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The FBI Charter
Geoffrey R. Stone*

On July 31, 1979, the Carter administration unveiled its proposed charter for the Federal Bureau of Investigation. The bill (S. 1612/H.R. 5030), which was drafted by the Bureau itself, has been the subject of considerable debate and controversy. The Senate Judiciary Committee and the House Judiciary Subcommittee on Civil and Constitutional Rights have held extensive hearings on the matter, and full congressional action is expected this spring. The proposed charter is for the most part the product of discontent, not with the Bureau's investigation of crimes generally but, rather, with its pervasive and long-standing surveillance of political dissidents. It must thus be assessed against the backdrop of these underlying concerns and in the light of the Bureau's own history.

The FBI had a less than auspicious beginning. Attorney General Charles Joseph Bonaparte first proposed the creation of a federal police force in 1907, but congressional authorization was withheld because of the widely held view that the establishment of such an agency would lead inevitably to "a general system of espionage" and would be "contradictory to the democratic principles of government." During a congressional recess in 1908, however, Attorney General Bonaparte quietly established the Bureau of Investigation within the Department of Justice. Despite vehement protest in Congress, the Bureau, with the active support of President Theodore Roosevelt, survived.

In its early years, the Bureau directed its energies primarily to enforcement of the Mann Act. Shortly after World War I, however, Attorney General A. Mitchell Palmer, frustrated by the Bureau's inability to solve a series of apparently anarchist-inspired bombings, created the General Intelligence Division (GID) of the FBI to investigate radical and subversive activities. The GID failed to discover the source of the bombings, but within six months it had compiled personal histories on 60,000 suspected "radicals." Before long, the index grew to include more than 200,000 names. During the Harding administration, the Bureau, under the direction of William J. Burns, accelerated its investigation of wobblies, anarchists, communists, and "subversives" generally. The Bureau wiretapped at random, broke into offices, and compiled information on personal lives. The targets were often critics of the Bureau or of the Justice Department and even included several senators who may have asked too many questions.

In 1924, Attorney General Harlan Fiske Stone, determined to refocus the Bureau's activities, ousted Burns and replaced him with J. Edgar Hoover. Hoover pledged that the Bureau would get out of the business of investigating political views and would henceforth limit itself to its intended function of investigating federal crimes. For the next twelve years, the Bureau exercised considerable restraint, but with the outbreak of World War II, it turned its attention once again to the investigation of political dissidents.

In a series of directives issued in the late 1930's, President Franklin Roosevelt, alarmed by reported attempts of foreign agents to influence domestic affairs, instructed Hoover to gather information concerning fascist and communist activities in the United States and to conduct investigations concerning possible espionage and sabotage. In 1938,

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Roosevelt, Attorney General Homer S. Cummings, and Hoover decided not to seek legislative authority for this expanding domestic intelligence program. Although these directives did not expressly authorize the investigation of “subversive activities” generally, Hoover, apparently reasoning that persons opposed to the American form of government or to basic governmental policies might engage in espionage or sabotage, construed the directives as broadly mandating open-ended inquiries into “subversion.” And by repeatedly misinforming a succession of careless or indifferent presidents and attorneys general as to the precise scope of the Roosevelt directives, Hoover managed for more than three decades to elicit tacit executive approval for continuing FBI investigations on an ever-expanding class of political dissidents. From 1957 to 1974, the Bureau opened investigative files on more than half-a-million “subversive” Americans. In the course of these investigations, the Bureau, in the name of “national security,” engaged in widespread wiretapping, electronic monitoring, mail-openings, and break-ins. Even more insidious was the Bureau’s extensive use of informers and undercover operatives to infiltrate and report on the activities and membership of “subversive” political associations ranging from the Socialist Workers Party to the NAACP to the Medical Committee for Human Rights to a Milwaukee Boy Scout troop.

Although some of these investigations were no doubt aimed at espionage, sabotage, or other federal crimes (such as violations of the Smith Act), they served other purposes as well. As early as 1939, the Bureau, without statutory authorization, initiated the compilation of a Custodial Detention List containing the names of those individuals who the Bureau determined should be “apprehended and interned immediately” in the event of war. The individuals’ names were derived from subscription lists of German, Italian, and communist newspapers, membership in identified organizations, and informant and agent reports on meetings and demonstrations. Hoover counseled FBI field offices that the existence of this list and its “purpose should be entirely confidential.” Although the Justice Department approved the compilation of such a list in 1940, Attorney General Francis Biddle determined three years later that the list was not legally justifiable and ordered that classifications as to the danger posed by individuals “not be used in the future.” Hoover decided not to comply with this order. In a letter marked “strictly confidential,” he announced a change in the Bureau’s nomenclature and instructed his special agents in charge henceforth to refer to the Custodial Detention cards as Security Index cards and not to allude to their existence in communications outside the Bureau. In the late 1940s, the Justice Department once again approved the maintenance of a Security Index and in the Internal Security Act of 1950, the Congress, ignorant of the Bureau’s program, enacted a statutory emergency detention program. The statutory program, however, was in many respects more restrictive than that of the Bureau, and for the next quarter-century, the Bureau, often with the knowledge and cooperation of the Justice Department, frequently disregarded the restrictions of the Act in order to utilize its own standard of “dangerousness.”

COINTELPRO (counterintelligence program) was the most daring of the Bureau’s activities. By the late 1950s, the Supreme Court had embraced restrictive interpretations of the Smith Act and the Internal Security Act of 1950, rendering them relatively ineffective in the fight against subversion. Frustrated by these decisions, and not content merely to compile extensive files on organizations and individuals viewed as threats to the nation’s security, Hoover decided to take matters into his own hands. In 1956 he launched COINTELPRO, which was designed to “expose, disrupt and otherwise neutralize” dissident individuals, organizations, and movements. COINTELPRO involved the extensive use of extralegal measures to combat domestic subversion. The Bureau sent anonymous, sullurious, and false letters to break up marriages, attempted to sow internal dissension within organizations, and informed public and private employers of the political activities and organization membership of “subversive” persons. Although directed initially against the Communist Party, the program expanded over the years to include Socialist, White Hate, Black Nationalist, and New Left targets as well. This extraordinary program was initiated without any prior executive or legislative authorization, and although Hoover occasionally informed various attorneys general of the existence of a counterintelligence program, his references were often too vague to make clear what actually was involved. The very existence of COIN­TELPRO was a closely guarded secret, shielded from public view by a carefully crafted system of multiple filings. As was so often the case in this period, the Bureau’s foremost concern was not with legality, but with avoiding the embarrassment of exposure. And, as with its extensive political surveillance and emergency detention programs, the FBI’s COINTELPRO was officially terminated only after
its existence and operation were finally revealed to the public through a series of exposes, lawsuits, and congressional investigations in the early 1970's.

A confidential document stolen in 1971 from the FBI field office in Media, Pennsylvania, gave the public its first hint of the existence of COINTELPRO. Watergate, however, led to most of the initial revelations. Disclosure of the "Huston Plan" and other instances of White House misuse of the Bureau played a central role in the events leading to Richard Nixon's resignation in 1974. The following year, Attorney General Edward H. Levi confirmed that Hoover had maintained secret files on various public figures, that the Bureau had on several occasions attempted surreptitiously to discredit its critics, and that it had gathered political intelligence for administrations of both parties. In reaction to these and other disclosures, Select Committees of the House and Senate embarked upon investigations of the Bureau's internal security operations, and the House Judiciary Committee asked the General Accounting Office to review FBI domestic intelligence policies and procedures. At the same time, various lawsuits seeking information under the Freedom of Information Act or charging the Bureau with unconstitutional or otherwise unlawful conduct brought forth further revelations. Within the Justice Department, Attorney General Levi established a committee to draw up formal guidelines for FBI investigations. As early as 1976, Attorney General Levi and FBI Director Clarence Kelley voiced support for a legislative charter, and as revelations of Bureau abuse continued to pour forth, the notion of a charter designed to eliminate Bureau reliance on "inherent authority" and to guarantee external oversight of Bureau activities gained widespread legislative, executive, and public approval.

It is against this background that the proposed charter was framed. It attempts for the first time to spell out legislatively the precise duties, responsibilities, and limitations of the Bureau, and it is without question a serious effort to accommodate society's interest in effective law enforcement with its often competing interest in the preservation of civil liberties. There are, however, several significant aspects of the bill that should cause concern. Although limitations of space preclude an exhaustive analysis of these concerns, at least a brief comment on those which seem most important may be of interest.

1. A central purpose of the proposed charter is to prevent a recurrence of the pervasive political surveillance that has marked so much of the Bureau's past. The bill thus explicitly declares that, in the exercise of its criminal investigation authority, the Bureau "shall be concerned only with . . . such conduct as is forbidden by a criminal law" and, further, that the Bureau "shall not conduct an investigation solely on the basis of . . . the lawful exercise of any . . . right secured by the Constitution or laws of the United States." Such straightforward, seemingly unambiguous declarations of principle can have significant symbolic and even practical impact. Standing alone, however, they cannot satisfactorily guard against the inevitable temptation to investigate political beliefs. As history amply demonstrates, the line between investigating political beliefs and investigating potential criminal activity by persons and associations holding certain political beliefs is fuzzy at best. The Bureau in 1919 was certainly justified in investigating bombings. It no doubt thought that it was doing precisely that when it compiled dossiers on all the anarchists and radicals it could find. In the late 1930's, the Bureau was cer-
tainly justified in investigating potential espionage and sabotage. It no doubt thought that it was doing precisely that when it gathered information on anyone even remotely suspected of having fascist or communist sympathies. Particularly in times of national crisis, even the most well meaning government officials may too readily make the not wholly illogical leap from investigating crime to investigating belief. In at least some circumstances it is, in the end, merely a matter of degree.

In an effort to lessen the likelihood of such investigatory leaps, the proposed charter provides that the Bureau may conduct full-scale “investigations,” as opposed to less intrusive and more limited “preliminary inquiries,” only “on the basis of facts or circumstances that reasonably indicate that a person has engaged, is engaged, or will engage in” criminal activity. Although a step in the right direction, this requirement is inadequate, at least with respect to full-scale investigations of associations engaged in protected first amendment activity. The phrase “facts or circumstances that reasonably indicate” is vague in the extreme. Is an association’s mere abstract advocacy of unlawful conduct in itself sufficient to satisfy this standard? If so, we have learned little from the past. For as history teaches, it is not uncommon for dissident organizations to employ abstract advocacy as a tenet, dogma, or slogan without a demonstrable danger to society. If abstract advocacy is not in itself sufficient, however, what additional information must be present before the Bureau may launch a full-scale investigation? Although the commentary accompanying the bill adds some substance to this phrase, it remains disconcertingly ambiguous. This problem is heightened by the bill’s express authorization of investigations of politically-oriented associations for possible future crimes without regard to whether the suspected criminal activity is to take place imminently or at some uncertain time in the indefinite future. Such an open-ended authorization will enable the Bureau to embark upon investigations of virtually unlimited duration despite the absence of even the suspicion of present danger. It is precisely these sorts of free-wheeling investigations that are most likely once again to lead the Bureau into mischief. To mitigate this danger, the proposed charter should be amended so as to permit full-scale investigations only when, on the basis of clear and objective evidence, there is reason to believe that the association will engage in criminal activity in the “immediate future.” Although such a standard is obviously not devoid of ambiguity, it at least focuses attention upon what should be an important limiting consideration. And although its use would doubtless forestall early investigation of at least some potentially dangerous organizations, this is a necessary and unavoidable trade-off if we mean seriously to avoid a repetition of the past.

2. The proposed charter delineates the circumstances in which the Bureau may employ “sensitive investigative techniques” in the course of its criminal investigations. In so doing, however, it seeks in practical effect to place Congress’ formal imprimatur upon a class of investigative practices long thought questionable. The proposed charter approves the use of trash covers, pen registers, warrantless arrests, “floater” informants, consensual electronic monitoring, and electronic location detectors essentially without restraint. It permits the use of informants and undercover agents to collect information about “an identifiable person on a continuing basis” whenever the information likely to be obtained is pertinent to an investigation. And it empowers the Bureau to issue investigative demands to obtain confidential financial, credit, toll, and insurance information from an individual’s bank, insurance agent, telephone company, or credit institution whenever “there is reason to believe that the records sought are relevant to an investigation.”

Admittedly, the Bureau’s utilization of these techniques is not demonstrably unconstitutional. To the contrary, some of these practices, such as consensual electronic monitoring, warrantless arrest, pen registers, and investigative demands, have been held by the Supreme Court not to violate the fourth amendment. Others, such as trash covers and electronic location detectors, have generated considerable division among the lower courts but have not yet been ruled upon by the Supreme Court. What is particularly striking about the proposed charter, however, is that it, for the most part, authorizes the use of “sensitive investigative techniques” right up to the constitutional limit. Apart from the minimal restraints imposed upon the use of investigative demands and informers, the overriding assumption seems to be that “if it’s not unconstitutional it’s not undesirable.” The privacy and dignitary interests of the individual are not exhausted by the Constitution, however, and for Congress to embrace such an assumption would be an abdication of its responsibility to ensure that the Bureau operates within proper bounds. The bill does direct the Attorney General to promulgate guidelines to assure that “investigations are conducted with minimal intrusion consistent with the need to collect information or evi-
dence in a timely, effective manner." But Congress should not pass the buck so quickly. In light of the Bureau's history, Congress has an obligation independently to scrutinize each of these "sensitive investigative techniques" to determine whether specific restraints should be imposed in the charter itself.

One aspect of the "sensitive investigative technique" issue merits special attention. As already indicated, the proposed charter ordinarily permits the use of informants and undercover agents whenever "the information likely to be obtained is pertinent to" an investigation. When the Bureau attempts to infiltrate an organization suspected of "terrorist activity," however, the proposed charter requires additionally that the infiltration be "necessary." The commentary explains that this additional requirement is imposed because "infiltration of groups whose motivation may be political raises unique First Amendment considerations." Although this bow to constitutional "considerations" is to be commended, it does not go far enough. The applicability of the "necessity" standard only in investigations of so-called "terrorist" organizations is simply inexplicable. This standard should logically be employed whenever the Bureau contemplates infiltration of a politically-oriented association, whether or not the suspected crime is "terrorist" in nature. More fundamentally, infiltration of a politically-oriented association should be permitted only when authorized by a judicial warrant premised upon a finding of "probable cause." Like a wiretap, which is of course subject to such restraints, an infiltrator poses a severe threat to associational privacy. The suspicion that an infiltrator might be present can cast a demoralizing cloud of uncertainty and mutual mistrust over the members of the association and can seriously chill their willingness to speak freely even within the confines of the organization. Moreover, infiltrators not only report on first amendment activity, they participate in it. An infiltrator can vote, make policy suggestions, and even serve in influential administrative and leadership positions. In light of the Bureau's past inclination to employ this technique indiscriminately, the refusal to adopt a judicial warrant/probable cause requirement is unfortunate indeed.

3. The proposed charter makes no reference to COINTELPRO or COINTELPRO-type techniques. It is unclear whether this omission signifies an endorsement of such techniques, a rejection, or merely an unwillingness to take a position. The failure to confront this issue is inexcusable. At the very least, the charter, tracking the Levi guidelines, should explicitly prohibit the Bureau from "disseminating information for the purpose of holding an individual or group up to scorn, ridicule, or disgrace; disseminating information anonymously or under a false identity; and inciting violence." At the other extreme, there may be circumstances in which preventive action short of arrest and prosecution is warranted. For example, it may at times be justifiable for practical or investigative reasons for agents to prevent access to or render inoperative explosives, firearms, or similar devices when there is probable cause to believe that the organization intends to employ them unlawfully in the immediate future. Similarly, there may be limited circumstances in which the Bureau, in order to prevent imminent crime, may appropriately inform members of an association planning imminently to engage in unlawful conduct that they are presently under surveillance. Beyond these extremes, there is a vast gray area in which careful legislative guidance is essential. COINTELPRO was too central an abuse simply to be ignored.

4. The proposed charter announces in no uncertain terms that its provisions may not be enforced in any way, shape, or form by the judiciary. It expressly rejects a civil cause of action even for knowing, intentional, and substantial violations, and it prohibits any court to quash a subpoena, suppress evidence, dismiss an indictment, or take any other action designed to redress violations of its terms. In defense of this refusal to permit judicial enforcement, Attorney General Civiletti has argued that there already "exists a full range of suits which can be brought against government officials who act illegally or without authority." The point seems to be that the creation of a civil remedy would be superfluous. This is erroneous. Even in present form, the proposed charter imposes several important restraints which go beyond the requirements of the Constitution. Existing law, however, recognizes a civil cause of action only for unconstitutional government action, and even that cause of action rests on a rather shaky foundation. Moreover, litigation of constitutional claims against the federal government or its agents, even when permitted, is presently quite burdensome. A statutory civil remedy, patterned, for example, after the remedy embodied in the Right to Financial Privacy Act of 1978, 12 U.S.C. 3417, might, by eliminating the jurisdictional amount requirement, establishing a minimum liquidated damage provision, and authorizing the shifting of attorneys' fees, greatly facilitate such litigation.

Supporters of the bill maintain further, however, that a civil remedy is unnecessary given the existing provisions for internal enforcement and
congressional oversight. The proposed charter instructs the Director of the Bureau to “establish an effective system for imposing administrative sanctions for” violations, and it mandates systematic review of Bureau activities by the Attorney General and regular reporting of such activities to specified congressional committees. This is all to the good. But it is not enough. If history teaches anything, it is that the danger lies not only in the Bureau, but in the Congress and the Executive as well. Although some attorneys general have been careful, responsible, and thoughtful in their supervision of the Bureau, others have been careless and have allowed themselves to be deceived and manipulated. Still others have expressly authorized and encouraged Bureau activities that, even at the time, were questionable at best. In some instances, the Bureau violated its own standards under pressure from the Executive, and in others, Congress provided the impetus or looked the other way. The plain fact is that with swings in the political pendulum, and particularly in times of real or perceived crisis, the Executive and Congress may once again lose that sense of perspective that is so essential to the preservation of our liberties. Even in times of relative calm, however, a civil remedy would serve as an important supplement to these other forms of regulation. It would enable the judiciary to play a central role in the interpretation of the charter; it would expose Bureau activities to public scrutiny; it would generate additional pressure on the Director to keep his house in order; and it would compensate victims of Bureau illegality for violations of their political and civil rights. In the end, of course, no written document or legal charter can by itself “reform” the Bureau. But it can set us off in the right direction.
Plaintiffs’ Attorneys’ Fees in Stockholder Class Actions and Derivative Suits
Leo Herzel and Robert K. Hagan*

The subject of the awarding of fees by courts to plaintiffs’ lawyers in stockholder class actions and derivative suits has become very important during the last forty years or so because class actions and derivative suits are increasingly being used by the courts and in federal legislation as an instrument of social policy. Size of the fees awarded to plaintiffs’ lawyers in such cases determines how many cases are brought. The method by which the fees are calculated determines what cases are brought, how such cases are conducted by the plaintiffs’ lawyers in charge of them, and also how many cases are brought. The principal purpose in this paper is to show that, despite the appearance of fairness, the policy now being pursued by the courts of awarding fees to plaintiffs’ lawyers on the basis of the fair value of the hours spent by them is contrary to the social interest.

Beginning with Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., the federal courts have begun to award attorneys’ fees primarily on the basis of the number of hours spent rather than on the basis of the benefit conferred. Almost all of the recent writing on the subject supports the shift in emphasis to hours. In the Lindy case, which involved the settlement of an antitrust class action, the court said that a judge who is fixing attorneys’ fees should award only reasonable compensation which should be determined primarily by multiplying the number of hours spent by a reasonable hourly rate and then making adjustments for several factors such as the contingent nature and complexity of the case and the amount of legal innovation required. (Under the federal antitrust laws, the lawyer for a plaintiff is entitled to a fee from the defendant if he wins a judgment after trial, but in a settlement, the fee must be awarded by the court from the same sources as in other cases, usually out of the recovery.) Since the Lindy case, most of the federal court opinions which have discussed the subject have expressly applied formulas in which the number of hours spent by the lawyers multiplied by appropriate hourly rates is the primary factor (“lodestar” is the term usually used). Moreover, a formula for awarding plaintiffs’ attorneys’ fees based primarily on their hours spent was included in the original draft of the new Justice Department proposals on class actions submitted to Congress, although the most recent Justice Department draft has eliminated the provisions for determining how to calculate plaintiffs’ attorneys’ fees.

The problem with awarding fees to lawyers primarily on the basis of the number of hours spent is that it gives the lawyers a strong incentive to increase their hours. When fees are awarded primarily on the basis of a percentage of the recovery, there is a direct and simple incentive for the lawyers to maximize the amount of the recovery and also to minimize the cost, including lawyers’ hours.

A simple example will illustrate the problem. If a lawyer has a choice of settling a class action for two million dollars or taking a one-out-of-two chance of recovering four million dollars after trial and appeal approximately three years later, the class would be clearly better off with a settlement. The mathematical expectation for the two outcomes is the same, except for the difference in the time when the money is paid, which clearly

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favors settlement. However, the lawyer does not have the same interest as the class, because on a time basis he would receive a much larger fee if he spends a large amount of time litigating over the three-year period.

In fact, the problem is even worse than this simple example suggests. Very often, a defendant's settlement offer takes into account factors such as the money and other costs of litigation to the defendant which makes the settlement offer higher than the present discounted value of any judgment which can reasonably be anticipated. In addition, defendants and their lawyers, when making settlement offers, sometimes overvalue the plaintiff's case through mistake or because of an unusual bias against risk taking or sensitivity with regard to litigation, which would also contribute to making the settlement worth more than the mathematically expected value of the case. By awarding attorneys' fees based on the number of hours spent, however, the courts have given plaintiffs' attorneys a strong incentive to ignore these considerations and continue litigating even though the class would be better off with the settlement. As a result, the involuntary class clients are in a less advantageous position, and the effectiveness of plaintiffs' lawyers as an instrument of social policy is seriously impaired because of lawyers' lost time. Moreover, and just as important, awarding attorneys' fees on the basis of hours also adds additional social costs by imposing time and other expense burdens on the courts and defendants which early settlement or more expeditious litigation could avoid.

Observation bears out this analysis. Personal experience has shown that during the last several years, stockholder suits have become much more difficult to settle at an early stage in the litigation. The notion that reluctance to settle is evidence of harder and more moral plaintiffs' lawyers is naive. The refusal by a plaintiff's lawyer to accept a settlement may be the height of wisdom or irrational stubbornness. The fact that he receives a larger settlement or judgment later throws no light on the question. The cost or risk incurred may or may not have been justified at the time of the first settlement offer. For example, a lawyer may refuse a million-dollar settlement and recover a judgment for two million dollars several years later on a case which at the time of settlement had a one-out-of-three chance of success. If this is the general policy of the lawyer, his involuntary class clients, on the average, will be losers, although in particular instances the clients would gain when the lawyer happens to be successful. Dawson, despite his advocacy of awarding fees on the basis of hours, recognizes that inhibiting settlements and forcing litigation to the bitter end could have extremely negative consequences.

The problems connected with awarding fees to lawyers on the basis of hours are the same as those associated with cost-plus contracts. In a cost-plus contract, there is no incentive for the person required to perform the work to keep down the costs and to improve the efficiency with which the work is done. Consequently, the costs can be expected to be much higher, on the average, than if there is a fixed contract price. The following is an evaluation of the use of cost-plus contracts by the British Government in World War II:

The "cost plus" contract obviously relieves the contractor of [the risk of the actual cost being higher than was expected at the time the order was received.] In its effects, however, the system has been unfortunate; it offers no incentive whatsoever to efficiency; under the peculiar type of "cost plus percentage profit" system efficiency is, on the contrary, strongly discouraged, because profits increase with cost. That the system has, in fact, led to waste and inefficiency is shown by the Reports of the Select Committee. They show that most complaints of waste and inefficiency directed to the Committee were connected with work ordered on a cost plus basis.

The difficulties associated with cost-plus arrangements are one aspect of an important basic characteristic of human nature which the psychologist B. F. Skinner has described in terms of what he calls "non-contingent reinforcers": "That behavior is extraordinarily sensitive to the consequences contingent upon it is beginning to be recognized wherever decisions are made. The tragedy of the non-contingent reinforcer in welfare payments (not to mention the welfare state) is being examined." The same argument does not apply to lawyers for sophisticated voluntary clients (a fair approximation of defendants in stockholder litigation) because voluntary clients are free to terminate their lawyers' services whenever they are dissatisfied. The justification for this statement is a corollary of the economic theory that the allocation of resources in a perfectly competitive economy would be optimum for any given distribution of income. In a world of voluntary contracts, nobody has to buy particular goods or services. If he chooses to buy, it must be because he is getting a benefit measured by the price he pays. Competition among suppliers of goods and services prevents excessive
profits or oppression by suppliers. The submarket for the services of lawyers who represent defendants in stockholder class actions and derivative suits is probably sufficiently close to the ideal for perfect competition. In other markets for lawyers' services, particularly where unsophisticated individuals are the voluntary clients, lack of information about price and quality could seriously impair the validity of an assumption that there is vigorous competition.

It may be feasible in some situations for courts when awarding attorneys' fees to determine in rough fashion whether some time has been wasted. For example, it may be possible to determine (or, sometimes, to maintain a plausible illusion that one is determining) if different lawyers representing the same class have duplicated each other's efforts or if time was wasted on claims that were ultimately denied. Beyond such rough attempts, however, it is not realistic to expect judges to make determinations whether plaintiffs' lawyers spent their time in the most efficient manner. For example, it can hardly be expected that a judge would disallow hours because the plaintiffs' lawyers did not make a motion for summary judgment or refused to agree to a particular settlement or a stipulation of facts which would have reduced the hours the lawyers devoted to the litigation. Decisions to take such actions are necessarily subjective, and judges cannot be expected to attempt to substitute their own judgments for the lawyers in charge of the cases except possibly in the most extreme situations.

Moreover, even crude judicial attempts to solve the problem of misallocation of lawyers' time can be misdirected since duplication of effort, or effort exerted by a lawyer on a legal or factual theory which is ultimately fruitless, does not necessarily mean that time was wasted. On projects of any intellectual consequence there is no effective way to determine whether time was wasted or effort duplicated unnecessarily. There are no general rules for problem solving which could serve as a standard against which to measure the effectiveness of lawyers since all knowledge is built on a combination of successive guesses (hypotheses) and corrected mistakes.10 (There are, however, techniques for evaluating the correctness of solutions and it is usually possible to reach some tentative agreement on the importance of solutions.) Some people accomplish very little of importance and make many mistakes. Others make many mistakes but achieve outstanding results. Should J. D. Watson and Francis Crick have been refused a Nobel Prize for their extraordinarily important discovery of the structure of DNA because they followed so many leads which turned out to be wrong and duplicated effort by working together?11 It is probably just as useless to attempt to penalize lawyers for following up legal and factual theories which have to be abandoned or for duplicating effort in the solution of a problem. By far, the best discipline is self-interest. Plaintiffs' lawyers should bear the cost of all hours they spend, and they are already required to share their fees with any coworkers.

A review of recent cases awarding attorneys' fees on the basis of hours spent confirms the observation that, as a practical matter, judges do not usually substitute their own judgments for those of lawyers by disallowing hours for managing cases inefficiently. In the Lindy case itself, the only time that was ultimately disallowed by the court was time spent by the lawyers in negotiating fee agreements and preparing claim forms for those claimants who had actually retained the lawyers and time spent by them on the attorneys' fees application, including the appeal on that issue.12 In general, cases subsequent to the Lindy decision have only disallowed hours which could not be compensated for under the general fund theory or under statutes awarding attorneys' fees or which appeared to duplicate the time spent by other lawyers.13

Occasionally, courts have noted that certain work was done inefficiently14 or by partners instead of associates at a higher hourly rate than was justified,15 and have reduced hours or hourly rates for such reasons.16 No case, however, has been uncovered where a court has penalized plaintiffs' lawyers because the court disagreed with their legal judgment on matters involving legal strategy, such as making or failing to make a motion for summary judgment or agreeing to or failing to agree to a settlement.17 Nor have courts usually disallowed hours because they thought lawyers adopted a legal strategy which resulted in too much work, such as engaging in protracted discovery or motion practice, although occasionally courts have rejected some of the hours spent on matters such as a brief because the court thought the hours were excessive.18

The decisions awarding attorneys' fees on the basis of hourly lodestar make another adjustment which also has very undesirable side effects. The courts have said that while hours, multiplied by appropriate hourly rates, are the "lodestar," there must be adjustments for several factors, one of the most important of which is the risk and uncertainty involved in the litigation. This policy is based on
the fact that normally a lawyer would charge more than his normal billing rate if he were not sure that he would be successful and his fee were dependent on the outcome of the litigation. The amount of the adjustment varies in accordance with the amount of risk and uncertainty. An adjustment of this type was mentioned in the *Lindy* case itself and has been taken into consideration subsequent cases which have used an hourly basis for awarding attorneys' fees. Unfortunately, this adjustment encourages plaintiffs' lawyers to bring cases with less merit. Taking a very simple example, it is not a wise social policy to make it just as attractive for lawyers to bring cases with a one-out-of-four chance of recovering a million dollars for the class as it is to take cases with a one-out-of-two chance of recovering the same amount by adjusting upward the expected fee for the more risky and uncertain cases. Ideally, lawyers should be encouraged to bring those cases with respect to which the law is most clear and where the violations are the most certain since, in those cases, society is least likely to waste its resources, such as courts, lawyers, and defendants' time and expenses, in useless efforts. Increasing attorneys' fees for the risk and uncertainty involved encourages lawyers to bring cases with regard to which the law and the facts are less certain. In the example, the fees should be the same for both sets of cases if the recoveries are the same. Plaintiffs' lawyers would still take very risky cases but only if the absolute amount of the recovery expected is correspondingly high or the cost of recovery can be kept low. If it is desirable to encourage legal innovation by plaintiffs' lawyers, a much better approach which would avoid any bias toward excessive risk taking would be to increase their compensation in all cases and not just in marginal, risky cases.

Increasing the propensity of plaintiffs' lawyers to take risks by giving them special incentive fees for risk taking aggravates an already serious problem since the incentives toward risk taking for plaintiffs' lawyers in derivative suits and class actions is already too high when fee awards are made on an hourly basis. There are two causes of this bias toward risk taking: separation of ownership and control between client and lawyer respectively (the involuntary client problem) and a system of payment which rewards successes and does not penalize failures.

A comparison with an ideal theoretical procedure (used to illuminate the problem and not as a practical proposal) should make the nature of this bias clearer. A public auction of all class action and derivative suits to the highest bidder could be used to eliminate the separation of ownership and control. Such an auction could be conducted by the Securities and Exchange Commission or some other governmental agency after public notice describing the case. Lawyers and laymen would be permitted to bid, but the layman would be required to obtain a lawyer of his own choice to handle the case. The purchase price bid at the auction would be paid to the class in class actions and to the corporation in derivative suits, and the class or the corporation would have no further economic interest in the case. The purchaser would own the claim.

If, for example, a lawyer (or his client) has successfully bid $400,000 for a claim, he would have to consider the protection of his $400,000 investment in the case as well as any expense in conducting the case when he is evaluating a settlement. The result would be that the lawyer would be forced to behave like any other private litigant. His willingness to take risks would be tempered by his desire to protect his investment, which is the way the class or the corporation in a derivative suit would behave if it could hire, control, and pay its own lawyers.

If, in the example, defendants were permitted to bid on the cases filed against them, they would be willing to bid at least the nuisance value of the suit and possibly much more depending on the defendants' attitudes toward risks and litigation. A plaintiffs' lawyer (or his client) who wanted to invest in the suit would be forced to invest more than the nuisance value of the suit and would, therefore, be much less likely to make the investment and to bring a nuisance value suit. If he did make the investment, he would be under pressure to settle for less than he paid in order to protect his investment against total loss, and the plaintiffs' lawyer and defendant would share the costs resulting from the lawyer's bad decision. In general, if defendants are permitted to bid, then, to the extent that they are the successful bidders, there has been a very efficient settlement of the case.

The auction model has one intriguing additional advantage over existing haphazard methods of allocating volunteer lawyers to involuntary clients in class actions and derivative suits. The best qualified lawyers would bid the highest prices at the auction because they could reasonably anticipate the largest recoveries which would increase the amount recovered by plaintiffs in meritorious class and derivative suits. The model in the example could be made
more effective by not holding the auction until after discovery is completed and awarding the lawyers who were in charge of the preliminary stage of the case before the auction a percentage of the amount paid at the auction as a fee.

Another adjustment made by the courts in the award of attorneys' fees is for the quality of the work involved; the higher the quality of the lawyers' work the greater fee. This adjustment was also discussed in the Lindy case and has been accepted in subsequent cases. While the courts look to a number of factors in determining the quality of the work, the primary factors appear to be the result obtained and the amount of innovation involved. The court in the Lindy case noted that the result is especially important when there has been a settlement. Making the quality of work a factor in the formula for determining the amount of the fee award would probably improve the efficiency with which class and derivative litigation is managed but only by reintroducing in a roundabout manner the concept of percentage of recovery. Consequently, such an adjustment would improve efficiency but only to a marginal extent, since the lawyers would know that the lodestar is still based on the number of hours they record. To the extent that innovation is a factor in determining quality, there is an undesirable bias toward risk taking. Also, by taking into consideration the benefit produced, the courts have not escaped one of the problems associated with awarding attorneys' fees on the basis of a percentage of the recovery—how to value the recovery when it is not readily measurable in monetary terms. Nevertheless, while measuring the benefit produced may be difficult in some special situations, it is substantially easier than determining whether that benefit was efficiently produced.

In summary, basing plaintiffs' attorneys' fees on the number of hours worked has probably not produced any significant advantages but has produced serious disadvantages when compared with awarding attorneys' fees on the basis of a percentage of the recovery. Awarding attorneys' fees on the basis of hours spent has removed a very important incentive to plaintiffs' lawyers to choose and to manage cases in the most efficient manner. Moreover, the rationale behind using the number of hours spent as a basis for awarding fees has led the courts to increase fees where the likelihood of recovery is small, or the amount of innovation required is great; lawyers are thus encouraged to pursue more risky and uncertain cases, which is antisocial in its effects because it increases the propensity to initiate suits and to litigate instead of settling marginal cases. On the other hand, the courts still look to the benefit produced, especially where there is a settlement, which, to some extent, probably reintroduces a percentage-of-recovery factor without eliminating the bias against efficiency in an hourly basis formula.

The most desirable basis for compensating lawyers in class actions and derivative suits is a percentage-of-recovery formula. This was the method commonly employed by courts before the present, overwhelming success of the hourly "lodestar" method. In the past, when courts used the percentage-of-recovery method, no particular percentage of recovery was applied to all cases. The percentages applied by the courts ranged from approximately 10% to 50%. Plaintiffs' lawyers had no method of predicting in advance what percentage would be applied in a particular instance, except for the very rough generalization that usually the percentage applied varied approximately inversely with the size of the recovery. The most important characteristic of any successful procedure for determining plaintiffs' lawyers' fees is that a lawyer's best strategy for obtaining the highest possible fee should be to do his best, i.e., to bring the cases which have the highest present net expected value and to litigate them in the most efficient manner possible. A percentage-of-recovery method, using a flexible schedule of percentages, comes closest to accomplishing this goal. There is no incentive to work extra hours or to avoid settlement because extra hours are at the lawyer's expense. The incentive to take risks is exactly correct, because the only risks that are rewarded are those that are successful and only as a function of the amount of the success.

The most important criticism which has been leveled against awarding plaintiffs' lawyers' fees on the basis of a percentage of recovery is that it appears unseemly and brings the courts and bar into disrepute because of the large incomes earned by some plaintiffs' lawyers. Once society, through the courts, has made a decision to use private lawyers for the achievement of social goals through class actions and derivative suits, the most important consideration should be the efficient implementation of the policy. If the policy itself leads to undesirable results, then there should be a re-evaluation of the policy. The worst possible solution is to keep the policy and entangle it in rules which make it operate perversely. If the underlying problem with a percentage-of-recovery method of compensating plaintiffs' lawyers is that the fees awarded are often
too high, the courts can solve this problem by lowering the schedule of percentages they use. The effect of such a change would be to decrease the number of cases brought, but there would be no bias against efficiency.

Notes
1. 487 F. 2d 161 (3d Cir. 1973).
2. Prior to the Lindy case, the courts had generally awarded attorneys' fees primarily on the basis of a percentage of the recovery, with the percentage, on the average, declining inversely with the size of the recovery. See Hornstein, Legal Therapeutics: The “Salvage” Factor in Counsel Fee Awards, 69 Harv. L. Rev. 658 (1956).
4. See, e.g., Donnarumma v. Barreca, 77 F.R.D. 455, 462-63 (C.D. Calif. 1978). The principals set forth in the Lindy case have also been adopted in cases where the defendants are required to pay the plaintiffs' attorneys' fees because of a statute or for some other reason. See, e.g., Pete v. UMW Welfare and Retirement Fund of 1950, 517 F. 2d 1275 (D.C. Cir. 1975) (en banc). The Lindy case has also been commented upon favorably by various writers. See, e.g., Developments in the Law-Class Actions, 89 Harv. L. Rev. 1318, 1611-1612 (1976); Hammond, Stringent New Standards for Awards of Attorneys' Fees, 32 Bus. Law. 523 (1977); Dawson, supra, 88 Harv. L. Rev. at 921.
7. Dawson, supra, note 4, 88 Harv. L. Rev. at 838.
10. “To a philosopher with a somewhat open mind all intelligent acquisition of knowledge would appear sometimes as a guessing game, I think. In science as in everyday life, when faced by a new situation, we start out with some guess. Our first guess may fall wide of the mark, but we try it and, according to the degree of success, we modify it more or less. Eventually, after several trials and several modifications, pushed by observations and led by analogy, we may arrive at a more satisfactory guess. The layman does not find it surprising that the naturalist works in this way. . . . It may appear a little more surprising to the layman that the mathematician is also guessing. The result of the mathematician's creative work is demonstrative reasoning, a proof, but the proof is discovered by plausible reasoning, by guessing,” G. Polya, Mathematics and Plausible Reasoning, Vol. II, Patterns of Plausible Induction, 118 (1968). See also Medawar, Anglo-Saxon Attitudes, Encounter, August, 1965, at 52, 54: “Unfortunately, we in England have been brought up to believe that scientific discovery turns upon the use of a method analogous to, and of the same logical stature as deduction, namely the method of Induction—a logically mechanized process of thought which, starting from simple declarations of fact sifting out of evidence of the senses, can lead us with certainty to the truth of general laws.”
17. Courts, however, have occasionally required plaintiffs' lawyers to share control of a case with objectors after a proposed settlement has been successfully attacked by the objectors at a hearing on the fairness of the settlement. See, e.g., Chalker v. Burks, 55 F.R.D. 168, 172 (S.D.N.Y., 1972).
19. Dawson, supra, 88 Harv. L. Rev. at 926.
20. 487 F. 2d at 108.
21. See, e.g., City of Detroit v. Grinnell Corporation, 495 F. 2d 448 (2d Cir. 1974).
22. 487 F. 2d at 108.
24. 487 F. 2d at 108.
25. Dawson, supra, 88 Harv. L. Rev. at 878.
The Brethren
Philip B. Kurland*

Virginia Woolf once wrote: "I think politicians and journalists must be the lowest of God's creatures, creeping perpetually in the mud, and biting with one end and stinging with the other." Robert Woodward and Scott Armstrong's *The Brethren* is further evidence—if any were needed—to establish the validity of this dictum. The book is not useful for much else. The publication of *The Brethren* is a media event, i.e., an occasion without any intrinsic importance which is foisted off on a gullible public through ballyhoo as though there were something there. It is a tour-de-force effected solely through "hype." P. T. Barnum would have loved it.

*The Brethren* is a journalists' weapon that was quite clearly aimed at the â©te-noir of the American press, the incumbent Chief Justice of the United States. Chief Justice Burger was an easy target for the gossip-mongering of which this book largely consists, for surely at times he is vain, overbearing, crotchety, self-righteous, and thin-skinned. Nor did the authors miss their target. But they were firing a shotgun, not a rifle, and the buckshot they scattered tore the skin of every other Justice as much as it did that of the Chief. Indeed, it was the three Justices that the authors and their spies seemed to regard as the most admirable who were most severely wounded: Justices Douglas, Brennan, and Marshall. The first of these largely because of the authors' disgustingly graphic depiction of a once-great jurist—perhaps the last of them—in the last days of his tenure when he had control over neither his mind nor his body. And Brennan appears as a whimpering, petty, hate-filled, disappointed Don Quixote, frustrated by the failure of the new Chief to follow where his predecessor had led. Marshall is made to look like a clown, in the words of Woodward and Armstrong, like an "Amos and Andy" character, which is surely unfair.

But then no man is a hero to his lackeys. And the stories told in *The Brethren* are essentially built on the tale-bearings of the Justice's loyal ex-staff members, law clerks apparently disappointed by their failures to control the decisions of the Court. Only Mr. Justice Stevens escapes with his skin whole, and that probably because the scope of this volume doesn't cover the Terms of Court during which Stevens has served.

Doubts must exist as to the truthfulness of the tale-telling. The sources of the stories are unidentified, allegedly because the tale-bearers were unwilling to be known for their breaches of confidence. The book consists largely of hearsay, or hearsay once-, twice-, thrice-removed. That some of it is heavily embellished by the authors' imaginations seems obvious. That some of it is pure fiction is revealed by the numerous quotations of thoughts that could be known only to the minds they occupied. (The few statements of events about which I have direct knowledge are plainly erroneous. These disparities from truth are not important in themselves, but sow seeds of doubt about all the other allegedly factual statements unproven by objective criteria.) Much is accomplished by the authors through innuendo of a kind worthy of Joseph McCarthy.

I do not mean to deny the validity of the primary effect of the book, a demonstration that the Emperor is in fact naked. That the Justices have, and
have expressed, distaste for one another, that they bicker and engage in petty annoyances, that each regards himself as the keeper of the Holy Grail, that some lack the learning or intelligence necessary to an adequate performance of their functions, that irrationality often replaces rationality as the measure of judgment, that politics in its lowest form plays a large role in adjudication, all of these things cannot be gainsaid.

The fact is, too, however, that the Emperor has been naked almost since he came to power. Similar disclosures could have been made—had there been similar breaches of confidence—about the Justices of the Warren Court, the Vinson Court, the Stone Court, the Hughes Court, the Taft Court, etc., back on to the time when the Great Chief Justice started the Court on its road to becoming a council of revision and a continuing constitutional convention.

Obviously, the Court as a public institution of no small power is a very proper subject of informed criticism. Justice Frankfurter once wrote: “Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions... Judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous criticism expressed with candor however blunt.” Another great jurist, Judge Learned Hand, added: “While it is proper to find fault when their judges fail, it is only reasonable that [the critics] should recognize the difficulties... Let them be severely brought to book, when they go wrong, but by those who will take the trouble to understand them.” Nothing in The Brethren comes close to the kind of reasoned criticism of the Court’s work that was endorsed by Frankfurter and Hand.

What we have here is simply a collection of personal crotchets, conceits, quirks, whimsies, foibles, eccentricities, and caprices of nine human beings engaged in a task worthy of Plato’s Guardians. This book is not criticism, it is only muckraking. It will afford titillation to the naive, and rouse the prurient interest of the sophisticated, political voyeur. Perhaps it is in the best tradition of the journalistic profession, but if so, it is the tradition of Walter Winchell rather than Walter Lippman. In terms of importance and longevity, its most likely precedent is a book by the authors’ boss, Benjamin Bradlee’s Conversations with Kennedy. The Brethren likely will bring no shame to any except those who provided the offal that was packaged in this volume.

One can readily guess as to the book’s lasting consequences. None. Temporarily, it may cause the Justices to deny private confidences to their law clerks or even to their brethren. It may, but it is not likely to, cause a lowering of popular confidence in the Court which, while it doesn’t stand high in the people’s estimation, stands higher than either of the other two branches of the national government. Since the power of the Court depends entirely on public respect for its judgments, the Court may come to feel somewhat constrained in rewriting the Constitution, congressional statutes, and executive orders. That would be good, but not likely, so long as the Justices look upon this book as the shoddy thing that it is.

The only sure consequence of The Brethren is that it will enhance the purses of its authors and publishers, thus giving the lie to Iago’s proposition that “he that filches from me my good name robs me of that which not enriches him.” H. L. Mencken records an old German proverb: “Little people like to talk about what the great are doing.”
Report from the Center for Studies in Criminal Justice
Franklin Zimring*

The Center for Studies in Criminal Justice was founded at the University of Chicago Law School in 1965. Operating in a relatively small academic unit of the University, the Center's primary goal has been to encourage and produce first-rate basic scholarship and to facilitate the advanced training of talented scholar-researchers.

Over the past eighteen months, five book-length manuscripts have been completed under the supervision of Center staff. Diverse in scope, subject matter, and authorship, these completed projects are representative of the Center staff's current interests and style of operation.

Wayne Kerstetter, Associate Director of the Center and Clarence Day Fellow during 1979, and Anne Heinz, Research Associate, have completed a report of a field experiment in Miami, Florida, which tested the effects of involving judge, defendant, and victim in the plea negotiation process by channeling all negotiation proceedings into a hearing. This report was published by the Government Printing Office.

The Director of the Center, Franklin Zimring, served as Rapporteur for the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders. The report of that Task Force, and Zimring's Background Paper, Confronting Youth Crime, were published in April of 1978.

Norval Morris and Michael Tonry, a research associate, edit a yearly compendium of essays on critical topics in criminal law and criminology. Funded by the National Institute of Law Enforcement and Criminal Justice and guided by an outside advisory board, Morris and Tonry have completed the first volume of this work and have commissioned papers for the second. The series, entitled Crime and Justice: An Annual Survey of Research, is published by the University of Chicago Press. Two of the nine chapters in the first volume were written by research fellows of the Center.

The Limits of Law Enforcement, Hans Zeisel's definitive examination of the processing of felony arrests in New York City, was completed in early 1980. Using two separate samples of felony arrests, the book provides a comprehensive guide through the labyrinth of criminal case processing, jail detention, plea bargaining, and sentencing.

Center staff have also prepared teaching materials for use in American law schools. Compiled by Franklin Zimring and research fellow, Richard Frase, The Criminal Justice System exposes law students to empirical material dealing with crime, police, pretrial processes, plea bargaining, and sentencing. This book was recently published by Little, Brown and Company.

The history of these projects provides an interesting window into work patterns in the Center over the past few years. One common theme is cooperation with other research or policy-planning agencies. For example, the Zeisel manuscript is based on a study he initiated as Research Director of the Vera Institute of Justice in New York; the Task Force on Sentencing Policy Toward Young Offenders was established by the Twentieth Century Fund; the Annual Survey of Research in Crime and Justice was prepared in collaboration with the National Institute of Law Enforcement and Criminal Justice and the University of Maryland; and the pretrial settlement experiment will be replicated by other researchers in consultation with the Center.

A second theme of Center publications is collabo-

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ration between authors. Three of these five major works involve co-authorship, and a fourth was written in collaboration with a task force. Typically, major research or editorial projects involve two authors, one with an academic affiliation at the University of Chicago and one with an academic appointment at another university.

Similar interinstitutional collaborations characterize recently undertaken research. Wayne Kerstetter is conducting a survey and analysis of team policing for the Center, partially supported by the Police Foundation in Washington, D.C. The Sentencing Guidelines Project, directed by Michael Tonry, is a joint undertaking with the University of Maryland Law School. Franklin Zimring is collaborating with the Rand Corporation on a study of sentencing policy toward young offenders in criminal courts. This cooperative effort is both necessary and healthy. Such arrangements have special value for the Center because they expand the scale of research without the burden of a large permanent staff, high overhead costs, or space requirements that would be inconsistent with the Center's affiliation with the Law School.

The financial history of these recent Center projects is also worth noting. The pretrial settlement experiment was funded by a large grant from the National Institute of Law Enforcement and Criminal Justice. As usual, the funding period was shorter than the time required to complete the project report. Modest but critical supplemental support provided by the Clarence Day Foundation enabled Wayne Kerstetter to complete the monograph. The National Institute of Law Enforcement and Criminal Justice will fund the replication of this study. Although the Twentieth Century Fund provided support for the work of its Task Force, no money was budgeted by that organization for empirical work. However, when the opportunity arose to explore the relationship between age and sentencing outcome in Washington, D.C., a grant from the Nancy and Raymond G. Feldman Fund made it possible to add an original research contribution to the work of the Task Force. The felony disposition study was originally funded through a grant from the National Institute to the Vera Institute of Justice. That grant represented 95% of the resources expended on the project, but funds were not available to support needed additional data analysis during 1977 and 1978. A modest grant from the Feldman Fund made possible the more refined analysis which has greatly enhanced the value of the book. Support for the preparation of The Criminal Justice System came from the Arnold and Frieda Shure Fund for Research at the University of Chicago Law School.

These fiscal case histories illustrate both the mix of public and private funds that has supported the Center's work in the past and the important role of relatively small supplemental private funds in facilitating the completion of research. The Center depends on private funding to take advantage of opportunities for inexpensive but innovative research and for pilot projects. Thus, while private funding has represented less than half of the Center's total expenditures, it has been essential to the character and nature of the Center's work.

The number and variety of research interests pursued by Center staff defy the discipline of an organizational chart. Norval Morris is principally concerned with the jurisprudence of sentencing convicted offenders, the proper role of imprisonment in criminal law, and the relationship between the state's mental health power and the administration of criminal law; Morris and Michael Tonry serve as editors of the Annual Survey, and Morris continues as general editor of the Studies in Crime and Justice. Professor Morris also plays an active role in monitoring the progress of the prison program he designed at the Butner, North Carolina, federal prison.

Wayne Kerstetter has undertaken an ambitious series of studies on police patrol, police management, and the assessment of efforts to reform urban police departments.

A grant from the Chicago Bar Foundation enabled the Center to award visiting fellowships to Gordon Hawkins in 1978 and James B. Jacobs in 1979. Hawkins is now completing an analysis of movements in the American prison population over the last decade. Jacobs plans a follow-up study of Stateville Penitentiary, the setting of his 1977 book, Stateville: The Penitentiary in Mass Society. He is also studying trends in the use of coercive social control in the United States since World War II.

Richard Block recently completed a comparative analysis of crime and criminal justice in the United States and the Netherlands. Hans Zeisel is pursuing studies on the relationship between race, discretion, and the death penalty. Michael Tonry is continuing to supervise the activities of the model federal sentencing commission. Franklin Zimring is involved in a series of empirical studies relating to violence, young offenders, and the general deterrent effects of criminal sanctions. One pending study, an attempt to assess the impact of the New York Legislature's 1978 “crackdown” on violent youth
crime, combines all three of these research interests. Finally, Hans Zeisel and Ellen Fredel are studying the reliability and utility of arrest statistics reported by municipal police departments to the Uniform Crime Reporting Section of the F.B.I.

Almost all of these research activities reflect longstanding commitments of Center fellows to particular areas and study topics. Many of the subjects of current projects have been part of the Center's research agenda since 1965: sentencing, deterrence, the prison, mental health, and criminal law. The sequence of studies in violence is now entering its eleventh year. These sustained research programs provide the continuity and flexibility necessary for the informed empirical study of crime and the criminal law. Recent productivity of Center staff is due, in no small measure, to the momentum generated by our work in earlier years.

The majority of Center fellows now hold academic appointments at institutions other than the University of Chicago. One result is that the Center's population is subject to the same kind of seasonal variation as Martha's Vineyard—far larger in the summer than in the winter months.

It is easy to over-estimate the role of premeditated design in the development of the Center. However, the staff is pleased with the result of this evolutionary pattern. Plans for the Center's future owe much to the fortuitous but satisfactory events of recent years.

The staff's ambition is to remain a small research and training institution that serves as an intellectual clearing house for empirical studies in the administration of the criminal law. To achieve that end, research professionals engaged in the Center's activities might be divided into four categories: Faculty Fellows, Research Associates, Visiting Fellows, and Fellows. Faculty Fellows are full-time faculty members at the University of Chicago who are continually involved in the research activities of the Center. At present, Professors Morris, Zeisel, and Zimmer fit that definition.

Research Associates are resident scholars engaged in Center research. Typically, a Research Associate comes to the Center shortly after completing doctoral work in law or social science and stays for a period of two to four years, sharpening substantive and methodological skills while contributing to Center-sponsored research. We anticipate that Research Fellows will "graduate" from this status into faculty positions at other major American universities. This pattern has already characterized the careers of James Jacobs (Cornell University), Richard Frase (University of Minnesota), Michael Tonry (University of Maryland), and Wayne Kerstetter (University of Illinois). The Center usually employs two or three such resident professionals.

Visiting Fellows are typically older and more experienced academic research professionals who come to the Center to pursue research projects of their own choosing. Such persons find the Center an attractive place to visit because of the individual skills of other Center personnel and because our numbers, while small, constitute impressive depth in an area where most individuals work in isolation. Our Visiting Fellows have included Johannes Andreass (Oslo), George Sturup (Denmark), and Mark Haller (Temple University). Their work has ranged from seminal studies on deterrence to a history of organized crime.

Fellows are those individuals who maintain continuous research ties with the Center for Studies in Criminal Justice but have academic appointments elsewhere; they are physically in residence only occasionally. Usually, Fellows are recruited from former Research Associates or Visiting Fellows, and Visiting Fellowships are offered to active Fellows. Some obvious examples include Hawkins, Jacobs, Frase, and Tonry.

The advantages of this structure are economy, flexibility, continuity, and an enhanced capacity to influence the course of research at other institutions. With such a structure, the Center will continue to finance large-scale research with federal funds; however, visiting fellowships and pilot project support must come from private funds if the Center is to continue activities on the same scale that has characterized it in recent years.

While this pattern of organization is appropriate for the work of the Center, it may also serve as a model for research and training in other law-related research endeavors. The lack of explicit empirical training for future legal academics, the absence of legal scholars in many law-related specialties, and the outright loneliness of the research process have stunted the growth of empirical research in American law. Ultimately, this Center may be more important to the Law School as an experiment in organization for research and teaching than as a research agency in criminal justice. If this is the case, the Center's four years of operation without major foundation support are of special value. The question of whether research centers such as this can be established for short periods of time with large external grants is rather less important than whether such centers can mature into important constituents of the academic legal enterprise.
On the Strange Making, Training, and Thinking of an American Law School Dean

Gerhard Casper*

A candidate for a vacant deanship recently told a search committee that deans are like champignons. At first impression the comparison evokes associations which seem pleasant enough. Champignons, after all, are—and always have been—a rare delicacy. Indeed, these days in particular, law school deans have become rather uncommon. About once a week I am advised of a vacancy in a law school deanship. However, this is not what the candidate who made the comparison had in mind. He thought deans were like champignons because one keeps them in the dark until they are ready to be canned. As my faculty and students do their best to keep me in the dark, I am not well positioned to shed much light on the present problems of legal education. Under these circumstances, I thought it might be appropriate to speak in part, not about where we are going, but where I have come from.

Permit me one paragraph about life stations. I was born in Hamburg in 1937. I entered primary school as World War II ended. My law studies were undertaken at the universities of Hamburg and Freiburg. In 1961, I did graduate work in law at Yale Law School, returned to Freiburg afterwards for a Ph.D. in law in the European fashion. My dissertation was on the so-called “realist” movement in American jurisprudence. In 1964, I accepted an offer from the University of California at Berkeley, and in 1966 I came to Chicago. Degrees did, of course, not end my legal education. As those of you who practice law have learned much of your law after graduation from law school, I learned much of my law teaching (especially American constitutional law, which used to be my preoccupation until I became dean). All of this seems rather straightforward, not even unduly exotic. However, it understates my exposure to American law and legal practice.

My first encounter with practical aspects of American law took place in 1953, when I was fifteen years old. I had been selected to go to the United States as a delegate to what was known as the New York Herald Tribune Forum, a four-month program aimed at increasing international understanding. The New York Herald Tribune annually brought together about thirty students from as many countries (European countries, Israel, Arab states, old and new nations of Asia and Africa). At that time, visas for German citizens had to be approved in Washington. A week before my scheduled departure for the United States, I still did not have a visa. I went to the American Consulate General in Hamburg for help. A Vice-Consul said he was sorry, but there was nothing he could do about it as Washington was probably searching for my war records. When I pointed out that I had been all of seven years old when the Third Reich came to its end, the consul simply shrugged his shoulders. The authorities at the Hamburg Board of Education, to whom I turned next with a request for assistance, told me that they could not and would not intervene. By now, there were three days to go. At this point, I remembered that I had previously gotten to know the director of the American Information Center in Hamburg. I made an appointment and described my difficulties. He said, “No problem at all, Gerhard,” picked up the telephone, called the consulate, and spoke to some person in authority: “John, this is Bill. I have young Casper here who needs and should have a visa by tomorrow. Can you please make the arrangements?” The next day I had my visa and a lesson on the equal and broad sweep of administrative procedures

* Dean of the Law School. These remarks were originally made at the Law Club of Chicago on December 6, 1979.
on the one hand, and pragmatic approaches to the
question of how to deal with snags on the other.

As we are on the subject of the Immigration and
Naturalization Service, I am reminded of another
lesson in bureaucracy, both charming and a bit dis-
concerting. When I became a citizen, I learned that
part of the process is an examination by an officer
of the Service into one’s political and personal back-
ground, covering, to this date, such subjects as com-
munism, adultery, and parking tickets. Traffic and
parking violations took up at least five minutes of
the interview. I trust you will be glad to learn that,
to the best of my knowledge, I am the first dean of
an American law school for whom the United
States Government has certified that he knows how
to read and write. To the dictation of the exam-
ining officer, I had to write the sentence: “I am
a professor of law at the University of Chicago.”
I also had to read aloud, from a catechism for cit-
zens, something to the effect that a good citizen
always puts the welfare of his country first. All of
that was easy. I encountered greater difficulties
when I was tested on my knowledge of American
constitutional law, my field of expertise. While I
got high marks for my response to the demand that
I enumerate the three branches of the federal gov-
ernment, the examiner and I did not quite agree
on the meaning of the due process clause of the
Fourteenth Amendment.

My first encounter with the United States in 1954
was bewildering, intriguing, and obviously suffi-
ciently fascinating to bring me back. If a sixteen-
year-old can survive living with six different host
families in the New York metropolitan area, from
Massapequa, Long Island, to the Bronx over a three-
month period, he can survive almost any cross-cul-
tural challenge. The first months of 1954, if you
recall, were the crucial period in the fall of Senator
Joe McCarthy. Watching the debate—indeed, being
made part of it by that very American notion of
hospitality which embraces the foreigner as a dis-
cussant—was a special kind of introduction to the
first and fifth amendments and the complex inter-
play of public opinion and political processes.

Nothing ever quite matched those three months
in my informal education, with the possible excep-
tion of a seven-week “legal” journey through the
South and West, which I undertook with a Scots
fellow student in 1962 after graduating from Yale.
For instance, we came to a motel at the outskirts of
Birmingham, Alabama, driving a friend’s old car
with a Connecticut license plate. The manager
treated us with formality and reserve. We had not
even reached our room when she came rushing
after us with a huge bowl of ice cubes. “Oh, I
apologize,” she said. “I just read your registration
card [on which we had innocently given our re-
spective home addresses in Europe]. I thought you
were Yankees, but now I see you are foreigners.
Welcome to Alabama. I hope you will have a won-
derful time.”

During that Southern trip, my friend, Ranald
McLean, and I earned our way—as I still do—with
after-dinner speeches. We got to a small town in
South Carolina. The president of the local Rotary
Club took us around town and pointed out which
was the white school and which was the black
school. At law school, we had, of course, studied
Brown v. Board of Education. Since this town had
made no attempt to desegregate its schools, we were
inclined to interpret the community’s attitude as a
violation of the Constitution. Our host told us that
Yale had failed to teach us the fundamentals of
Article III and federal jurisdiction. Supreme Court
decisions interpreting the Constitution, he said, had
no general effect or application. As long as there
was no specific court order to desegregate these
very schools, there was no legal obligation to do so.
As Cooper v. Aaron remains controversial to this
day, this was at least a debater’s point. For better
or for worse, our exchange also encapsuled a dif-
ference between European and American views of law
and modes of legal education.

The typical European law school curriculum
covers the most important areas of law from the
civil code to criminal law, administrative and con-
stitutional law. The predominant mode of instruc-
tion is the lecture method (you must keep in mind
that law schools have thousands of students and a
professorial staff not substantially larger than that
of an average American law school). The subject
matter is the positive law—conceptualized, system-
ized, occasionally even problematized, to be sure
—but the emphasis is on somewhat abstract infor-
mation about general rules and principles of law,
supplemented by practice exercises in their appli-
cation. Even those law professors who pride them-
sevesselves on being “progressive” find their progressive
solutions usually by vigorous, if not rigorous, de-
ductive reasoning. For instance, in postwar Ger-
many, law professors and courts have been busy
engaged in turning the constitution into a coherent
and comprehensive ideology which provides an-
swers for the most difficult social and political ques-
tions.

We in the United States, on the other hand, re-
main preoccupied with cases and court decisions.
This has led to a state of affairs where American
legal education has, for instance, substantially neglected the institutional arrangements of government, though uncertainties increasingly abound over the question of who governs in what respect and on the basis of what authority. Both the European and the American approaches may be wrong. While I have little patience for the European tendency to engage in excessively abstract and deductive reasoning, the exceedingly narrow-minded question—"But is there a court decision on the point?"—often leads American lawyers to ignore the systemic context and implications of legal institutions.

Unfortunately, the American lawyer's predilection for the specific has not protected us against highly speculative manipulation. In constitutional law, in particular, the combination of the case method with ad hoc ideological speculation has made us all but forget the admonition of Joseph Story, the two-hundredth anniversary of whose birth this year nobody seems to be celebrating: "Upon subjects of government it has always appeared to me that metaphysical refinements are out of place. A constitution of government is addressed to the common sense of the people; and never was designed for trials of logical skill, or visionary speculation." My colleague, Philip Kurland, may have had a point when he suggested the other day that we found "a Society for the Prevention of Cruelty to the 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."

In 1964, I returned to the United States, mostly because of my respect for American universities, which has since developed into an admiration, especially for the educational miracles performed by private universities with extremely scarce resources. Their autonomy is one of the most glorious aspects of America's contribution to higher education. To a very large extent, this autonomy has been made possible by the abiding devotion of outstanding lawyers such as your deceased President and our alumnus, Jerry Weiss, who applied his prodigious energies to the support of his alma mater. I am, nevertheless, worried about the future on two counts.

First, the cost of running great private law schools is growing faster than the income they can raise from traditional sources. My colleagues at Columbia, Harvard, Northwestern, Pennsylvania, Stanford, and Yale—to mention but a few—agree that this state of affairs has dangerous implications not just for the law schools but for the legal profession as well. Law schools serve the profession and the public not only through the education of future lawyers but also through the research and writing of faculty members who, in many instances, now find themselves with lower real incomes than they had ten years ago. More importantly, the level of law faculty salaries, by comparison with law practice, is extremely unfavorable to our ability to attract young teachers. In addition, we find it difficult to cope with extraordinary cost rises in such areas as library acquisitions. One of the unfortunate aspects of this situation, aggravated by some of the ideological trends I referred to earlier, is that law
schools may be losing their moorings in the profession. It has become apparent that substantially increased private support is essential if we are to continue to maintain institutions for high quality teaching and research.

Secondly, we are being regulated to death. Since becoming dean on January 1, 1979, I have been taken aback by the volume of regulations, proposed regulations, guidelines, and so on, issuing from the Section of Legal Education of the American Bar Association and similar bodies. The irony of these regulatory efforts is the fact that it is largely the private sector which does the regulating. Its volume does not lag behind governmental regulation. It is sad indeed that the American Bar Association, of all organizations, is beginning to pose a threat to academic freedom.

The ABA either tells us or would like to tell us how to govern our law schools, what students to admit, whom to give scholarships to, what to teach, how to teach, what resources we should allocate to our library, and so forth. The federal government concerns itself with whom we should hire as faculty. The Supreme Court of South Carolina recently attempted to prescribe the college curriculum to be followed by prospective lawyers including, among other things, courses in speech. When I was a child, I was told that the Prussian version of the story in Genesis about why Adam and Eve were driven out of Paradise was that the tree of knowledge from which Eve picked the apple stood in the center of a lawn which bore a sign "Do not walk on the lawn." This story can soon be told about the United States with equal justification. In the course of the academic year 1978-79, the Section of Legal Education and Admission to the Bar issued about sixty memoranda (that is better than one a week), often lengthy, to deans of ABA-approved law schools.

I should like to provide one example which is quite trivial on the one hand and pernicious on the other. The Section of Legal Education has recently proposed an amendment to accreditation standard 201 which would require us to engage in periodic "self-study." The fact that its parentage includes the U.S. Department of Health, Education, and Welfare and that a requirement of this nature is already part of the accreditation and reinspection processes offers little comfort. On the basis of my knowledge and experience, I think that I can safely assert that no country in Western Europe, where legal education is very tightly controlled by the state, would impose a requirement as intrusive of academic freedom and as wasteful as this one. Requirements of this type are open-ended invitations to indirect regulation.

The latter point is illustrated by Recommendation 13 in the recent report of the so-called Task Force on Lawyer Competency: The Role of the Law Schools, for which the Section of Legal Education is also responsible. Recommendation 13 proposes that the self-study requirement "should be expanded to include specific consideration of the responsibility of the school to ensure that its graduates meet adequate fundamental lawyer skills" which include "oral communication, interviewing, counseling, and negotiation." One is surprised not to find as part of the list the recommendation proposed by the most immediate past president of the ABA that law schools should "encourage the teaching of law office management skills." About this suggestion, Judge McGowan, in a talk at the University of Chicago Law School last year, commented, "Surely attendance at one law school faculty meeting, followed by a visit to a few law professors' offices should be enough to demonstrate that this is a hollow dream at best." If the American Bar Association continues to go down the road of forcing all of us into procrustean beds, I think it will become absolutely mandatory for the major law schools in this country to seriously consider making a concerted effort to change the regulatory system.

Increasingly, the organized bar seems to be asking the question: "What can we make law schools do to get us out of trouble with the Chief Justice, the President, and the public?" Obviously, the questions we ask determine the answers we get. I am reminded of one of my favorite stories, which I learned my first year of law school in Hamburg, when I availed myself of the opportunity to sit in on courses in other departments. One such course was in the Divinity School, and the instructor described a debate between a Jesuit and a Benedictine monk as to whether one is permitted to smoke while praying. The Jesuit thought it was permissible to smoke while praying. The Benedictine took the opposite position. They referred the matter to their respective superiors. When they got together again, each had been confirmed in his views. The Jesuit could not understand the stubbornness of the order of St. Benedict. What question did you ask, he interrogated his brother. "Are you permitted to smoke while praying?" "No wonder," the Jesuit responded. "I asked whether you may pray while smoking."

I sometimes wonder whether the greatest issues in American legal education today do not turn on the appropriateness of the questions we want the law and the law schools to answer.
To hear Earl B. Dickerson speak, one might be charmed into believing that his remarkable career was just a series of fortuitous coincidences. To follow his career, however, from the time of his graduation in 1920 as the first black to earn a J.D. degree from the University of Chicago Law School, soon leads one to the realization that he is an extraordinary man. A distinguished attorney, Mr. Dickerson was a former president of the Supreme Life Insurance Company of America; a founder of the American Legion; a former president of the National Lawyer's Guild, the National Bar Association, and the Chicago Urban League; civil rights activist; and Franklin D. Roosevelt's appointee to the first Fair Employment Practice Commission—to name but a few of his many accomplishments.

A conversation with Earl Dickerson, 88, is a history lesson told with wit and humor. Not only has he known such great public figures as Franklin Roosevelt, Martin Luther King, and Paul Robeson, but he fondly remembers former Law School professors, Ernst Freund, Harry Bigelow, Ernst Puttkammer, James Parker Hall, and Floyd Russell Mechem.

Dickerson has also participated in important historical events, particularly the civil rights movement. He says that he has always "quarreled with any vestige of inequality that makes distinctions on the basis of race," and he chose to fight through the courts and through organizations such as the National Lawyers Guild, the NAACP, and the Democratic party in Chicago politics. His most celebrated legal case, argued before the U.S. Supreme Court and won in November, 1940, was *Hansberry v. Lee*, *et al.* This landmark case broke down the use of racial restrictive covenants in the Hyde Park-Kenwood community of Chicago, opening up twenty-six city blocks for occupancy by blacks and other minorities.

During the Depression, Mr. Dickerson was instrumental in saving the Supreme Life Insurance Company of America, the second largest black-owned insurance company in this country, from financial ruin. Dickerson has stated that, "When most of the life insurance companies in the State of Illinois were going into insolvency and declared so by the Director of Insurance, I prepared [as General Counsel to the company] a policy lien for execution by policy holders of the company. By this means, we were able to raise more than one-half million dollars in company assets. This lien was tested in the Supreme Court of Illinois and found valid." The importance of this company to millions of people cannot be overstated, as blacks had been consistently denied insurance by white-owned companies.

A fighter, considered by some in the 1950's to be "subversive," Dickerson inherited this spirit from his family, who traditionally resented the indignity of racial discrimination. Born in Canton, Mississippi, in 1891, Dickerson left the South at the age of fifteen and came to Chicago via the Illinois Central Railroad. In Chicago, he was encouraged to attend the Evanston Academy, a former preparatory division of Northwestern University, and the University of Illinois.

Because blacks had not been allowed to practice law in the South when Dickerson was growing up, as a youth he never gave much thought to the legal profession. However, while in college, Dickerson was quick to see that through the law he might contribute to social change. Dickerson explained that he
was "never the guy to sit quietly while the [racial] battle was raging," and thus he applied for admittance to the Law School, which he entered in 1915.

Dickerson's legal education was interrupted by World War I, during which he served as one of the first black lieutenants in the U.S. Army. After serving for two years in the war, Dickerson returned to the Law School and graduated in 1920.

Dickerson has been quoted elsewhere as saying, "One of the greatest moments in my life was in 1914 at the University of Illinois. I was receiving my degree and I looked in the audience at my mother who had come up from Mississippi for the occasion. And she was there when I became the first black man to earn a doctor of jurisprudence degree from the University of Chicago. Each time I almost cried."

Dickerson has since gone on to earn an Honorary Doctor of Laws degree from Northwestern University and an Honorary Doctor of Humanities degree from Wilberforce University, as well as awards from the University of Chicago, the NAACP, the Black Illinois Legislative Lobby, the Abraham Lincoln Center in Chicago, and the Cook County Bar Association.

Now Honorary Chairman of the Supreme Life Insurance Company, Dickerson still manages to go to his office at least twice a week. His physical and mental vitality belie his advanced years, and one could easily spend hours listening to him tell of a career which has spanned 60 years. His stories are not only fascinating for their descriptions of places now buried under skyscrapers and people familiar to most of us only through history books, but they are also entertaining in their own right, reflecting Dickerson's appreciation of the full and active life he has had. He is too humble to take much credit for all he has accomplished during his lifetime, yet the facts speak for themselves. Clearly, he is one of the Law School's outstanding alumni, who throughout his long career, has fought against racial inequality. ■
New Appointments to Faculty and Staff

Mr. Douglas G. Baird has been appointed Assistant Professor of Law, beginning July 1, 1980. Mr. Baird is a 1979 graduate of Stanford Law School, where he served as Managing Editor of the Stanford Law Review. Upon graduation, he was elected to the Order of the Coif. Mr. Baird obtained his B.A. in English *summa cum laude* from Yale College in 1975. His teaching and research interests include commercial law and intellectual property. He is presently law clerk to Judge Dorothy Nelson, United States Court of Appeals for the Ninth Circuit.

Effective July first, Mr. Joseph Isenbergh begins his appointment as Assistant Professor at the Law School. A graduate of Columbia University and the Yale Law School, Mr. Isenbergh specializes in the area of tax law. Presently, he is a member of the Washington, D.C., law firm of Caplin & Drysdale.

Mr. Douglas Laycock has been promoted to Professor of Law with tenure in the Law School. Mr. Laycock is a 1973 graduate of the Law School and has been teaching at this school since September, 1976. His primary areas of interest are civil liberties, equity, and federalism.

Professor Henry Monaghan has been appointed the Harry Kalven, Jr., Visiting Professor of Law for the winter and spring quarters of 1981. At present, Mr. Monaghan is the Robert S. Stevens Professor of Law at Cornell University Law School. Among the courses Mr. Monaghan will teach at the Law School will be one on the First Amendment.

Ms. Sandra Slagter, who replaces Lee Cunningham (now Assistant Director of Admissions at the Business School), began her duties as Registrar on January 16. Before coming to the Law School, Ms. Slagter worked as a patient representative for Billings Hospital.

The Law School looks forward to the arrival of Ms. Judith Wright, whose appointment as Law Librarian and Lecturer in Law will be effective June 1, 1980. Ms. Wright obtained her B.S. degree at Memphis State University and her M.A. from the Graduate Library School at the University of Chicago; she holds a JD degree from DePaul University. From 1970–77, Ms. Wright served on the staff of the Law School Library, most recently in the capacity of Reference Librarian.

Faculty Notes

Ronald H. Coase, Clifton R. Musser Professor Emeritus of Economics, has been elected a Distinguished Fellow of the American Economics Asso-
ciation. Mr. Coase was one of two members of the Association thus honored in December, 1979.

Kenneth W. Dam, Harold J. and Marion F. Green Professor in International Legal Studies and former Director of the Law and Economics Program, will become Provost of the University beginning July 1, 1980. As Provost, Professor Dam will be the senior academic officer of the University, under the President, and will be responsible for overseeing and administering academic affairs.


Professor Edmund Kitch was appointed Director of the Law and Economics Program effective January 1, 1980. Mr. Kitch has been a member of the Law School faculty since 1965 and teaches courses in regulated industries, legal regulation of the competitive process, corporations, and securities.

Philip Kurland, Professor of Law and William R. Kenan, Jr., Distinguished Service Professor in the College, delivered a talk on "The Supreme Court and its Critics" to a standing-room only audience at the Law School's March Loop Luncheon for alumni.


During the fall and winter, Professor John Langbein presented papers on French constitutional criminal law at the annual meeting of the American Society for Comparative Law and on the history of the justices of the peace in England at the annual meeting of the American Historical Association.

In November, 1979, Norval Morris, Julius Kreeger Professor of Law and Criminology, was given the August Vollmer Award of the American Society of Criminology "for outstanding contributions to Criminal Justice."

Adolf Sprudzs, Foreign Law Librarian and Lecturer in Legal Bibliography, was awarded a research fellowship by the Max Planck Institute for Foreign and International Private Law in Hamburg, Germany, and spent the months of May,
Adolf Sprudzs, Foreign Law Librarian, June, and July, 1979, at the Institute as a Visiting Foreign Law Librarian.

He was invited to participate at the German Librarians' Congress in West Berlin in June, 1979, and gave a lecture on the American Association of Law Libraries at the annual meeting of the Arbeitsgemeinschaft für juristisches Bibliotheks- und Dokumentationswesen held during the Congress.

While on sabbatical from the Law School, Professor James White has been writing a book on rhetoric and culture for which he received a grant from the National Endowment for the Humanities (NEH). Based upon this work, Mr. White delivered a lecture at the University entitled "Thucydides: The History of a Culture of Argument," sponsored by the Division of Humanities last fall. During the summer of 1979, he directed a law teachers' seminar on argument and literature, which was held at the Law School under the auspices of the NEH.

Hans Zeisel, Professor Emeritus of Law and Sociology, has been elected a Fellow of the American Association for the Advancement of Science.

Clerks

For the first time ever, more than thirty Law School graduates have clerkships in the same year—thirty-one in 1979–80. The following is a list of those graduates and the judges for whom they are clerking:

United States Supreme Court

Maureen Mahoney (Justice William H. Rehnquist)
Michele Odorizzi (Justice John Paul Stevens)

United States Courts of Appeals

Robert Kopecky (Chief Judge Frank M. Coffin, 1st Cir.)
Lloyd Day (Chief Judge Irving R. Kaufman, 2d Cir.)
Frederick Sperling (Judge James Hunger, III, 3rd Cir.)
Thomas Bush (Chief Judge Collins J. Seitz, 3rd Cir.)
Susanna Sherry (Judge John C. Godbold, 5th Cir.)
David Frankford (Judge Irving L. Goldberg, 5th Cir.)
Jon Carlson (Judge Alvin B. Rubin, 5th Cir.)
Michele Smith (Judge William J. Bauer, 7th Cir.)
Robert Shapiro (Judge Walter Cummings, 7th Cir.)
Marilyn Lamar (Judge Richard D. Cudahy, 7th Cir.)
John Laser (Judge Luther M. Swygert, 7th Cir.)
Michael McConnell (Chief Judge J. Skelly Wright, D.C. Cir.)

United States District Courts

Carol Hayes (Judge B. Avant Edenfield, S.D. Ga.)
Dean Polales (Judge Nicholas J. Bua, N.D. Ill.)
Michael Brody (Judge Bernard M. Decker, N.D. Ill.)
Joseph Markowitz (Judge Bernard M. Decker, N.D. Ill.)
Robert Weissbourd (Judge George N. Leighton, N.D. Ill.)
Eric Yopes (Judge Phil M. McNagny, Jr., N.D. Ind.)
John Farrell (Judge S. Hugh Dillon, S.D., Ind.)
Alan Smith (Chief Judge Irving Hill, C.D. Cal.)
State Courts of Last Resort
Karen Herold (Judge Thomas E. Delahanty and
Judge David A. Nichols, Me.)
Joseph Lavela (Judge Charles Levin, Mich.)
Mary Probst (Judge George M. Scott, Minn.)
Rebecca Pallmeyer (unassigned, Minn.)
State Intermediate Courts
Timothy Huizenga (Judge Glenn K. Seidenfeld,
Ill. App.)
Robert Coyne (Judge Seymour Simon, Ill. App.)
Thomas Geselbracht (Judge Seymour Simon, Ill.
App.)
State Trial Courts
Marcus Chandler (Judge Ira A. Brown, Cal.
Super., San Francisco County)
John Memmite (Judge Ernest L. Alvino, N.J.
Super, Gloucester County)

Visiting Committee members. From left: Kenneth C. Prince
(JD’34, Chicago), Richard B. Berryman (JD’37, Washington,
D.C.), and Robert Karrer (MCL’66, Zurich, Switzerland)

Visiting Committee
On November 14 and 15, 1979, thirty-one members of the Law School’s Visiting Committee, the purpose of which is to acquaint members of the University’s Board of Trustees with designated operations of the University, met at the Law School. The chairman of this committee is James T. Rhind, a trustee of the University. The one and one-half day program included presentations by Dean Gerard Casper on the faculty, Assistant Dean Richard Badger on the students, Professor John Langbein on the library, Assistant Dean Holly Davis on funds, Associate Dean James Gibson on building and space, and representatives of various student organizations on activities.

After committee members met with students over lunch, they listened to a panel discussion on “How to Improve the Quality and Experience of Trial Lawyers.” The panelists were Jack Corinblit (J.D. ’49), Judge Barrington D. Parker (J.D. ’46), and Professor Spencer L. Kimball.

At a dinner held in honor of the Visiting Committee, Professor Philip B. Kurland delivered a talk on the Supreme Court.

Charles J. Merriam, 1903–1979
On November 4, 1979, Charles J. Merriam (JD ’25), one of the Law School’s distinguished and loyal alumni, died at the age of 76. Mr. Merriam practiced patent law for over 50 years and was formerly a senior partner in the Chicago law firm of Merriam, Marshall & Bicknell. He had also served as Director and President of the University of Illinois Foundation.

Last Spring, the Law School was particularly honored and pleased by Mr. and Mrs. Merriam’s generous endowment of the Charles J. Merriam Faculty Fund, created to support distinguished faculty of the Law School and visiting faculty. This quarter, Professor A. W. B. Simpson, occupant of a chair at the University of Kent at Canterbury, England, becomes the first Charles J. Merriam Scholar.

Blackstone’s Commentaries
The University of Chicago Press has recently issued a four-volume facsimile of the eighteenth-century first edition of William Blackstone’s Commentaries on the Laws of England. Blackstone’s classic and monumental work is further enhanced by introductions to each volume written by four contemporary legal scholars: Stanley Katz, Professor of the History of American Laws and Liberty at Princeton University and a former professor of law and history at the University of Chicago; A. W. Brian Simpson, Professor of Law at the University of Kent at Canterbury and Visiting Professor at the Law School, spring quarter; John Langbein, Professor of Law at the Law School; and Thomas Green, Professor of Law at the University of Michigan.

Zonis on Iran
Marvin Zonis, Associate Professor at the University of Chicago and former Director of the Center for
Middle Eastern Studies, discussed “Iran—The Islamic Revival and the Future of the United States in the Middle East” at the January Loop Luncheon for alumni of the Law School.

Professor Zonis is the author of *The Political Elite of Iran* and the co-author of *Analysis of United States-Iranian Co-operation in Higher Education* as well as numerous articles about Iran.
Publications of the Faculty, 1979-80

WALTER BLUM
The Tax Expenditure Approach Seen through Anthropological Eyes, 8 Tax Notes 699 (1979).

LEA BRILMAYER

DENNIS CARLTON
Planning and Market Structure in McCall (ed.): The Economics of Information and Uncertainty (University of Chicago Press, 1980).

GERHARD CASPER

DAVID P. CURRIE
Nondegradation and Visibility under the Clean Air Act, 68 Calif.L.Rev. 601 (1980).

KENNETH W. DAM

RICHARD A. EPSTEIN
Plaintiff's Conduct in Products Liability Actions: Comparative Negligence, Automatic Division, and Multiple Parties, 45 J.Air Com. 87 (1979).

GARETH JONES

SPENCER KIMBALL

EDMUND W. KITCH

PHILIP B. KURLAND

William M. Landes

John H. Langbein


Douglas Laycock
Catholic Schools and Teachers’ Unions, 140 America 406 (1979).

Bernard D. Meltzer

Norval Morris
Hans Mattick and the Death Penalty: Sentimental Notes on Two Topics, 10 U. Toledo L. Rev. 299 (Winter, 1979).

Richard A. Posner
Information and Antitrust: Reflections on the Gyp-


Utilitarianism, Economics, and Legal Theory, 8 J. LEGAL STUD. 103 (1979).


Retribution and Related Concepts of Punishment, 9 J.LEGAL STUD. 71 (1980).

A Theory of Primitive Society, with Special Reference to Law, 23 J.LECON. (forthcoming, April, 1980).

The Uncertain Protection of Privacy by the Supreme Court in Gerhard Casper and Philip B. Kurland (eds.): The Supreme Court Review: 1979 (University of Chicago Press, 1980).

ANTONIN SCALIA


The Disease as Cure: "In Order to Get beyond Racism We Must First Take Account of Race," 1979 WASH. U.LAW QUARTERLY 147.

With Murray L. Weidenbaum, eds.: REGULATION (bimonthly, American Enterprise Institute).

ADOLF SPRUDZS


GEOFFREY R. STONE


The FBI Charter, 26 L.SCH.REC. 3 (Spring, 1980).

Surveillance and Subversion, REV.SAM.HIST. (forthcoming, 1980).


JAMES B. WHITE


HANS ZEISEL


FRANKLIN E. ZIMRING


Remarks as Commentator, CURRENT DEVELOPMENTS IN JUDICIAL ADMINISTRATION, 80 F.R.D. 147, at 163 (1979).

Class Notes Section – REDACTED

for issues of privacy
The Law School is presently preparing a 1980 Alumni Directory and is in need of your assistance. If you know a current address for any of the alumni listed below, we would appreciate your informing the Editor as soon as possible. Thank you for your cooperation.

1915
Hirsch E. Soble
1916
Daniel S. Gishwiller
David J. Greenberg
1917
Elizabeth Perry
1918
Mary Wetsman Uhr
1919
Hsian Yuen Ho
Sylvia A. Miller
1920
Perry M. Chadwick
Louis Chiesa
Leonard H. Jones
1921
Simon H. Alster
Irwin M. Baker
Chester E. Cleveland, Jr.
Maurice Y. Cohen
Albert H. Gavit
1923
Louis Lasman
1924
Carl Olaf Baas, Sr.
Edward M. Keating
Marion T. Martin
Carl J. Meyer
Leo Rice
1925
Sibbing P. Au
Dale H. Flagg
Peter G. Gaudes
Sidney Rosenblum
1926
Wan H. Chiao
1927
Frederick A. Amos
Tsun Sin Su
Theodore J. Ticktin
1928
Jack H. Bender
Marcus W. Denny
Sander S. Kane
Martin Solomon
1929
Lester O. Blackman
Jack J. Franklin
David Freedkin
William Schull
1930
George H. Allison
Edward B. Meriwether
1931
Walter C. Hart
Louis F. Zubay
Jules M. Zwick
1932
Gordon M. Leonard
1933
Isaac I. Bender
Herman L. Fisher
William F. Zacharias
Bartel Zandstra
1934
Joseph M. Baron
1935
Glennie Gorton Baker
M. Daniel Frantz
Robert L. Oshins
Donald D. Rogers
Ralph L. Sherwin
1936
Joseph H. Buchanan
Maurice Chavin
1937
Alexis S. Basinski
Robert S. Leavitt
1938
Seymour Gorchoff
Phineas Indritz
Alexander A. Sutter
1939
Walter C. Shaw, Jr.
1942
John Norton Crane
Charles F. McCay
Leonard S. Roberts
M. Jackson Underwood
1948
William J. Ristau
Milton P. Webster
1950
Robert Lederman
1953
Dale W. Broeder
Elliott E. Stanford
1954
Sergio M. deSouza
Erroll E. Murphy
Paul N. Wenger
1955
Stanley A. Durka
Michael Para
1956
J. James Dines
Alfred J. Langmayer
Robert D. Ness
William R. Padgett
1957
Wilson R. Augustine
Harry J. Holmes
Carl F. Salans
1958
Frank H. Burke
Bernard Parkas
1959
LeRoy E. Endres
Ahmed Faraj Mohammed
Sandra O. Shuch
Thomas Trirschler
1960
Bruce L. Bromberg
Yiyun Shih
Maria A. Waters
1961
Hassan O. Ahmed
Ronald G. Carlson
Emil J. Venuti
Harry G. Wilkinson
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