Matthew Arnold—in which Hans took particular pleasure, his favorite poem, set deep in his affection, to the degree that he commissioned an artistic representation of it by Ed Balchowsky entitled “Where Ignorant Armies Clash by Night.” The poem reveals something of the fire and ice, the joy and sadness, within Hans—a tension known to a degree to all of us; but, I suspect, Hans lived the conflict more insistently, with more direct feeling, higher plateaus, and deeper depths, than the rest of us.
Ann W. Barber (1911-1978)

Ann Barber, retired registrar of the Law School, died May 5, 1978, following an automobile accident while visiting the south of France. A memorial fund has been established in her memory, to enable the Ann Barber Outstanding Service Award to be given annually to a third-year student who has made a particularly helpful contribution to the quality of life at the Law School.

Mrs. Barber graduated from Smith College with honors in 1933, and did graduate work at Yale University and at the University of Florence, Italy. She joined the Law School staff in 1962 and served as Assistant to the Dean of Students until her retirement in mid-1976.

She is survived by her husband Courtenay, of 1344 East 48th Street, Chicago, and four sons: Courtenay III, of Woods Hole, Mass.; Robert, of Falmouth, Mass.; and Thomas and Peter, of Chicago.

A memorial service for her was held May 22 in Bond Chapel, at which Dean of Students Richard I. Badger delivered a eulogy, portions of which are reprinted below.

Remarks by Richard I. Badger*

When Ann Barber retired from the Law School in June, 1976, the students organized a party in her honor. At that time we presented her with a gift which seemed particularly suitable for the occasion: her own Law School transcript, with the highest average in the school's history—approximately 85. I would like to share with you now a story I told on that occasion. I reported that in 1962 an emergency meeting of the faculty building committee had been called. Although most of the faculty, students and staff generally were pleased with the new building, everyone recognized that Saarinen’s design had omitted a very important element: the glass and grey stone structure lacked any warmth whatsoever. The Committee decided that the only solution was to hire someone who would add the warmth which Saarinen had left out. Ann Barber joined the Law School shortly thereafter. In retrospect, it was probably one of the best appointments the Law School ever made.

For nearly 15 years, Ann Barber was a source of warmth and thoughtfulness for students, faculty and staff. I remember my first contact with

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*Assistant Dean and Dean of Students.
Ann as a student. It was registration day for first year students and a group of us huddled in a conference room. Each of us probably had the same anxieties about the three-year experience we were about to begin but we tried desperately not to reveal them to each other. Ann, no doubt, sensed our concerns and gave just the right mix of direction and support to make us feel comfortable. It was the same throughout the three years. Whenever there was a time of trauma for us—such as examinations or when grades were returned—Ann Barber was there to cheer us up when we needed it. In a world described as a “paper chase,” Ann had a way of making the experience bearable, and at times, almost enjoyable.

As a student I had subscribed to the common belief that Ann Barber really ran the Law School. As an administrator I discovered that was not quite true. I learned that no one could ever hope to run, in the traditional sense, an institution so heavily populated with lawyers and almost-lawyers. Such institutions seem to have a mind of their own. But I did find, as I am certain my three predecessors also had discovered, that Ann helped so much to make the Law School a friendlier place.

Ann provided the wisdom and concern which kept us from making bad decisions in hard cases, the cheerfulness and humor which helped restore the proper perspective to our lives, the warmth and friendship which helped us all to survive the law school experience. Countless Chicago graduates remember Ann with fondness. She played an important part in all our lives.
From the Law School

ENDOWED PROFESSORSHIPS

Three of the four endowed professorships announced in connection with the Law School's 75th anniversary have been filled.

David P. Currie has been named to the Harry N. Wyatt Professorship. Mr. Currie joined the Law School faculty in 1962. He was the main author of legislation creating the Illinois Environmental Protection Act of 1970. He then served for two years as chairman of the Illinois Pollution Control Board, where he acquired a reputation as a tough but reasonable enforcer of antipollution laws.

Mr. Currie did undergraduate work at the University of Chicago and received a law degree in 1960 from Harvard. He teaches administrative law, civil procedure, and federal jurisdiction, in addition to a seminar on antipollution legislation. He has written three major casebooks: Cases and Materials on Federal Courts (1968 and 1975), Cases and Materials on Pollution (1975), and Cases and Materials on Conflict of Laws (1968 with R.C. Cramton, and 1975 with Cramton and H.H. Kay).

The Wyatt chair is named for Harry N. Wyatt, a senior partner with the Chicago law firm of D'Ancona, Pfau, Wyatt and Riskind, and was established through a gift from his wife, Ruth F. Wyatt, who received her undergraduate degree from the University. Mr. Wyatt is also a member of the Law School Development Council, past president of the Law School Alumni Association, a former member of the Law School Visiting Committee, and has served on numerous alumni committees for the Law School.

Spencer L. Kimball has been named the first Seymour Logan Professor of Law. An authority on insurance regulation, he joined the Law School faculty in 1972, and served as Executive Director of the American Bar Foundation from 1972 until 1978. His book Insurance and Public Policy won the Elizur Wright prize for 1980. He is the principal draftsman of the revised insurance laws of Wisconsin. He has also written a casebook in legal history.

Mr. Kimball holds a B.C.L. degree from Oxford, where he was a Rhodes Scholar, and an S.J.D. from the University of Wisconsin. He became Dean of the University of Utah College of Law in 1950, at the age of 31. From 1957 to 1968 he was a member of the University of Michigan law faculty. After leaving Michigan and before coming to Chicago, he was Dean of the University of Wisconsin Law School.

The Seymour Logan Professorship was established by Mr. Logan’s widow, Renee, and their four children. Mrs. Logan is an alumna of the University’s School of Social Service Administration, where she received an M.A. degree in 1970. She earned an undergraduate degree from Northwestern.

Mr. Logan received an A.B. from the University of Chicago and received legal training at the University’s Law School and at the Chicago-Kent College of Law. He was associated with the Morris D. Logan and Sons real estate company, a firm founded by his father, and owned Capital Associated Hotels, a brokerage company. He was director of the University of Chicago Foundation for Emotionally Disturbed Children and a trustee of Roosevelt University. From 1964 until his death in 1967, Mr. Logan was president and chairman of the Greater Chicago Hotel Association.

Richard A. Posner is the first incumbent of the Lee and Brena Freeman Professorship of Law, established to promote research and teaching in comparative domestic, foreign, and international economic regulation. He graduated

Previously Mr. Posner served as Assistant to the Commissioner of the Federal Trade Commission, Assistant to the Solicitor General of the United States, General Counsel of the President's Task Force on Communications Policy, and Associate Professor at Stanford Law School. He is the author of *Antitrust: Cases, Economic Notes, and Other Materials; Economic Analysis of Law*; and other books and articles.

Lee A. Freeman and his wife, Brena, matched a grant from the Ford Foundation to create the Lee and Brena Freeman Professorship. Mr. Freeman is senior partner in the Chicago law firm of Freeman, Rothe, Freeman and Salzman, and is one of the leading antitrust lawyers in the United States. He is a member of the Antitrust Section of the American Bar Association, the Illinois Bar Association, and the Antitrust and Public Utility Committee of the Chicago Bar Association.

In addition to his professional activities, Mr. Freeman is director and general counsel-secretary of the Lyric Opera of Chicago, past president of the Fine Arts Music Foundation, and director of the Chicago Ballet, Goodman Theatre, and Travel Light Theater. He serves as a governing life trustee of the Chicago Art Institute. He and his wife, a graduate of the Chicago School of Music, financed the Fourth International Verdi Congress, held in Chicago in 1974, and have commissioned chamber music by American composers, including the Pulitzer Prize-winning *Third Chamber Quartet* by Karel Husa.

The *Harry Kalven, Jr. Professorship of Law* has been established with funds from the Robert R. McCormick Charitable Trust of Chicago, in honor of the late Professor Kalven, who was a member of the Law faculty from 1946 until his death in 1974 at age 60. The McCormick Charitable Trust was established by the 1955 will of the late Col. Robert R. McCormick, editor and publisher of the *Chicago Tribune*. Mr. Kalven was an authority on law governing free speech and other rights guaranteed by the First Amendment. The Kalven chair is to be filled by a scholar in First Amendment studies.

Mr. Kalven's interest in First Amendment issues led to his often cited article *The Metaphysics of Obscenity* (1960) and to his book *The Negro and the First Amendment* (1965). The classic 1953 essay on tax justice by Walter J. Blum and Mr. Kalven, *The Uneasy Case for Progressive Taxation*, has just been republished by the University of Chicago Press in its Midway Reprints series, with an epilogue by Mr. Blum, *The Uneasy Case for Progressive Taxation* in 1976. At the time of his death, Mr. Kalven was completing a book on the theories underlying contemporary American law on freedom of speech, which also reflected his thoughts on modern sociological findings and theories about the formation of public opinion and the economics of modern mass communication.

A faculty committee of Gerhard Casper, Philip B. Kurland, and Geoffrey R. Stone is considering possible candidates for the Kalven chair.

ARRIVALS AND DEPARTURES

**Frank H. Easterbrook**, J.D. '73, has been appointed Assistant Professor, and will join the faculty in June of 1979. He is currently Deputy Solicitor General of the United States. His particular scholarly interests at present are antitrust law; government regulation of private conduct, and criminal law and procedure.

**Charles M. Gray** has returned to the University and to the Law School, and will teach two courses in legal history this year. He is Professor of English Legal History in the Department of History, and Lecturer in Law. Most recently he has been Senior Research Associate and Lecturer in Law and History at Yale.

**Stanley N. Katz**, Professor of Legal History since 1971 and Associate Dean of the Law School, left Chicago in July to take a chaired professorship in the History Department at Princeton. The *Glass Menagerie* said of him in 1973, "Everybody doesn't like something, but nobody doesn't like Stan Katz." He will be missed.
Six visiting faculty members will be in residence during some or all of the academic year 1978-79.

Paul M. Bator will be here all year. He is Professor of Law at Harvard, where he has taught since 1959 in the areas of administrative law, civil procedure, federal jurisdiction, and art and the law. He is co-author of the second edition (1973) of Hart & Wechsler’s The Federal Courts and the Federal System. He holds Bachelor’s and Master’s degrees from Princeton and an LL.B. from Harvard. He is teaching Federal Jurisdiction I and II this fall and winter, and will teach Civil Procedure in the spring.

Continuing a fine tradition, Gareth Jones will return in the spring for the fourth successive year. He is a Fellow of Trinity College, Cambridge, and holds the Downing Professorship of the Laws of England. He is an honorary Bencher of Lincoln’s Inn. He was educated at the Universities of London and Cambridge. Mr. Jones is co-author, with Robert Goff, of The Law of Restitution, a revised edition of which has just been completed; he also wrote The History of the Law of Charity, 1532-1827 (1969). This spring he will be teaching Restitution. At Cambridge he teaches contracts, restitution, trusts, and English legal history.

Hans G. Rupp will also be here in the spring quarter, teaching a course with Gerhard Casper, Comparative Constitution Law: United States and Federal Republic. Judge Rupp has had a distinguished career as a scholar, public servant, and supreme court justice (1951-1975) in Germany. He has taught constitutional law at the University of Tübingen since 1955. He studied law at Tübingen and Berlin, receiving a doctorate from Berlin in 1933. He studied at Harvard Law School from 1935 to 1937.

Paul M. Shupack, J.D. ’70, will be teaching Contracts this winter and Commercial Law II in the spring. He is Assistant Professor at the Benjamin N. Cardozo School of Law of Yeshiva University. After completing undergraduate work at Columbia, Mr. Shupack studied political theory, constitutional law, and jurisprudence at Harvard as a Woodrow Wilson Fellow in Government. He has practiced law in New York City.

A.W.B. Simpson is Professor of Law at the University of Kent at Canterbury, England. From 1955 until 1973 he taught at Oxford Law School as a Fellow of Lincoln College. He will teach Jurisprudence in the winter quarter. He has written A History of the Common Law on Contracts (1975) and edited Oxford Essays in Jurisprudence (1973). He is a Lay Magistrate. His main teaching interests are in legal history, jurisprudence, and criminal law. He has served on government committees dealing with reform of the law on rape and obscenity. Mr. Simpson holds M.A. and D.C.L. degrees from Oxford.

A. Dan Tarlock has taught at the Indiana University School of Law since 1968. He will present courses in two of his specialties: Oil and Gas in the winter quarter and Land Use Controls this spring. He has co-authored casebooks on Water Resource Management and Environmental Law and Policy, and is working on a casebook on land use controls. In 1977 he was Professor-in-Residence with the Omaha-based law firm of Kutak, Rock and Huie. He holds A.B. and LL.B. degrees from Stanford.

There are two new faces among the Lecturers in Law this year.

Peter L. Rossiter of Schiff Hardin & Waite is teaching Corporation Law in the fall quarter and Commercial Law I this winter. Mr. Rossiter received a J.D. from Yale Law School in 1973. He clerked for Judge Alvin B. Rubin, then U.S. District Judge, Eastern District of Louisiana, in September 1973 until May 1975. He also taught part-time at Tulane University Law School in 1975. He clerked for Chief Justice Warren E. Burger for the 1975 term, and joined Schiff Hardin & Waite in August 1976.

Michael L. Shakman will teach a winter-quarter seminar, Principal Issues in Civil Litigation. After receiving a J.D. cum laude from this law school in 1966, he joined the Chicago law firm of Devoe, Shadur & Krupp. During 1966-67 he clerked for Justice Walter V. Schaefer of the Illinois Supreme Court. Mr. Shakman is a member of the First Panel of Attorneys, Federal Defender Program for the U.S. District
Court, Northern District of Illinois, and serves on the National Panel of Arbitrators of the American Arbitration Association. He is an Associate Editor of the ABA journal Litigation.

BIGELOW TEACHING FELLOWS

Five Bigelow Fellows, under the guidance of Associate Professor Geoffrey R. Stone, will be providing individual tutoring and small-group instruction and practice in legal analysis, research, and exposition for first-year students.

Mark A. Ash has a J.D. degree from the University of Virginia Law School and undergraduate training in English and general studies at Harvard. He has clerked for the San Francisco law firm of Lillick, McHose & Charles.

Charles R. DiSalvo has been the directing attorney of the Barbourville office of the Appalachian Research and Defense Fund of Kentucky since July 1976. He has worked for ARDF since 1974, representing community groups in health care, education, and coal-related environmental matters and in civil-rights litigation. He holds a Master’s degree in East Asian Studies from Claremont Graduate School and a J.D. from the University of Southern California.


Therese Green’s undergraduate training was in English and sociology at Alverno College in Milwaukee, where she took a B.A. in 1965. She spent two years in Ethiopia as a Peace Corps volunteer and later worked on development of Peace Corps programs and the training and assessing of volunteers. Following graduation from Chicago-Kent College of Law in 1977 she clerked for Chief Judge Floyd R. Gibson and Judge Myron H. Bright of the U.S. Court of Appeals, Eighth Circuit.

For the past five years W. William Hodes has been senior staff attorney with the Education Law Center in Newark, New Jersey, a public interest law firm. He served as Assistant Corporation Counsel for the City of Newark from 1970 to 1973. He is a 1969 graduate of Rutgers Law School and did undergraduate work at Harvard. Mr. Hodes is working on a textbook that will take a clinical or “problems” approach to legal writing and research.

MANDEL LEGAL AID CLINIC

There are two new staff attorneys and clinical fellows at the Clinic this year.

Laurence A. Benner, J.D. ’70, has been National Director of Defender Services of the National Legal Aid and Defender Association, and director of the Office of the Defender in Grand Rapids, Michigan. In 1972 Mr. Benner directed a study funded by the National Institute of Justice to examine indigent defense services throughout the country. The findings of the study were published as The Other Face of Justice.

Mark J. Heyrman, J.D. ’77, has been Assistant Defender with the Illinois State Appellate Defender in its Second Judicial District Office for the past year. His undergraduate degree is in the administration of criminal justice, from the University of Illinois at Chicago Circle. Mr. Heyrman specializes in the rights of the mentally disabled. Mr. Benner and Mr. Heyrman join three other clinical fellows: Marc O. Beem, J.D. ’75; Frank S. Bloch, who is also Lecturer in Law; and Randolph N. Stone, who has been working in the Woodlawn Community Defender Office since the summer of 1977.

Charlotte K. Schuerman is now at the Clinic full time as Social Worker and Field Supervisor.

The Law School has received a three-year grant from the National Institute of Mental Health for an experimental project to provide interdisciplinary clinical training to law and social-work students in the representation of persons suffering from mental illness. Mark Heyrman and Charlotte Schuerman are conducting the project, which will focus on the legal and social service needs of those who are outpatients and have been released from mental hospitals. This is one of ten experimental inter-
disciplinary programs currently being sponsored by NIMH.

A one-year grant from the U.S. Department of Health, Education and Welfare has been received to examine alternative methods of clinical supervision on actual cases. Mandel Clinic attorneys will undertake to identify the most effective approaches by studying the methods used with their students during the 1978-79 academic year. The funds were awarded from Title XI of the Higher Education Act of 1965, which provides support for clinical legal education. Frank S. Bloch will direct activities under the grant during the autumn quarter.

ALUMNI COLLEGE '78

The Alumni College program "Individual Rights and the Concept of Equality," sponsored by the UC Center for Continuing Education and held at CCE July 24-29, included talks by four members of the Law faculty, Philip B. Kurland, H. Douglas Laycock, Antonin Scalia, and Franklin E. Zimring, and by two graduates of the Law School, Carol Moseley Braun and Elmer Gertz.

TAX CONFERENCE

The 31st Annual Federal Tax Conference was held October 25-27 in the Auditorium of the Prudential Building in Chicago. A full house of over 450 registrants attended the sessions.

FACULTY AND STAFF NOTES

Assistant Dean and Dean of Students Richard I. Badger is serving a two-year term as one of six elected trustees of the Law School Admission Council, 1977-1979.

Admirers of Professor Walter J. Blum and the late Harry Kalven, Jr. may wish to celebrate in an appropriate fashion the reissuance of their classic study The Uneasy Case for Progressive Taxation as a University of Chicago Press Midway Reprint. The volume is thought by many to be perhaps more timely now than when it was published in 1953.

Visiting Professor of Economics Samuel Brittan delivered the Henry Simons Lecture April 4 on "The British Economy: Its Present Position and Future Prospect," or, "How English is the English Sickness?". Mr. Brittan has been principal economic commentator for the Financial Times in London since 1966 and has written a number of books. A published version of his Simons Lecture came out in the October 1978 issue of the Journal of Law and Economics.

Gerhard Casper, Max Pam Professor of American and Foreign Law and dean-designate, has been elected to membership in the American Law Institute.

He presented a paper on "The Committee System of the United States Congress" at the Tenth International Congress of Comparative Law, held August 23-28 in Budapest, Hungary.

He participated in two-day conferences on "Practice before the United States Supreme Court and Courts of Appeal" held in Chicago, Los Angeles, and New Orleans, speaking on "The Court’s Workload and its Effect on Practice."

Ronald H. Coase, Clifton R. Musser Professor of Economics at the Law School, was elected to the American Academy of Arts and Science in May, at the Academy’s 198th annual meeting in Boston. Mr. Coase is one of five University of Chicago faculty members among 107 elected Fellows this year.

Kenneth W. Dam, Harold J. and Marion F. Green Professor in International Legal Studies, is a member of the Ford Foundation “Next Twenty Years” Energy Study Group.

His book with George P. Schultz, Economic Policy Beyond the Headlines, was published by W.W. Norton in March.

He spoke on "Checks and Imbalances in Economic Policy Making" at a conference on analysis of security prices held at the Graduate School of Business in May.

Assistant Dean Frank L. Ellsworth has been appointed to a three-year term on the Committee on Continuing Legal Education of the Association of American Law Schools.
He spoke on “American Legal Education: Definition and Ingredients” on June 28 at a panel during the annual meeting of the American Association of Law Libraries, in Rochester, New York.

Susan C. Haddad, Assistant to the Dean since 1975, left the Law School in May to practice family law with the Chicago firm of Bentley, DtCanto, Silvestri, Forkins & Doss. She handled arrangements for many Law School events and activities and alumni events, edited the Law School Record and Occasional Papers, served as managing editor for the Law Alumni Journal, and also had responsibility for overseeing publication of the Law School Announcements and the Glass Menagerie.

The fourth edition of Cases and Materials on State and Local Taxation, by Jerome R. Hellerstein and Assistant Professor Walter Hellerstein, was issued by the West Publishing Company in April. Mr. Hellerstein is on leave this year at the University of Georgia School of Law.

Mr. Hellerstein was on the faculty of the ALI-ABA Course of Study in State and Local Taxation and Finance, held in New York in March. He presented a class on the constitutional law background to state and local taxation at the Tax Executives Institute State and Local Taxation Course held in East Lansing, Michigan, in May. He presented a paper, “Constitutional Constraints on State and Local Taxation of Energy Taxation” held in Washington, D.C., in May, co-sponsored by the National Tax Association and the Tax Institute of America.

Stanley A. Kaplan, now Professor Emeritus, will continue to teach Federal Regulation of Securities as well as Fiduciary and Professional Responsibility this year. He has become a partner in the Chicago law firm of Reuben & Proctor.

Professor Edmund W. Kitch spoke to the Chicago area alumni on “The Effect of Federal Oil Price Regulation” at a Loop Luncheon May 10. He addressed a panel organized by the ABA Special Committee on Aeronautical Law, on the Civil Aeronautics Board under Chairman Alfred Kahn, during the ABA meeting in New York in August. He testified before the Subcommittee on Communications of the House Commerce Committee on the Communications Reform Act of 1978, August 22. On September 15 he gave a paper on “The Political Economy of Innovations in Drugs and the Proposed Drug Regulation Reform Act of 1978” at the American Enterprise Institute in Washington, D.C., during a conference on the international supply of medicines. A shorter version of this paper is published elsewhere in this issue. He spoke on the political economy of the patent system to the Olin Fellows at the Center for Law and Economics, University of Miami, on September 29.

Assistant Professor Anthony Kronman will be a visiting professor at Yale Law School during 1978-79.

Philip B. Kurland, Professor of Law and William R. Kenan, Jr. Distinguished Service Professor in the College, presented the convocation address, “Lament for Camelot,” at the University’s 368th convocation, in Rockefeller Chapel, in June. The text was published in the July 24, 1978, issue of the University of Chicago Record.

Mr. Kurland’s book Watergate and the Constitution was published this year by the University of Chicago Press.


During 1977-78, Mr. Langbein was Visiting Fellow at All Souls College, Oxford, and Visiting Scholar at the Max Planck Institute for
European Legal History, in Frankfurt, Germany. His year of research was devoted to two related projects: a study of the historical foundations of adversary criminal procedure in eighteenth-century England, and a study of the French and German reception and transformation of the Anglo-American jury system in the nineteenth century.

Assistant Professor H. Douglas Laycock is Vice-President of the Chicago Council of Lawyers for 1977-1979.

He has served as Reporter to the Committee on Motion Practice of the Illinois Judicial Conference, participating in seminars for Illinois circuit and appellate judges in September, 1977, and for Illinois associate judges in March, 1978.

On October 25, he participated in a public forum on affirmative action and constitutional rights, in Park Forest, Illinois, sponsored by the Lincolnway Section of the National Council of Jewish Women.

Edward H. Levi, Glen H. Lloyd Distinguished Service Professor, was awarded the third annual Louis Dembitz Brandeis Medal for distinguished legal services, by Brandeis University on June 7 in New York City. The first two recipients of the award were Leon Jaworski and Elliott L. Richardson.

Mr. Levi received the Citation of Merit Award for 1977-78 at the annual luncheon meeting of the Yale Law School Alumni Association, in October of 1977. He holds a J.S.D. degree from Yale in addition to Ph.B. and J.D. degrees from Chicago.

Julian H. Levi, Professor of Urban Studies in the Division of the Social Sciences and Lecturer in Law, is Visiting Professor this fall at Hastings College of the Law, University of California, in San Francisco. Mr. Levi is Executive Director of the South East Chicago Commission.

Professor Jo Desha Lucas lectured July 19-21 at Emory University in Atlanta, Georgia, at a course on federal practice taught jointly with Judge Sidney O. Smith, Jr., as part of the Emory Summer Program for Lawyers.

The second edition of Labor Law: Cases, Materials and Problems, by Bernard D. Meltzer, James Parker Hall Professor of Law, was published last year by Little, Brown, and has been well received. Professor Neil M. Bernstein has hailed it as "the best labor law book that is currently available." Professor Raymond Goetz reviewed the book in 45 University of Chicago Law Review 483. Goetz comments, "Meltzer has provided us with another fine instructional tool. . . . In my judgment, no labor law teacher could go wrong adopting this book."

Professor Meltzer lectured at Arden House August 1 on the "Legal Framework for Labor Arbitration" in a seminar for new labor arbitrators, sponsored by the ABA's Labor Relations Committee, the American Arbitration Association, and the Federal Mediation and Arbitration Service.

Dean Norval Morris, Julius Kreeger Professor of Law and Criminology, received an honorary LL.D. degree from Villanova University May 19. His citation reads:

"Scholar, lawyer, educator, advisor to presidents and prisoners, he came to us from the Antipodes to set the established world of criminology upside down, through his innovative and imaginative views of crime and punishment. He leads a great school of law wisely and by his writing and generous participation at every level of the criminal justice system has helped make that system more effective, more just and more compassionate."

Associate Professor Gary H. Palm is the subject of a profile in the Fourth Biennial Report 1975-1976 published by the Council on Legal Education for Professional Responsibility, Inc. Mr. Palm has been director of the Mandel Legal Aid Clinic since 1970. He and the Clinic are among ten people and programs featured in the report.

Susan S. Raup joined the administrative staff in June as Director of Alumni Activities, assuming Susan C. Haddad's role with publica-
tions and alumni relations. She has had experience with publications, public relations, graduate admissions, and placement, as administrative assistant at the Institute of Optics, University of Rochester, from 1965 to 1978, and at the Department of Oceanography at the Johns Hopkins University from 1957 to 1965. Mrs. Raup holds an A.B. from Mount Holyoke College and pursued graduate study at Harvard.

She has been appointed to serve on the Board of Directors of the Illinois Institute for Continuing Legal Education.

Professor **Antonin Scalia** appeared on the national public television program “The Advocates” in a debate on tuition tax credits.

He is on the Board of Editors of a new publication, *Regulation*, to which he regularly contributes brief unsigned items.

Professor Emeritus **Malcolm P. Sharp** celebrated his 81st birthday on November 20. He spoke to the Chicago Loop Luncheon alumni group on “Jurisprudence, Some Recollections and Expectations” on October 25 of last year.

**Adolf Sprudzis**, Foreign Law Librarian and Lecturer in Legal Bibliography, was re-elected to the Board of Directors of the International Association of Law Libraries for a second three-year term, 1977-1980. He was the official IALL representative at the Council Meeting of the International Federation of Library Associations and Institutions, held August 26-September 3 in Strbské Pleso, Czechoslovakia.

Professor **James B. White** delivered the annual John R. Coen lecture at the University of Colorado April 14, on “The Incoherence of the Criminal Law.” He was a member of the Colorado law faculty from 1967 until 1975.

Mr. White spoke on “Argument in the Iliad” at the Modern Language Association annual meeting in December 1977.


He was one of seven contributors to an interview film, “The Founding Fathers of Advertising Research,” put out by the Advertising Research Foundation. Among the other contributors were George Gallup, Frank Stanton, and Ernest Dichter.
Publications of the Faculty, 1977-1978

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GERHARD CASPER

RONALD H. COASE

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Coordination of Worker's Compensation Benefits with Tort Damage Awards, 13 Forum 464 (1978).

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Jo Desha Lucas
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Bernard D. Meltzer

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Richard A. Posner


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ADOLF SPRUDZS


JAMES B. WHITE

HANS ZEISEL

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FRANKLIN E. ZIMRING


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