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President Theodore Roosevelt at the laying of the Law School cornerstone, April 2, 1903
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80th ANNIVERSARY

This year the University of Chicago Law School celebrates its eightieth anniversary. The Spring issue of the Law School Record looks back, with seven articles about former faculty members from various periods of the Law School's history. It also looks forward, with an article by a young faculty member now at the Law School.

The eight scholars featured in the following pages are, of necessity, an arbitrary selection. They are, however, examples of the diversity and strength of the Law School during its first 80 years.
James Parker Hall
by Livingston Hall and James Parker Hall, Jr.

In October, 1904, two years after the Law School was founded, James Parker Hall, then 32 years old, became its dean. For the next 24 years he led the school along the path of greatness foreseen and prepared for by President William Rainey Harper.

This was no easy task. Himself a Harvard Law School graduate of the class of 1897, Dean Hall had to meld the Harvard tradition of excellence with the innovative ideas of Ernst Freund whom President Harper had eagerly adopted.

Where Harvard taught nothing but "pure law" in its law school, the Law School at Chicago was to integrate into its curriculum courses that Harvard believed belonged properly to the departments of political science and sociology. Upon recommendation of the first Curriculum Committee, composed of Dean Joseph H. Beale and the then Professors Hall and Whittier, at Chicago courses and seminars in administrative law, federal jurisdiction and practice, legislation, municipal corporations, legal ethics, and Roman and international law could be elected in the second and third years.

Another serious difference came from the fact that Harvard used only the "case method" established by Langdell and Ames, while Chicago was prepared to consider also using lectures and the textbook method.

Finally, the new Law School would run on the quarter system, would take students after three years of college and permit them to count the first year of law school as credit also for a college degree, would admit women, and would give a doctor's degree, the J.D., instead of Harvard's LL.B.

To accomplish this melding of the Chicago innovations with the Harvard standards of overall excellence, President Harper secured for Chicago a truly great faculty of predominantly full-time teachers. Dean Beale came for two years on loan from Harvard. James Parker Hall was brought into the fold from Stanford Law School, where he had been an associate professor for two years, along with Clarke B. Whittier. Julian W. Mack and Blewitt Lee, who came to Chicago from Northwestern Law School, both had substantial law practices and were allowed time for practice. Floyd R. Mechem came from Michigan in 1903. Ernst Freund was moved from the Department of Political Science at Chicago to its Law School.

When Dean Beale left Chicago to return to Harvard in 1904, Dean Hall and the five other teachers listed above faced the serious task of creating an organic whole out of the divergent elements bequeathed to them by President Harper's vision. During the first decade there were added to the faculty other men who were great in their fields. These included Harry A. Bigelow, Frederic Woodward, Judge Edward Hinton, and (briefly) Roscoe Pound.

As primus inter pares, Dean Hall served the new Law School well. Roscoe Pound said of him (3 J. Legal Educ. 529): "He devoted himself to building up a great law school, a school of the highest standards, vigorously maintained, and brought the institution to a leading place among American law schools. He was... a wise administrator... Withal, he was the most considerate of leaders, under whom and with whom it was a pleasure to teach."

But Dean Hall did more than administer. He taught many subjects, especially torts and constitutional law, which he taught for 25 years. His text on constitutional law, written in 1910, was used by the LaSalle Extension University, a correspondence school, until it closed its doors in 1980. His casebook on constitutional law, published in 1913, with a 1926 supplement, was for many years a leader in its field. As Pound wrote (supra), this casebook, "a model of analysis and comprehensiveness, which held ground for more than a generation, testified to what he might have done if he had not had the burden of administrative work to carry during all but four of his twenty-five years as a full time teacher of law." Thus he held his own with the other great men on his faculty, in his own fields of law.

Dean Hall early made his choice to teach law to young men and women. James Weber Linn, in his column "Round about Chicago," wrote of Dean Hall, soon after his death on March 13, 1928: "He gave up private practice, out of which he could have made a huge income, because he loved the law. Some years ago he declined the presidency of Cornell University [his alma
mater, from which he graduated in 1894] because he delighted in the teaching of law. And his attitude toward law was always the same. He believed it to be a recorder of comparative social values and the greatest force in the world for social reorganization.”

The broadening of the Chicago curriculum to include practical education, and to keep the Law School in touch with the bar, brought in a number of practicing lawyers as part-time teachers. Dean Hall recognized this need. In 1922, he was president of the Association of American Law Schools. The Association created a Committee on the Establishment of a Permanent Organization for the Improvement of the Law, of which he was a member. As a result of its report in June 1922, the American Law Institute was founded. At the Institute’s first meeting on February 23, 1923, he was elected a member of its Council, and served as such until his death in 1928. The Institute brought together for the first time lawyers, judges, and law teachers in a joint effort to improve the law.

Dean Hall’s heavy schedule of teaching, administration, writing, and Law Institute work, complicated by illness in his later years, did not exhaust his public service. In 1918-19, as a major in the Judge Advocate General’s Department, his knowledge of constitutional law was put at the disposal of the Army. He was for many years secretary of the Abraham Lincoln Social Settlement, where he was advisor and friend to its director, Dr. Jenkin Lloyd Jones.

A prodigious worker, Dean Hall taught almost every summer, reserving to himself and his family only the month of September each year. His room at home on East Fifty-eighth Street was filled with papers and books. On the many Saturdays when the Council of the American Law Institute met in New York, he would leave Chicago by train Friday afternoon. After the Saturday meeting, he would take the night train to western New York, to spend Sunday with his mother and sister in Jamestown, and return to Chicago on the Sunday night train. This rigorous schedule produced the ulcer which after surgery caused his death from a cardiac embolism.

This account of Dean Hall goes somewhat beyond the Law School’s first decade. It is fitting, however, to note that the innovative trends of the school’s early years were exemplified in the whole of Dean Hall’s life. President Harper and Professor Freund planned well. Dean Beale’s two years left a legacy of promise to Dean Hall, his successor. And well did Dean Hall administer the trust of a law school committed to the study of the “whole field of man as a social being.”

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Livingston Hall is the Roscoe Pound Professor of Law Emeritus at Harvard Law School. James Parker Hall is a financial consultant and former Treasurer of the University of Chicago. The authors gratefully acknowledge the excellent history of the founding of the Law School by former Assistant Dean Frank L. Ellsworth, Law on the Midway (University of Chicago Press, 1977); and the material in the Fall 1977 issue of the Law Alumni Journal.

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Harry A. Bigelow
by Sheldon Teft

Harry A. Bigelow was the youngest of that small group of young lawyers whom President William Rainey Harper brought to The University of Chicago early in the twentieth century to establish its law school. When Mr. Bigelow joined the faculty he was under 30 years of age and had been out of law school slightly more than four years. After a brief period as a clerk in a Boston conveyancing office and one semester as a part-time instructor in criminal law at the Harvard Law School, he had moved to Honolulu, where he spent three very active years as a junior member of the Bar of the Hawaiian Islands.

In January 1904, Acting Dean Joseph H. Beale, Jr., who was then on leave from Harvard to help President Harper organize the new law school in the West, persuaded Mr. Bigelow to abandon the practice and join the faculty at Chicago. There he spent the remainder of his life and for more than 40 years was an active member of the Law School faculty.

The combination of an extremely acute
Mr. Bigelow's nonprofessional interests included fields as diverse as art, motor cars and motoring, golf, primitive cultures, overseas travel, and the exploration of remote areas. In the 1950s with his Chicago friends Herbert and Mary Hastings Bradley, he organized two important overland expeditions to remote sections of the Belgian Congo which were then largely unexplored. He was a connoisseur of African and Japanese art; his collection of Japanese prints was especially noteworthy.
Ernst Freund

by Francis A. Allen

Ernst Freund is one of the great and distinctive figures in the history of American legal scholarship. The high regard of his contemporaries is perhaps sufficiently suggested by Mr. Justice Frankfurter's tribute: "I don't think I ever met anybody in the academic world who more justly merited the characterization of a scholar and a gentleman than did Ernst Freund." 2 A more particular recognition of Freund's unique contribution was expressed by an English legal periodical at the time of his death: "All [of Freund's] treatises have a very peculiar quality of their own, unlike anything else in the whole range of English and American legal literature. The author's Teutonic education produced an inexhaustible industry, a remarkable capacity for inventive classification, and a power of subtle and penetrating analysis." 2

Ernst Freund was born in New York on January 30, 1864, while his German parents were paying a brief visit to the United States. His early education was almost wholly German. He was a student at the Kreuzschule in Dresden and the Gymnasium at Frankfort am Main, and later attended the University of Berlin and the University of Heidelberg. He received the degree of J.U.D. from the last-named institution in 1884. Shortly thereafter Freund migrated to the United States, and practiced law in New York City from 1886 until 1894. He began his teaching career at Columbia College in 1892, when he joined the faculty as acting professor of administrative law. He was granted a Ph.D. in political science from Columbia in 1897.

In 1894, Freund began his thirty-eight years of association with the University of Chicago when he accepted an appointment to the political science faculty of the new university as instructor of Roman law and jurisprudence. He quickly gained an enviable reputation as a teacher and a scholar; and when, in 1902, the Law School of the University of Chicago was established, Freund was appointed to the original faculty as professor of law. Within two years Freund had published The Police Power, and in the three decades that followed he produced a steady stream of articles, books, teaching materials, and reports, including his best known writing: Cases on Administrative Law (1911, 2d ed., 1928), Standards of American Legislation (1917), Administrative Powers over Persons and Property (1928), and Legislative Regulation (1932). In 1929, he was appointed the first John P. Wilson Professor of Law.

The life of Ernst Freund spans the years between the Civil War and the New Deal. Throughout the Western world, the forces of change produced a new age of legislation. In the United States, the Interstate Commerce Act of 1890 and its subsequent amendments inaugurated an era of federal regulation and established many of the characteristic features of American administrative law. The Sherman Act was only the most conspicuous of the numerous legislative enactments directed against the trusts. Factory legislation, laws regulating the hours of labor and other aspects of the labor contract, workman's compensation, public utility regulation, and agitation for schemes of social insurance—all became prominent features of American life at or near the turn of the century. This remarkable outburst of legislative innovation brought with it judicial reaction and restraint. Cases like Lochner v. New York 3 and Ives v. So. Buffalo R. Co. 4 were among the most widely discussed public events of the day.

Throughout his professional life, Freund viewed these occurrences with interest and concern. He brought to his analysis an unmatched knowledge of comparable legislative developments in the industrialized societies of Western Europe. He was one of the first American scholars to give detailed attention to the problems of achieving efficient and effective government while preserving individual rights.

1 Frankfurter, Some Observations on Supreme Court Litigation and Legal Education I (The Ernst Freund Lecture, The Law School, University of Chicago, February 11, 1953).

2 Note, 49 Law Quarterly Review 177 (April, 1933).

3 198 U.S. 45 (1905).

4 201 N.Y. 271, 94 N.E. 431 (1911).
and volition in an age of widespread legislative regulation.

All Freund's major volumes are concerned with the new problems created by legislative law making. Indeed, they may be viewed collectively as a single work, since each of the volumes deals with particular aspects of the larger theme. The Police Power, published by Freund early in his career as a law professor, seeks to define the constitutional scope and limits of legislative powers of regulation. The first paragraph of his Preface exposes the fundamental tension between freedom and restraint inherent in all regulative endeavors. The "police power," he says, should be defined as the "power of promoting the public welfare by restraining and regulating the use of liberty and property." In Standards of American Legislation and Legislative Regulation, the latter published in the final years of his life, he turned directly to the problems of law making by legislatures and undertook to identify the basic principles of sound legislation and the distinctive techniques of statutory law. But an age of legislation is almost inevitably an age of administration, and Freund's pioneering works on American administrative law are a natural expression of his general concerns. Cases on Administrative Law, which for more than two decades dominated American law school instruction in the field, and Administrative Powers over Persons and Property, perhaps Freund's best known work, complete the list of his major productions.

Freund brought to his work a high intelligence and an erudition that have rarely been matched in the history of American legal scholarship. It was an erudition of many dimensions. First, it should be noted that Freund possessed unusual command of the various divisions of Anglo-American law and that his knowledge encompassed the law in its historical as well as in its modern manifestations. Freund's interests were by no means confined to the public-law subjects. He wrote and taught in the law of real property (including wills and future interests). His articles range over such diverse areas as domestic relations, corporations, torts, municipal corporations, criminal law, jurisprudence, and international law. Second, because of his German education and subsequent studies, Freund possessed a thorough grasp of Continental legal systems. It is accurate to regard Freund as one of the first and most important American comparative-law scholars. His administrative Powers over Persons and Property bears the subtitle A Comparative Survey; and readers of Standards of American Legislation will be impressed by his skillful use of German, French, and English legislative materials. Freund at no time made a fetish of the comparative technique, but employed it as a natural and necessary device for the comprehensive consideration of the subjects he treated.

Standards of American Legislation provides an admirable introduction to Freund's work and thought. Written originally as a series of lectures for delivery at Johns Hopkins University in 1915, it is the most graceful and engaging of Freund's books. It is perhaps just to say that the Standards deals with matters of "technical" interest, for it is concerned with problems of social technique. But the matters are not technical in any narrow or trivial sense of the term. Freund is concerned with the new problems of law making confronting the industrialized democracies of the Western world. These are the problems of effective implementation of legislative policy within a framework of values that accord high priority to individual rights and individual freedom.

No serious examination of American legislation can avoid discussion of the relations of legislative and judicial power. This was even more clearly true in Freund's day than it is in ours. It is significant that the opening paragraph of his Standards adverts to these problems. He does not hide his conviction that many of the then recent decisions invalidating legislative acts on constitutional grounds were mistaken. If Freund's position is not to be misapprehended, however, it should be clearly understood that although he believed that many judicial applications of constitutional standards were mistaken and much constitutional doctrine ill-conceived, he never challenged the legitimacy of judicial review or doubted its necessity in the American system.

Freund's comments on the relations of legislative and judicial power lead naturally to the primary theme of the Standards: the search for adequate principles to guide modern legislative law making. As has been observed, he regarded the judicial function as vital and could assert that "our main reliance for the perpetuation of ideals of individual liberty must be in the continued exercise of the judicial


prerogative.”” But equally important is Freund’s strongly expressed conviction that constitutional law is incapable of serving as an adequate source of legislative principles. This theme recurs throughout Freund’s major works. It seems not too much to say that one of his principal scholarly objectives was the freeing of American public law from what he conceived to be the crippling dominance of constitutional law.8 Freund identifies a number of considerations which, in his view, render constitutional law an insufficient guide for modern legislation. In one of his articles, he argues that the adversary process in constitutional litigation is incapable of unearthing the range of facts required for sound judgments on the wisdom of legislative measures.9 At other times, he emphasizes the inevitable vagueness of constitutional standards. Even when the legislation under attack suffers from serious deficiencies, judicial condemnations expressed in the language of due process or liberty of contract rarely expose the vice with necessary precision.10 Of perhaps particular relevance to the modern reader is his argument that because constitutional adjudication is primarily concerned with the limits of power, it provides poor guidance for the wise uses of conceded power. Reliance on constitutional standards may therefore result in lesser rather than greater protections of individual rights. “[T]he extreme of power tends to become the norm of legislation. For unfortunately the only utterances upon the constitutional justice of legislation that carry any authority are those from the courts; from this lawyers are likely to conclude that there are no non-judicial principles applicable to constitutional rights; and legislators (many of whom are lawyers) seem to believe that the principles enforced by the courts are the true and only principles of legislation.”11 On another occasion, he wrote: “[W]e have become so accustomed to rely upon written constitutions for legislative restraint, that we have lost to a considerable degree the habit of voluntary restraint which is politically so much more valuable.”12 We are in danger of “confusing what is sustainable with what is right.”13 These points have been made frequently since Freund wrote, and undoubtedly, had been expressed before; but they have rarely been made as effectively.

Ultimately, Freund concludes that valid principles of legislation can be discovered only by a study of legislation itself; and he visualizes a science of jurisprudence which would make the statutory law the object of intensive analysis and historical investigation. “It is indeed from the combined legislative, administrative, and judicial experiences that we gather the problems of legislation and their solution, but the solution does not proceed from or rest upon judicial authority, but must be worked out upon the basis of a discipline hardly recognized either in England or in this country—an independent science of jurisprudence.”14

Freund made no secret of his dissatisfaction with the state of legal scholarship in his time. In the Standards he remarks: “Unfortunately, hardly any systematic thought has been given to problems of jurisprudence in their constructive aspect. . . . In America the critical treatment of technical legislative problems is . . . meager and unsystematic.”15 It is apparent that the preoccupations of legal scholarship have substantially changed since Freund’s day and, from Freund’s point of view, for the better. It would not be accurate to suggest that Freund’s influence was primarily responsible for these changes. The logic of events made it inevitable that the law schools could not forever confine themselves to the elaboration and rationalization of common-law doctrine, important as that undertaking undoubtedly is. But Freund foresaw the path that much modern legal scholarship would be required to follow, and he is entitled to recognition for his vision and his constructive example.

2One manifestation of this position was Freund’s insistence that the study of administrative law requires a focus on the administrative process rather than on such constitutional problems as delegation and separation of powers. See Comment, “Ernst Freund—Pioneer of Administrative Law,” 29 U. Chi. L. Rev. 755 (1962).
4S.A.L. at 211-212, 220.
5Id. at 284-285.
6Id. at 78.
7S.A.L. at 214.
8Id. at 251-252.
burden of editing, introducing, annotating, and, jointly with his distinguished Chicago colleague Edward Shils, translating Weber were typical of Max. So was the splendor of the accomplishment.

In order to make the text fully intelligible and useful, Max wrote, it had to be commented upon. "As the readers will observe, the range of Weber's knowledge was phenomenal. . . . Weber draws upon Hindu, Chinese, Islamic or primitive Polynesian law just as well as on the legal systems of Rome, England, medieval Europe, or modern Germany, America, or France. In many, if not in most cases, he hints at the phenomena referred to rather than explain them." It was Max who did the explaining for us. Who else could have? The range of Max's knowledge was equally phenomenal. And it was available to his colleagues and students, without the slightest diminution, until his death at age seventy-nine.

In the preface to Max Weber on Law in Economy and Society, Max also queried how the reader can know whether Weber is correct in all those statements which he uses as the basis of his generalizations and conclusions. "They had to be checked and their sources had to be found. . . . Not even Max Weber could be expected to be infallible, but the number of serious mistakes turned out to be unbelievably small." Max checked Weber. But even Max Rheinstein cannot be expected to be infallible. Who will check Max's sources? Only Max could.

The Max Rheinstein bibliography includes some 350 titles covering his major substantive fields—family law, decedents' estates, and the conflicts of laws—as well as comparative law and legal theory. The bibliography attests not only to the universality of his knowledge and learning about substantive law, but also to his empiricist attitude towards legal scholarship. The latter is perhaps best expressed in his book Marriage Stability, Divorce and the Law (1972). The work is concerned with how divorce law works, or rather does not work, in industrial societies of the twentieth century. The data are drawn from various countries and include almost everything of empirical importance, from legislation and statistics to complex cultural data not amenable to quantitative analysis.

In the world of the American law school which precariously pursues both "is" and "ought," Max was committed to being, in Weber's words, a teacher, not a leader. At what happened to universities the world over in the wake of the sixties, he looked with bemusement. Teaching did not, for Max, include politics. And a splendid teacher Max was, as can be measured by the admiration, friendship, and warmth.

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Max Rheinstein
by Gerhard Casper

Chapter Seven of Max Weber's Economy and Society is entitled "Sociology of Law." Its data are taken from almost anywhere and any age. Its range is formidable, its German impenetrable at times even for the German reader. My first attempt to work through it was made in a deck chair on a boat from Bremerhaven to New York. I struggled for eight days, but, on arrival in New York, had to admit defeat. A few weeks later, however, while a student at Yale, I discovered the key to Finnegans Wake—an annotated American edition of Weber's writings on the sociology of law. In its preface the editor stated his hope to have produced an English text "which is not only accurate but also more readable than the German original." This was obviously the book I needed. It was also my first encounter with Max Rheinstein.

In the preface, Max identified himself as having had "the privilege of attending classes of Max Weber's at the University of Munich." When he undertook Max Weber on Law in Economy and Society, Max Rheinstein was in his fifties, a scholar of world renown. The commitment to scholarship, and the generosity and loyalty expressed in his shouldering the
which the generations of his former students express. Max was not only an important mediator for the many foreign students at the University of Chicago Law School, but he also transformed the teaching of foreign law to American students into a disciplined enterprise of high quality and seriousness. This was accomplished in the specialized courses of the Foreign Law Program as well as by the comparative perspective he provided in such “regular” courses as Conflicts.

One of the qualities which endeared Max to students and colleagues was his intellectual curiosity. Conversations with Max were never one-way. Max’s eagerness to learn from the student usually surpassed the student’s eagerness to learn from Max. His attitude was one of live and let live. He was friendly to the extent of being most reluctant to say anything critical of personal acquaintances. As Andreas Heldrich, of the University of Munich, recently wrote, “When he did express some cautious skepticism concerning a colleague, we knew that that unfortunate fellow had no redeeming feature whatsoever.”

Max’s scholarly curiosity and appetite for life, shared, supported, and gently watched over by Lilly Rheinstein, brought him to travel all over the world. Once asked by Ken Dam what he would have done had he not become a professor, he said: “Oh, I would have been a travel agent.” Max filled the somewhat empty and sterile notion of a world citizen with color and richness. He could do so easily, because he had the one quality which I suspect is indispensable for bridging cultures: Max was a patriot, or to use a German expression, “ein Lokalpatriot.” The two places where Max had his moorings were Munich, his home town, and Chicago, the city which had become his refuge from the Nazis. Most of his adult years were spent at the University of Chicago. In the best of its traditions, he was a member of the university community, not just the Law School. Merely by discovering every cultural event in town and not permitting it to take place without their participation, Max and Lilly contributed to making Chicago one of the great cultural centers of the world.

To Munich the Rheinsteins returned every summer—the “Royal Bavarian Capital” where he grew up during the last decades of 750 years of Wittelsbach rule. Looking back in a vignette entitled Royal Bavarian, Max wrote about his years spent in “Royal Bavarian” schools: “Judging from what life required in later years of change, uncertainty, demands and troubles, that schooling cannot have been bad. . . . [W]e learned to think, logically, autonomously and critically. We became conscious of the Great Tradition, acquired a sense of history and with that, perhaps a degree of conservatism, but conservatism of the liberal, Royal Bavarian kind. . . .” In part, Max’s humanism, zest for life, and his openness to the world reflected the vitality of his home town at the beginning of the century.

Weber’s “Science as a Vocation” concludes with two famous sentences: “We shall set to work and meet the ‘demands of the day,’ as men as well as professionally. This, however, is plain and simple, if each finds and obeys the daimon who holds the fibers of his life.” Max met the demands and found his daimon.

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Karl N. Llewellyn

by Allison Dunham

I first encountered Karl Llewellyn when I was a first-year student at Columbia Law School in 1936. In his contracts class I “volunteered” the opinion, contrary to what I thought was his, that when a farmer replied to a telephonic price quotation given by a produce house with the statement “I will bring the produce in today,” he did not intend to commit himself to sell to that produce house when he arrived in town. This opinion was based on my employment experience in a farm produce house in South Dakota and was contrary to some of the
doctrinal notes in the offer and acceptance section of our first-year course book in contracts. This was my first participation in class discussion and my first significant confrontation with one of the leading exponents of legal realism.

Almost my last recollection of Llewellyn is his written reaction and comment on a fictitious examination paper I slipped into the collection of examination papers from his course in legal reasoning: “He knows his Llewellyn but has not read the materials.”

The first incident described above made a lasting impact on me in seeking the legal significance of almost any commercial practice. I am told that the incident was probably one reason why Llewellyn selected me to be the reporter for what became Article 9 of the Uniform Commercial Code (UCC) on Secured Transactions, reporter alone for a few months while I completed my teaching at Indiana University Law School and then reporter with the late Grant Gilmore, the co-creator of Article 9 of UCC, while I was at Columbia and Grant was at Yale.

The result described in the last incident was obvious, since by that time I had been exposed to Llewellyn as a student at Columbia Law School, as a member of the board of the Columbia Law Review, as a co-reporter for committees of the National Conference of Uniform State Laws and the American Law Institute, and as a colleague first at Columbia Law School and then at Chicago, a span of almost 20 years interrupted only by World War II. He was one of my mentors. Except for The Bramble Bush, I have not read any of his jurisprudential writings. Somehow my preoccupation with land law in the area of public law meant that after Article 9 was completed we went our separate ways. But even after a hiatus, many episodes from my return to commercial law indicate the impact he had on my legal behavior.

Shortly after Llewellyn’s death, some members of the University of Chicago Law School faculty attended a conference at the University of Stockholm involving the exportability of the UCC. The other participants were legal scholars from the six or seven Scandinavian universities. As we were taken into the city and then out again to Vällingsby where the conference was to be held, it was quite clear from the glaring billboards and from the department store windows that Swedish “consumption” of consumer durable goods and other consumer goods was at a high level, and without being able to read Swedish I knew from my knowledge of business practices in the United States that the law of consumer credit “must be” sophisticated and advanced.

Imagine my surprise, then, when we were told by our Swedish academic colleagues that the only way Swedish retailers could obtain working capital was by placing second, third, and even sixth mortgages on their store buildings. This was because, we were told, the theory of property law did not permit separation of ownership of moveable property from possession. The Llewellyn-trained academics knew this was not so; secured credit in inventory or accounts receivable or both had to be permitted if the visible signs of high-level consumption had any meaning.

Fortunately for us, a major Swedish Bank with a large international department was host to the visitors at a formal dinner in the banking facility. After dinner it suddenly occurred to me that my colleagues from the University of Chicago had at the time I observed so monopolized our hosts that each of us had cornered a representative of the bank and engaged him in earnest conversation.

The next morning, when we assembled for breakfast, we looked at each other and almost simultaneously said “they can,” meaning that in practice what was being done was to recognize security interests in moveables and intangibles even though legal theory about possession and dominium dictated the opposite. I think Llewellyn would have been proud of our skill in reasoning from observable facts to probable cause of the legal result. When anthropologists doubt the validity of The Cheyenne Way as a description of Indian law, I doubt the doubters because I know of his amazing ability to sense the essence of a situation from a few almost random instances. He was right more often than he was wrong.

My return to commercial law after an absence of almost 30 years makes me again aware of his influence on me, this time in narrow-issue thinking and, I hope, in imaginative use of precedents. Although my present colleagues assert that contractual rules about privity of contract deny the possibility of any third party being entitled to enforce a contract to which he is not a party, I do not believe this is so, and I ask them about the precedent-making significance of a long list of statutes enabling third parties to enforce contracts between others. As a student of Llewellyn, I smile (since I am a guest) at the explanation given: statute law is not part of the common law, and the
practices there disclosed are apparently aberrations, even though I have yet to discover a significant commonly occurring situation of fact in which the so-called privity rule prevents enforcement by a stranger to the contract. *Agar v. Orda*, 264 N.Y. 248, 190 N.E. 479 (1934), which he hammered into us as the "right" approach in sales law, if followed, would significantly reduce the need for statutes. I wonder whether Llewellyn would surrender in 1983 to the demand for a specific statute to solve every particular problem that the common law had not solved but could solve?

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**Brainerd Currie**

by Herma Hill Kay

The task given to the authors of these tributes to great Chicago law professors—that of capturing the essence of a scholarly career in 2,000 words—is a challenging one. In Brainerd Currie's case, it is not made less difficult by the relative brevity of his career. In contrast to Judith Wax's description of her long-postponed work as a writer, entitled *Starting in the Middle*, Brainerd Currie's work as a scholar ended in the middle, cut short by his untimely death at the age of 53. Yet such was the measure of his creative intellect that in the 30 short years between his first law teaching job at Mercer in 1935 and his death in 1965 while holding the William R. Perkins Professorship at Duke, Brainerd Currie had changed the direction of the law in one field—conflict of laws;² had left his mark on significant developments in two others—civil procedure³ and admiralty⁴—and had documented the early efforts to recognize another—legal education⁵—along more functional lines. Under these circumstances, selection is necessary. I have chosen to give prominence to Currie's work in the conflict of laws, both because I think that his contributions there are fundamental ones with enduring impact, and because most of this work was done during the eight years (1953-61) that he spent at Chicago.

Currie announced his governmental interest analysis for choice-of-law problems in 1958.⁶ Conceived during what must have been an extraordinary period of scholarly productivity that commenced with his year of fellowship at the Center for Advanced Study in the Behavioral Sciences at Palo Alto in 1957, the theory appeared in four major articles⁷ published in 1958, followed by three⁸ in 1959, four more (three with co-authors⁹) in 1960, two (including

²Currie's major writings in the conflicts field are collected in his Selected Essays on the Conflict of Laws (1963).


⁵E.g., Currie, The Materials of Law Study, 3 J. Leg. Ed. 331 (1951); 8 id. 1 (1955).

⁶The following account of Currie's work is drawn from Kay, Theory into Practice: Choice of Law in the Courts, 34 Mercer L. Rev. 521, 538-40 (1983). It is used here with the permission of the Mercer Law Review.


a reply to an earlier critic)\textsuperscript{10} in 1961, three (including a brief comment in a symposium discussing a leading case decided by the New York Court of Appeals)\textsuperscript{11} in 1963, and a final piece on the Full Faith and Credit Clause in 1964.\textsuperscript{12}

Currie developed his governmental interest analysis as a critical denunciation of the traditional choice-of-law rules based on Professor Joseph Beale's vested rights theory\textsuperscript{13} and embodied in the 1934 Restatement of Conflict of Laws. Currie's major insight was that these rules "create problems that did not exist before,"\textsuperscript{14} and that they solve the false problems in irrational ways, by nullifying capriciously the interest of one state or another whose laws were said to be in conflict without analysis of their underlying policies. He therefore suggested that choice-of-law rules be abandoned,\textsuperscript{15} and he vigorously opposed the ongoing effort of the American Law Institute to produce a new set of such rules in Restatement Second.\textsuperscript{16}

Currie's ultimate hope was that congressional legislation might provide a solution for truly conflicting state interests. But, in the meantime, he offered a method for courts faced with the need to decide conflicts cases that would eliminate the false conflicts by applying the law of the only interested state, while permitting differing outcomes in true conflicts cases depending on where the suit was brought. His initial suggestion was that a forum, faced with a choice-of-law problem, should investigate the foreign law only when asked to do so by the parties, and should apply that law only in cases where the forum had no interest in applying its own law\textsuperscript{17}—the "false conflict" case where only one state had an interest in furthering the policy embodied in its local law. This method was subsequently modified to take account of cases where the ostensibly conflicting interests of two or more states created an apparent true conflict: in such cases, he suggested, a "more moderate and restrained interpretation both of the policy and of the circumstances in which it must be applied to effectuate the forum's legitimate purpose"\textsuperscript{18} might avoid the conflict. If the conflict of policy and interest persisted, however, the forum was faced with a "true conflict" case and it should choose its own law in order to advance its state's interest.\textsuperscript{19}

It is not an exaggeration to say that no development of significance that has occurred in choice-of-law theory in the United States in the 25 years since Currie announced his governmental interest analysis has failed to take account of his views. To be sure, the scholarly verdict has not been a harmonious one: while some writers have taken Currie's analysis as the starting point for their own work,\textsuperscript{20} others have rejected it as a false guide to solutions they view as unduly narrow.\textsuperscript{21} As I have demonstrated elsewhere,\textsuperscript{22} only the courts of two states—California and New Jersey—continue to proclaim their adherence to his method in the decision of actual cases (even while, in California's case, rejecting his suggested solution to true conflict cases). But Currie's distinction


\textsuperscript{12}Currie, Full Faith and Credit, Chiefly to Judgments: A Role for Congress, 1964 Sup. Ct. Rev. 89.

\textsuperscript{13}J. Beale, Treatise on the Conflict of Laws (1935).

\textsuperscript{14}Currie, Notes on Methods and Objectives, supra note 8, at 174.

\textsuperscript{15}Id. at 177.

\textsuperscript{16}Currie, Comments on Babcock, supra note 11, at 1234-39.

\textsuperscript{17}Currie, Notes on Methods and Objectives, supra note 8, at 177.


\textsuperscript{20}Kay, supra note 6, at 540-52.
between true and false conflict cases has become so widely accepted by judges that it has found its way into courtroom applications of all the modern approaches to choice of law. Similarly, his emphasis on ascertaining the policy underlying the laws said to be in conflict is a cornerstone of modern theory and a key factor in distinguishing modern approaches from traditional jurisdiction-selecting approaches to the choice-of-law problem.

Whatever other reasons may explain the enduring quality of Currie's ideas—the force of his criticism, the keenness of his insights, and the logic of his analysis are among those that come to mind—surely one important factor is the freshness and simplicity of his writing style. A few examples may be in order. The opening sentence of his paper on legal education prepared for a 1956 Symposium on Law and the Future immediately grasped the reader's attention: "No man ever leaped clear-eyed from his bed, crying 'Go to! I will write a paper on the future of legal education,' and proceeded to do so forthwith." And here is how he persuasively demonstrated the lack of point in the traditional conflicts rule that the law of the place where a contract is made determines its validity:

I suppose a case can be stated in which there is no conceivable doubt as to where the contract is made and to be performed. The parties meet in person, accompanied by their counsel, in the center of a stadium. The document is read aloud. With solemn, ceremonial flourish the document is signed, sealed, witnessed, and delivered. The parties shake hands. The document provides that when payment—the only performance called for—is due, the parties will meet again in the same place to make and receive it. To devise a rule which would admit the statement that the contract was made in any other place would challenge the ingenuity of a Lewis Carroll. If the scene is enacted in Massachusetts, the immanent law of that state, which droppeth as the gentle rain from heaven, pervades the contract, rendering it, if it is the promise of a married woman to answer for the debts of her husband, wet and void. If then, as persons seeking shelter from the rain, the parties move their solemn charade across a state line, and act out their parts in a congenially dry climate, what possible difference can that make in terms of anything that Massachusetts or any other interested state may be trying to accomplish through its laws? We may invent doctrines of local public policy and fraud on the law, and resort to other devices to contain the absurdities spawned by sanctification of the place of making; but, as we shall see, they have not been effectively contained. Why not face the fact that the place of making is quite irrelevant, why not summon public policy from the reserves and place it in the front line where it belongs?

The gift of expressing complex ideas in lucid terms is a rare one indeed. When a slightly self-deprecating sense of humor is allowed to enhance the text, the resulting effect is charming—and convincing.

How are a scholar's contributions to the growth of the law ultimately to be measured? In Brainerd Currie's case, the significance of his impact on choice-of-law theory was acknowledged during his lifetime by the award of the first Colf Triennial Book Award for outstanding legal scholarship. Presenting the award to Currie for his Selected Essays on the Conflict of Laws in 1965, Professor John Dawson commented that "[h]is central ideas are not accepted by all conflicts lawyers but it seems clear enough that after Brainerd Currie that dark science called the conflict of laws can never be the same again." Dawson's prediction was an apt one. The enduring influence of Currie's work is acknowledged today by the continuing debate he began in choice of law, as a new generation of scholars seeks to probe and refine his ideas, incorporating or rejecting them in their own work. There can be no finer tribute to a great scholar than the continued power of his ideas to provoke thought.

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24Currie, Married Women's Contracts, supra note 7, at 236.
Harry Kalven, Jr.

by Hans Zeisel

... he is to be remembered, too, as a legal scholar playing a gallant role as public citizen. Harry Kalven on Ernst Freund (40 U. Chi. L. Rev. 235 [1973])

Harry Kalven will be remembered for three major achievements. He was a distinguished teacher and author in the field of torts; he was among the pioneers who integrated social science into the law; and he was a leading scholar on the law of the First Amendment, the topic that was closest to his heart.

It was only toward the end of his career that he was able to concentrate his energies on the First Amendment. A few years before his death—in the aftermath of a heart attack—he dropped most other activities and devoted himself with great energy and excitement to his magnum opus, an ambitious intellectual history of the First Amendment tradition. The course he taught on the First Amendment during these years was so popular with the students that it had to be moved to the auditorium, an event without parallel in the school’s history.

Although his reputation as a First Amendment scholar rests primarily on his writings about the decisions of the Warren Court, Kalven’s views on freedom of speech were in many ways shaped earlier—by his experiences in the 1950s, the time when I first came to know him. During those dark years for free speech he wrote a number of essays in response to various loyalty and security issues of the day. In the main, these pieces appeared not in law journals but in general magazines, most often in the Bulletin of the Atomic Scientists.

Taken together, they represent an important chapter in his development as a First Amendment thinker and provide a vivid glimpse of this “legal scholar playing a gallant role as public citizen.” I can think of no better way to convey some sense of the flavor of this man—his brilliance, his wit, his sense of justice—than to taste once again these spirited essays.

Taking the Fifth

In 1953 the Bulletin invited Kalven to debate with Professor Bernard Meltzer the merits of avoiding testimony before legislative committees by claiming the Fifth Amendment right against self-incrimination.¹

The debate was triggered by a pronouncement of the Association of American Universities that “[r]efusal [to testify], on whatever legal grounds, cannot fail to reflect upon a profession that claims for itself the fullest freedom to speak...” Harvard had added its own voice: “The use of the Fifth Amendment is in our view entirely inconsistent with the candor to be expected of one devoted to the pursuit of truth.”

Professor Meltzer argues both the immorality and the futility of claiming the Fifth Amendment unless it is truly invoked to protect against self-incrimination. Kalven, although not “in direct disagreement with much Mr. Meltzer has said,” does not approve of the universities’ position. He argues that, given the gross impropriety of the investigating methods, claiming the Fifth Amendment as a formal defense is not necessarily improper and no stigma should be attached to its invocation. In response to the Harvard statement that “we will not shut our eyes to the inference of guilt which the use of the Fifth Amendment creates as a matter of common sense,” Kalven drily remarks: “It would be enlightening to learn from the Harvard Corporation just what in its view is the function of this part of the Fifth Amendment in our legal system.” He continues: “I endorse fully of course the point that a faculty member must be willing to defend his convictions at any time in the appropriate forum; but the statement seems to me to commit a serious and dangerous error. The refusal to cooperate with public authority when the result of an honest belief that the authority is acting illegally is not a lack of candor.” “Where the question is incriminating on its face” he insists, “I do not read the law as

requiring anything further to support the refusal to answer." He adds: "It is possible that the view here suggested on behalf of the privilege comes too late in the day. But if so, this is an occasion for regret. This is not a particularly happy year in which to have become hyper-critical of a part of the Bill of Rights." Years later, in 1957, he acknowledged that he might indeed have come too late: "[T]he claim of the privilege has been widely interpreted as raising a serious suspicion about the witness. . . . The privilege has thus proved to be almost completely self-defeating. . . . The paradox of the privilege has become so complete that the main fact-finding achievement of the committees investigating subversion has been the locating of people who claim the privilege of not answering their questions."

Oppenheimer Is Denied Security Clearance

Next came "The Case of J. Robert Oppenheimer"—Kalven's analysis of the Atomic Energy Commission's denial of security clearance to the distinguished scientific director of the Manhattan Project. Again it was the Bulletin that invited Kalven's comment.3

I well remember how he went about this task. For several days from early morning until late at night he hardly left his study, reading, making notes, and finally, as he did so often, typing the 15,000 word piece in one uninterrupted sweep.

Kalven begins with a summary of the case against Oppenheimer: his close association with the Communist movement prior to 1942, when he entered government service; the 1943 "Chevalier incident," when his friend Chevalier told him that one Eltenton had asked him about the possibility of Oppenheimer sharing information with the Russians. Oppenheimer had reported Eltenton immediately to the FBI but had delayed naming Chevalier, whom—as it turned out correctly—he believed innocent. In the hearing before the Commission, moreover, Oppenheimer admitted having lied originally to the FBI about details of his contacts with Chevalier.

"With this much firmly in the record," Kalven asks, "what can the fuss be about? Can it be anything more than a close case which you or I might have decided differently?" He then begins his analysis by making three general points:

This prima facie case . . . dissolves quickly upon further acquaintance with the facts. First, the early Communist ties are understandable in the context of Oppenheimer's life history. . . . Once he started war work his interests and associations changed radically and permanently. In brief, he appears to have been intellectually attracted to communism for a short intense period and then simply to have outgrown it. Second, he is of course Robert Oppenheimer and not John Doe; and has in the past twelve years achieved a record of absolute top-level performance on behalf of government characterized by great dedication. Third, the early ties were never denied by Oppenheimer and have been fully known for at least ten years to the government, which has so earnestly sought his services.

Even General Groves, the head of the Manhattan Project, had regarded the Chevalier incident "as a display of the schoolboy attitude of protecting a friend." In Kalven's view, Oppenheimer's lying about Chevalier is "a serious error of judgment in security matters" and the only important item in the record that weighs against him. But since the episode is 14 years old and has been superseded by a decade of faithful, important service, Kalven considers it improper to allow it to seriously impeach Oppenheimer's character. The lie about Chevalier, Kalven concludes, "whatever it shows, does not show that Oppenheimer is a liar."

He then takes on the chief legal difficulty of the case, namely, that the commissioners had merely exercised their broad, undefined discretionary rights. He notes that "[i]t is in the nature of a security risk judgment with which one disagrees that one can never tell whether it is the standard or the application that is at fault." And he continues:

If the standard is . . . a prudential weighing of evidence to determine future risk to classified information . . . , I find the Commission opinions making a great error in the application of their standard. If the standard has become more stringent so that it was well applied here, one can only tremble at how that standard would read if articulated. . . . Dr. Oppenheimer is less a security risk today by any standard than he was when he was cleared by the Commission.

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1A View from the Law—Playwright Arthur Miller on Trial, New Republic, May 27, 1957.
in 1947. This may not be a legal defect in the case but it is assuredly a moral defect that cannot be ignored. And the point bites deeper, when it is remembered that Dr. Oppenheimer was insistently sought by the government since that time. It was ignoble of the government to reopen the case with no more new data to go on than it had, and it was twice ignoble to reach an adverse decision on such stale matters.

I cannot get over a sense of incredulity as I read the majority opinion. . . . It would be disturbing indeed if judgments like this were exercised in the simple matter of whether a man should be hired or not. It becomes intolerable to have them made a serious part of something so substantial as a security hearing where career and reputation are crucially at stake. The majority must have known that this was not some sort of game of logic they were playing. Nor were they charged with the responsibility of evaluating a candidate for sainthood. They were involved in the serious human business of deciding whether a distinguished scientist was by government action to be publicly stamped as unreliable and set apart from his fellow scientists and other men.

He closes the piece with these words: "It is the security system and not Dr. Oppenheimer that, in the end, has lost its case."

**Kalven Is a Witness**

A short while later, in 1955, Kalven’s piece on Oppenheimer became itself part of an investigative record, when its author was called to testify before the formidably titled Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee of the Judiciary of the U.S. Senate. The occasion: at the initial suggestion of a committee of the Kansas Bar Association, and by arrangement with the Tenth Federal Judicial Circuit, the Jury Project had recorded, with consent of counsel and with the consent and control of the federal district judge, jury deliberations in five civil cases. More than a year after these tapes, with an introduction by the chief judge of the circuit, had been played in a masked form to a select group of lawyers and judges at the annual conference of the Tenth Circuit, the *Los Angeles Examiner* burst into a banner headline announcing that the University of Chicago Law School bugs juries.

The Committee seemed anxious to show that the research effort, which resulted in two major publications, standard works in their respective fields: *The American Jury and Delay in the Court*, was a Communist-inspired plot to subvert the American jury system. Both Levi, then dean of the Law School, and Kalven, who had become director of the project, defended the research episode, firmly insisting that it in no way impeded the judicial process, that only the untoward publicity accorded to the event could possibly cause damage.

Queried extensively about his Oppenheimer piece, Kalven quietly reaffirmed: "That was my opinion at the time. It is my opinion now."

He was also questioned about another "security matter," a letter in which he had asked President Truman to commute the death sentence of the Rosenbergs. When asked his view of the case, he responded that he found it puzzling on the evidence, not perhaps so puzzling as to warrant a different verdict, but sufficiently puzzling to warrant waiving the death sentence.

**The Case of Linus Pauling**

Most of the questioning in the jury hearing was done by the Committee’s counsel, Mr. Sourwine.

When Kalven next writes about the Internal Security Committee—the occasion is the investigation of Linus Pauling—he puts the Committee counsel into the title of the piece: "Sourwine in an Old Bottle." He also treats him to an epigraph from the annual lampoon skit he had written that year, as so many years before, with his colleague John Hutchens for the amusement of the Chicago faculty. It is one of Kalven’s many baseball stories:

**COMMITTEE COUNSEL:** Evidence before this committee shows that you gentlemen are members of an organization known as the Red Schoendienst Fan Club.

**WITNESSES:** Yeah Red.

**SENATOR:** At last we are getting somewhere. (To director of research) Do

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you have a citation there on Red Schoendienst?

DIRECTOR OF RESEARCH: (leafing through a large book) Lefty Gomez, Lefty O'Doul, Red Grange, Red Rolfe, Red Ruffing, yes, here it is, Red Schoendienst. On October 1, 1953, the Daily Worker carried the following item: "Red Schoendienst is currently batting 335!"

The facts of the Pauling controversy are simple: "Mr. Pauling furnished the Committee with much information about his well-known international petition against nuclear testing including a list of signers. . . . He refused, however, to turn over the correspondence he had received from those he solicited, or to say how many signatures each respondent had supplied." The Committee's aim was to show that the petition was Communist inspired; the chairman, Senator Dodd, happened to be a leading advocate of nuclear testing. In the end Mr. Pauling proved too much for the committee—there were no contempt proceedings.

As Kalven traces the inquiry he is moved to remark that "one can view the hearings as a dramatic opposition of Mr. Pauling and Mr. Sourwine and, on this view, take on some of the point of a morality play." Tracing the progress of the mortality play, he allows us an occasional chuckle.

The next colloquy produces one of Pauling's finest moments at the hearing:

Sourwine: The list includes the name of Professor Hideki Yukawa of Japan. Do you know him?
Pauling: Oh yes, very well.
Sourwine: Do you know him as a winner of the Lenin prize?
Pauling: He did? I didn't know that he'd won the Lenin Prize. I knew that he won the Nobel Prize for physics.

But in the end it is Kalven's outrage over the record that permeates the piece: "the Committee's conduct verges on the fraudulent, but it is hard to see what the purpose of the fraud was." He concludes:

I said at the outset that the hearings seemed to me wasteful, hypocritical, and offensive. I see no reason to qualify that verdict now. We have noted that a thin line separates the ludicrous from the sinister as we go through the hearings. Undoubtedly to some the whole enterprise will appear too inept to take seriously, and certainly Mr. Pauling emerges in very good health and vigor. Maybe it is not serious. But it is, after all, an expression of the official climate of opinion in the official sense of the fair use of government power in the United States in the year 1960. And I find it not quite sufficient comfort that, under the existing circumstances, we are protected from the Committee's malice only by its incompetence.

Victory in the Courts

There comes then an episode in Kalven's battle with the committee that allowed him to bring to bear on an actual case both his legal knowledge and his familiarity with the tools of social science research.

In 1965 the House Un-American Activities Committee subpoenaed the distinguished physician Dr. Jeremiah Stamler to appear as witness in its Chicago hearing. On the advice of his counsel, Albert Jenner, Jr., and Thomas P. Sullivan, Dr. Stamler refused to testify on First Amendment grounds and asked the court for a declaratory judgment that would uphold his refusal. Kalven was a consultant on the case, and was asked how one might demonstrate to the court that the Committee's method of asking questions violated both the authority vested in it by the Congress and the constitutional rights of the witnesses.

Kalven suggested that a content analysis be made of the Committee's hearings, that is, a detailed analysis of content, purpose, and context of the questions asked and answered or not answered, in a number of hearings that would be randomly selected from all the Committee's hearings. That analysis became one of the important weapons in a court battle that eventually ended in withdrawal of the contempt citation against Dr. Stamler, and thereby in victory over the Committee.6

This brief essay cannot give more than a glimpse of the measured architecture of the pieces Kalven wrote during these years, of the precision with which the legal argument develops, of the respect and mastery of language they reflect, of the sense of humor that illuminates their serious business, and of the magnificent anger which moved that gentle man when his sense of justice was offended. [Footnote: Cf. Zeisel & Stamler, The Case against HUAC—the Evidence: A Content Analysis of the HUAC Record, 43 Harv. C.R.-C.L. L. Rev. 109 (1976).] [End Note]

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Is Cost-Benefit Analysis a Panacea for Administrative Law?

by Cass R. Sunstein

Both administrative law and cost-benefit analysis are nowadays popular subjects among all three branches of the federal government. During the past 10 years, the courts have often required administrative agencies to justify their decisions by showing that the "benefits" outweigh the "costs." Congress has expressly required cost-benefit analysis, forcing agencies to show that the benefits of regulation are greater than the costs. Our last four presidents have shown similar enthusiasm for cost-benefit principles. Most recently, President Reagan has signed an executive order stating that agencies may not issue expensive rules unless "the potential benefits to society... outweigh the potential costs to society."

It is not hard to understand this enthusiasm for cost-benefit analysis as a tool for improving the performance of administrative agencies. Recent studies, many of them coming from or based on the work of lawyers and economists from the University of Chicago, have tended to show that regulation often reduces rather than improves economic welfare. Indeed, agencies sometimes impose costly regulatory requirements that do little to help the supposed beneficiaries. (Certain occupational safety and health requirements are frequently given as examples.) Cost-benefit analysis, designed to ensure that regulation helps rather than hurts, promises to provide a remedy for these problems.

I want to explore here some of the most important questions raised by the use of cost-benefit analysis for remediying defective performance by administrative agencies. The first problem is one of definition. What does cost-benefit analysis mean? It is sometimes suggested that cost-benefit analysis is simply a rough tool for weighing the advantages and disadvantages of regulation. In this view, President Reagan's executive order amounts to little more than an echo of a conventional principle of administrative law—that an agency's decision must not be "arbitrary or capricious." Cost-benefit analysis thus becomes a means of making sure that agency decisions are reasonable and that they do not impose costs that are disproportionate to their benefits.

The virtue of this definition is its flexibility. Who would object to a principle that prevents administrators from taking action having costs that are disproportionately high? But the virtue of this approach is also its vice, for it renders cost-benefit analysis almost wholly indeterminate. The critical questions become ones of valuation—how much does one value a certain gain in health or life? How important is it to reduce the incidence of racial discrimination? What price should be paid to justify the benefits that would be gained by mandatory seat belts? All of these questions cannot be answered simply. Numerical values must be used in cost-benefit analysis, and therein lies the problem. There must be some more specific notion of how costs and benefits are to be valued. As a result, cost-benefit analysis—if it is merely a principle of proportionality—states a truism that is apt to be of little or perhaps no help to regulators.

This critique of cost-benefit analysis—the critique from indeterminacy—depends not at all on an argument that it is in some sense immoral or unethical to put a price tag on such things as life or health. That argument has undoubted appeal, but in a world of scarce resources, there is some limit to the amount that one would pay, for example, to diminish the incidence of cancer due to carcinogens in the workplace. Perhaps regulatory decisions should not be made to depend on an effort to maximize social wealth—a question I take up below. But no matter what approach one takes to regulation, it will be necessary to decide that some prices are simply too high to be worth paying.

Thus far I have suggested that if cost-benefit analysis means a rough weighing of the advantages and disadvantages of regulation, it is simply too vague to be of much use for actual decisions. But in setting forth the notion of cost-benefit analysis, economists have something in mind other than a rough, ad hoc assessment of advantages and disadvantages. In their view,
costs and benefits are measured far more rigorously—by seeing how much people are willing to pay for the item in question. To speak in rough and general terms: The benefits of pollution regulation, for example, would be measured by the willingness of those subject to pollution to pay for the regulation. Aggregate willingness to pay would in turn be compared with the costs of regulation, which would include the amount those subject to regulation would have to expend, and also the administrative costs of the regulatory scheme. The same would be said of regulation of race and sex discrimination, of safety in the workplace, and so forth. There are of course formidable difficulties in finding out how much people are willing to pay for these things, but that is a practical and not a theoretical problem.

In this light, what is one to say about efforts by the courts and the executive branch to make the decisions of administrative agencies depend on application of cost-benefit analysis? One obvious problem is that few believe that, as a general rule, Congress passes regulatory statutes in order to promote economic efficiency. Indeed, Professor George Stigler’s Nobel Prize was awarded in large part because of Stigler’s efforts to demonstrate that regulation is often designed not to maximize wealth, but to redistribute it. Laws forbidding racial discrimination and protecting wilderness areas are not, in this view, best understood as efforts to increase the size of the pie; they are instead designed to transfer resources and opportunities from certain segments of the public to another.

Some have criticized this “interest group theory” of the legislative process and suggested that regulation is not about the allocation and transfer of resources at all. In their view, legislation is an effort to decide upon and implement certain widely held public values. But the proponents and the critics of the interest group approach are agreed on one fundamental thing: that as a general rule, regulatory statutes do not, in purpose or in effect, promote efficiency.

In these circumstances, judicial and executive branch efforts to make regulatory decisions on the basis of cost-benefit analysis, economically defined, raise serious questions of separation of powers. The executive is supposed to execute the laws, not to make them. If the executive decides to implement a statute only when implementation is “efficient” under the standards of economic efficiency, he will (often) be violating the intent of Congress. If those who passed a regulatory statute did so in order to do something other than promote efficiency, the executive has no authority to decide that regulatory decisions will be made by applying economic principles of cost-benefit analysis. So too with the courts, which are charged with interpreting and applying, not rewriting, the law.

To say all this is to suggest that courts and administrators are often prohibited from making regulatory decisions on the basis of cost-benefit analysis, economically defined. (It is not, of course, to say that decisions may not be based on a rough balancing of advantages and disadvantages; and it is not to deny that some statutes can be understood as efficiency-promoting.) But what of Congress? Shouldn’t Congress design statutes so as to promote efficiency? Some bills now pending in Congress would amend all regulatory statutes to ensure that regulatory action could be taken only when the benefits outweigh the costs. Those bills would drastically alter a number of existing regulatory provisions, including, for example, those that regulate cancer-causing and other substances and hazardous conditions in the workplace. Should those bills be enacted?

This is a large and difficult question, and I can only outline some of the relevant considerations here. First, cost-benefit analysis, economically defined, takes the status quo—including the existing distribution of income—for granted. Willingness to pay is inevitably a function of ability to pay. But regulation often should not assume that the existing distribution is perfect; indeed, regulation is often a referendum on the current distribution.

Second, cost-benefit analysis, taken by itself, does not easily square with an approach that is deeply engrained in American law—one that understands the law as a means of protecting entitlements rather than of maximizing utility or wealth. The law of tort—and the law of racial discrimination—may be understood as concerned not with maximizing aggregate economic welfare, but with protecting a set of individual rights. Cost-benefit analysis may, to be sure, proceed after the initial set of entitlements has been established; but it does not help very much in setting that initial structure, from which willingness to pay must be measured.

Finally, regulation, and government activity in general, are often best regarded not as an attempt to serve the existing set of preferences but as an effort to reexamine them, and to decide upon those values that ought to govern the community as a whole. Economic cost-benefit analysis is generally hostile to this approach. It takes current preferences as its starting point;
costs and benefits are calculated by seeing how much people, given whatever preferences they may have, are willing to pay for regulation. But regulatory activity, I submit, often operates as an effort to scrutinize our preferences, to see whether what we now want—like pollution or discrimination—is what we should continue to want. Indeed, this process of scrutiny may be what self-government is all about.

It will be useful to conclude with a summary of my objections to cost-benefit analysis as a tool for regulatory decisions. To the extent that it is defined as a rough counting of advantages and disadvantages, it is too indeterminate to be of much help. To the extent that it is defined in economic terms, cost-benefit analysis often cannot, as a matter of separation of powers, be made the basis of decision by the courts or the president; and cost-benefit analysis, economically defined, is usually not an attractive basis for decision by the legislature.

All this is not to say that it is undesirable to identify the costs and benefits, or the advantages and disadvantages, before proceeding. Nor is it to deny that costs and benefits should sometimes be taken into account as a relevant consideration in the regulatory process. But the current enthusiasm for cost-benefit analysis should be tempered with the understanding that it is far from a panacea for the current problems of administrative regulation.

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Cass Sunstein is Assistant Professor of Law.
Fifty years ago Benjamin Cohen left his New York law practice for Washington, where he became a member of President Franklin Roosevelt's "Brain Trust" and a principal legal architect of the New Deal. His career of public service, however, had begun much earlier, as counsel to the American Zionists at the Paris peace conference, and has continued for half a century more. If it has done so quietly, that is a measure of his quiet and retiring personality, not his public contribution.

Arthur Schlesinger, Jr., has said of Cohen: "His modest and self-effacing way of life and his preference for doing good by stealth have not perhaps made him a household name; but those most intimately involved with public affairs over the last half-century recognize him as a man exceptional in his intelligence, his creativity, his selflessness, and his superb devotion to the public weal."

Cohen was born in Muncie, Indiana, in 1894. He graduated from the University of Chicago in 1914 and from the Law School in 1915. After a year of further study at Harvard Law School (S.J.D., 1916), he became secretary to U.S. Circuit Court Judge Julian W. Mack in Chicago. From 1917 to 1919 he was an attorney for the wartime U.S. Shipping Board, and after the war, he served as counsel to the American Zionists at the peace conferences in Paris and London (1919-21). The next 11 years he spent in private practice in New York City.

In the spring of 1933, with Roosevelt's proposed securities legislation in trouble, a call went to Felix Frankfurter, then at Harvard. Two days later Frankfurter brought to Washington James Landis and Benjamin Cohen. "Cohen, a man of deep and sensitive idealism, was a brilliant draftsman and sagacious counselor. For all his unworldliness of manner, he well understood the stock market and, indeed, had made a good deal in the twenties, getting out safety before the crash." Within three days Cohen and Landis had drafted a bill that a few weeks later became the Securities Act. That was the start of Cohen's long and productive Washington career.

In the work of perfecting the securities bill, Cohen and Landis were joined by Thomas G. Corcoran, who worked closely with Cohen on subsequent New Deal legislation — in particular, the Securities and Exchange Act (1934), the Public Utility Holding Company Act (1935), and the Fair Labor Standards Act (1937). The press dubbed Cohen and Corcoran the "Gold Dust Twins," in reference to a popular commercial jingle. Their personalities, however, were quite different. "Cohen was the man of ideas and reflection; Corcoran, though he had plenty of ideas, was preeminently the salesman and promoter." Corcoran himself, interviewed by the Washington Post for an article honoring Cohen on his seventy-fifth birthday (September 24, 1969), said of Cohen: "He didn't like to run in front, but in terms of the deposit he's left on this town, all those big financial bills, you have no idea."

Cohen was associate general counsel to the Public Works Administration from 1933 to 1934 and general counsel to the National Power Policy Commission from 1934 to 1941. He was also a special assistant to the U.S. attorney general (1936-38), a post in which he was concerned with public utility holding company litigation. However, "Mr. Cohen's greatest contributions were not on account of his formal or official positions, but rather through his intellectual influence on all those with whom he was associated, formally or informally." During World War II Cohen was instrumental in initiating the plan for lend lease and programs for economic stabilization and war mobilization. He was adviser to the American ambassador to Great Britain in 1941, assistant to the director of the Office of Economic Stabilization in 1942-43, and general counsel to the Office of War Mobilization in 1943-45. In 1944 he was also a legal adviser to the International Monetary Conference at Bretton Woods, New Hampshire.

1 Comment by Nathaniel L. Nathanson, Frederic P. Vose Professor Emeritus, Northwestern University School of Law. Mr. Nathanson was an attorney with the Securities and Exchange Commission during Roosevelt's administration.
and a member of the American delegation to the Dumbarton Oaks Conference. Corcoran, in his 1969 interview with the Washington Post, summarized Cohen's wartime contributions: "Ben was in substance our economic administrator during the war; the whole structure of wage and price controls was his work. He built the SEC. Even now, no man in the country understands these forces as he does. Lend-lease was his. He kept the civilian economy on a non-inflation basis all through the war."

Cohen's work during the war was concerned not only with mobilization but also with preserving an economic foundation for postwar peace. It is not surprising, therefore, that he played an important advisory role in negotiations after the war and has devoted most of his long career since then to issues of international cooperation. He was a counselor to the Department of State in 1945-47 and a member of the American delegation to the Berlin Conference in 1945. He attended the Council of Foreign Ministers in London (1945), Moscow (1945, 1947), Paris (1946), and New York City (1946) and the Paris Peace Conference (1946). In 1950 he appeared as the U.S. representative before the International Court of Justice, The Hague.

Joseph L. Rauh, Jr., a Washington civil rights lawyer, responded:

I could tell a hundred stories of his wisdom, but will limit myself to one: In the 1950s, when most people didn't know where Vietnam was, Ben used to say to my wife and me that there was grave danger of our getting involved in that country. As our involvement escalated, so did his advice to stay out. I have been congratulated by many people for being one of the first to speak out against the Vietnam war, but I always laugh and say it couldn't have been any other way if one had been a disciple of Ben Cohen.

Arthur Schlesinger, too has commented: "I have often wished that I had paid more careful attention to the warnings he delivered in his quiet manner in the early sixties about the awful potentialities of our involvement in Vietnam." Cohen has attributed the Vietnam war and the Watergate affair at least partly to increasing isolation of the president, in contrast with Roosevelt's broad-based administration. "[T]he President has retained the power to make important decisions which may profoundly affect the course of human events in this country and in the world without checking in advance his view with any responsible and informed group of persons of political stature and independence." Cohen proposed the establishment of a small executive council as a possible means of alleviating this danger. "The Presidents, even the greatest of them, need unbiased judgment and moral support from persons they can regard as their peers."

It is the country's good fortune that Benjamin Cohen brought his wisdom, judgment, and moral support to Washington in 1933 and continued to exercise them on behalf of responsible government in the years that followed. That he has chosen to do so out of the public eye makes his contribution even more remarkable.


*Id. at 31.*

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President Franklin Roosevelt signing the Utility Holding Company Act, 1935.
Witnessing the signing are, left to right: Senators Alben Barkley, Burton Wheeler, and Fred Brown; Dozier De Vane, solicitor of the Federal Power Commission; Representative Sam Rayburn; Benjamin Cohen, general counsel to the National Power Policy Commission; and Thomas Corcoran.
Publications of the Faculty

The publications described briefly below are a selection of recent writings by Law School faculty members.

Douglas G. Baird

This article looks at the two bankruptcy statutes that the Supreme Court found unconstitutional during the 1981 term. In one of these cases, the Court struck down all the jurisdictional provisions of the Bankruptcy Reform Act of 1978. Mr. Baird argues that both cases can be better understood if it is borne in mind that bankruptcy law, at its core, provides a federal forum in which the state-law claims of competing creditors can be adjudicated. This view of bankruptcy law underscores the difficult issues before Congress when it considers the ways in which it may give jurisdiction to bankruptcy judges without violating the dictates of Article III of the Constitution.

Dennis W. Carlton

Both the Federal Trade Commission and the Department of Justice have recently given attention to the use of delivered pricing. Their concern is that delivered pricing can be used to facilitate collusion. (Delivered pricing occurs when the price a buyer is charged is not directly related to the freight incurred in shipping to the buyer. For example, under uniform delivered pricing, all buyers pay the same price, regardless of location, to receive the product.) This paper reexamines the objections to delivered pricing. Economic theory is used to show how many of the objections are unfounded. The paper develops a theory to explain when delivered pricing is likely to be used collusively, and applies the theory to several old as well as recent cases.

Frank H. Easterbrook

Mr. Easterbrook and Mr. Fischel continue to develop the analysis of the legal rules governing, and economic functions of, tender offers and defensive tactics by the targets' managers. This article separates the results of targets' defensive tactics as a device for setting up an auction (which helps the targets' shareholders, given that an offer is on the table) from the effects of auctions on the number of new offers (there will be fewer as the price rises and bidders are unable to recover their sunk costs of information). Easterbrook and Fischel argue that the business judgment rule should be interpreted as not allowing defensive tactics even for the purpose of auctioneering.

Richard A. Epstein

The purpose of this article was to examine the extent to which changes in common law rules can have large effects upon the allocation of resources or the distribution of wealth within a society. Its central conclusion is that so long as the debate is confined to the types of issues presented to courts, the effects in both areas are likely to be small, especially when measured against the changes that can, for good or ill, be achieved by direct legislation. The article ranges over a number of traditional common law debates, including the choice between negligence and strict liability as the basic standard of tortious responsibility, and the role of promissory estoppel as a supplement to consideration in the law of contract formation.

Dennis J. Hutchinson

In Plyer v. Doe, the Supreme Court held that the equal protection clause of the Fourteenth Amendment forbids a state to charge non-resident tuition to illegal alien school children. Mr. Hutchinson argues that the decision is of unpredictable precedential value and that, as equal protection jurisprudence, it is better understood as "substantive due process," that is, a new—perhaps unique—substantive constitutional right of dubious constitutional basis.

William M. Landes

Although economic analysis of antitrust cases has been widespread and uncontroversial for many years, the use of economics to examine antitrust enforcement itself has been largely neglected. The key concept in applying economics to antitrust enforcement is that of an efficient violation—one where the gains to the violator exceed the harm to victims. An optimal sanction is one that is sufficiently high to deter inefficient but not efficient violations. In this paper Mr. Landes applies the analysis of optimal sanctions to a variety of issues, including the social loss from monopoly and cartels, efficient joint ventures, predatory pricing, the desirability of victim compensation, and the relevance of the victim's conduct to his ability to recover damages.

John H. Langbein

The black letter rule of American probate law is that mistakes in wills cannot be corrected, no matter how obvious or egregious. When the typist drops a paragraph from the will, or the lawyer hands the testator the wrong instrument for execution, the law treats the situation as irredeemable. In an article co-authored with Professor Waggoner of the University of Michigan Law School, Mr. Langbein points out that in recent case law the courts are showing themselves increasingly dis-
satisfied with the results in these cases, but a doctrinal solution consistent with the formal requirements of the Wills Act has not been found. The two authors undertake to provide a solution, based upon analogy to the law of nonprobate transfers, where similar defects have been excused by imposing a clear-and-convincing evidence standard upon the proponents of the instrument.

**Bernard D. Meltzer**


This supplement covers developments from the spring of 1977 to August 1981 and updates the second edition of Mr. Meltzer's casebook, published in 1977.

**Norval Morris**

Madness and the Criminal Law (University of Chicago Press, 1982).

Practiced separately, criminal law and mental health law achieve a just balance between freedom and authority, between the rights of the individual and the desire of the public to protect itself and its members. When mixed, however—as happens when courts must rule on the fitness of the mentally ill to be tried or on their responsibility for criminal conduct, and in sentencing the mentally ill for crimes—confusion and cruelty, injustice and inefficiency predominate. Mr. Morris addresses this question in the context of the competency of mentally ill criminals to stand trial, their responsibility for crime, and the sentences to be imposed if they are convicted of crime.

**Geoffrey R. Stone**


This article examines for an essentially lay audience the issue of televising judicial proceedings. The article traces the historical origins of the traditional prohibition on the practice, analyzes the Supreme Court decisions of the 1950s and 1960s holding that the practice violates the due process rights of criminal defendants, describes the recent trend of permitting the practice, and identifies the potential problems inherent in the practice as currently authorized.

**Cass R. Sunstein**


This essay attempts to set forth a general theory of the equal protection clause. In so doing, it challenges the notion that modern equal protection jurisprudence is an incoherent amalgam of conflicting preferences on the part of Supreme Court justices. The central thesis is that the equal protection clause is designed to bar unprincipled distributions of wealth or opportunities. A distribution is unprincipled when it is not an effort to promote a public value, but rests on the intrinsic desirability of treating one person better than another. The essay uses this understanding to explain judicial treatment of classifications on the basis of race and sex, to explore recent “busing” cases, and also to understand judicial analysis of classifications in the area of commercial and business law.

**Hans Zeisel**

The Limits of Law Enforcement (University of Chicago Press, 1982).

The common answer to our crime problem is that we need more—and more severe—law enforcement, but Mr. Zeisel concludes in this book, after careful investigation, that that approach will not work. His argument is based on a detailed follow-up of a probability sample of 2,000 felony arrests in New York City, including interviews with the arresting officers, prosecutors, defense counsel, and judges. Zeisel maintains that police arrest rates and court conviction rates cannot be significantly increased, nor will higher sentences solve the problem of crime. What is needed is a preventive strategy. The book includes a forward by Edward A. Levi.

**Franklin E. Zimring**

The Changing Legal World of Adolescence (The Free Press, 1982).

This book is a significant departure from Mr. Zimring's previous work in criminal law and criminology. It is an attempt to explain what others have called "children's liberation" and "the revolution in juvenile justice" in ordinary nonlegal language. Moreover, he argues that recent changes represent the law's attempt to catch up to social changes in the meaning of adolescence over the last 50 years. The final sections of the book try to present a coherent view of adolescence in modern American society and law.

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memoranda

APPOINTMENTS

Robert H. Bork has been appointed Lecturer in Law. From 1962 until 1981 Judge Bork served on the faculty of the Yale Law School. At the time of his resignation from the Yale faculty, he was the Alexander M. Bickel Professor of Public Law. He left Yale in 1981 to become a partner in the firm of Kirkland and Ellis and shortly thereafter was appointed to the U.S. Court of Appeals for the District of Columbia Circuit. From 1973 to 1977 Judge Bork served as solicitor general of the United States. He is a graduate of both the College and the Law School of the University of Chicago (B.A., 1948; J.D., 1953) and the author of numerous articles in the areas of constitutional and antitrust law. His most recent book is The Antitrust Paradox: A Policy at War with Itself (1978). Judge Bork will offer a seminar on judicial review during the autumn quarter.

Erhard Denninger has been appointed Visiting Professor of Law and Thyssen Fellow for the autumn quarter, 1983. A graduate of the University of Mainz, he has been professor of law at the Johann Wolfgang Goethe University in Frankfurt since 1967. He is the author of many books and articles in the areas of public law and legal theory, and will join Professor David Currie in teaching a seminar in comparative constitutional law.

Mary Ann Glendon has been appointed Visiting Professor of Law for the autumn quarter. Since 1968 she has served on the law faculty of Boston College, and she is the author of many books and articles. Her most recent publications include The New Family and the New Property (1981) and State, Law and Family (1977), and she is editor-in-chief of volume 4 of the International Encyclopedia of Comparative Law. She also serves on the Executive Committee of the Association of American Law Schools. A graduate of the University of Chicago (B.A., 1959; J.D., 1961; M.C.L., 1963), she was with the firm of Mayer, Brown, and Platt in Chicago before going into teaching. Professor Glendon will teach a course in family law.

Geoffrey P. Miller has been appointed Assistant Professor of Law. Mr. Miller is a 1978 graduate of Columbia Law School, where he was editor-in-chief of the law review. He received his A.B. magna cum laude from Princeton University in 1973. After graduating from law school, he clerked for Judge Carl McGowan of the U.S. Court of Appeals for the District of Columbia Circuit and for Justice Byron R. White of the U.S. Supreme Court. Subsequently, Mr. Miller worked for two years for the Office of Legal Counsel at the U.S. Department of Justice. At present, he is associated with the Washington, D.C., law firm of Ennis, Friedman, Bersoff, and Ewing. His interests include administrative law, courts, regulation of financial institutions, and corporations.

A. W. B. Simpson has been appointed Professor of Law. A graduate of Oxford University, Professor Simpson taught at Oxford from 1955 until 1973. At Oxford he was a Fellow of Lincoln College. In 1973 he became Professor of Law at the University of Kent at Canterbury. He is the author of Introduction to the History of Land Law (1961) and A History of the Common Law of Contract (1975). In addition to contracts and legal history, his interests

Uncrating the Pevsner sculpture, August 7, 1963. Mrs. Antoine Pevsner and Dean Phil C. Neal.
include jurisprudence and criminal law. One of the most distinguished British legal historians of his generation, Professor Simpson has been a Visiting Professor at the Law School in 1979, 1980, and 1982. He will divide his time equally between the University of Kent and the University of Chicago.

FACULTY NOTES

Professor Dennis Carlton presented a talk recently on the economic impact of the ATT divestiture at a conference sponsored by the Legal Times of Washington. He also gave seminars on “A Reexamination of Delivered Pricing” at the University of Chicago and on “Futures Markets, Market Interrelationship, and Industry Structure” at the annual convention of the American Economic Association. His recent publications include “The Disruptive Effect of Inflation on the Organization of Markets” (in Inflation, ed. Hall [University of Chicago Press, 1982] and “Planning and Market Structure” (in The Economics of Uncertainty, ed. J. McCall [University of Chicago Press, 1982]).

Last fall, Professor Frank Easterbrook attended the 1982 general meeting of the Mont Pelerin Society as a Fellow, and also attended a conference, at Stanford’s Hoover Institution, on the fiftieth anniversary of the publication of Berle and Means’s Modern Corporation and Private Property. At the latter conference he presented, with Visiting Professor Daniel Fischel, a paper on “Voting in Corporate Law,” which will appear, with the other papers presented at the conference, in a special issue of the Journal of Law and Economics. In February he gave a paper at the Legal Theory Workshop of Columbia University Law School, and in March he spoke at the Conference Board’s annual antitrust seminar in New York and presented the annual Harris Lecture at the University of Indiana at Bloomington. He has published several recent articles, including “Antitrust and the Economics of Federalism,” in the Journal of Law and Economics; “Is There a Ratchet in Antitrust Law?” in the Texas Law Review; and “Substance and Due Process,” in the Supreme Court Review.

Richard Epstein, the James Parker Hall Professor of Law, was a commentator last fall at a panel discussion on the time dimension in products liability cases, at New York University, and participated in a workshop on the history of workers’ compensation at the Columbia University Law School. In February he participated in a workshop on “A Common Law for Labor Relations: A Critique of the New Deal Legislation” at the University of Michigan, and a symposium on the same topic at the Yale Law School.

Professor R. H. Helmholtz, Director of the Legal History Program, attended the inception of the Charles Homer Haskins Society, at the University of Houston, November 5-6, 1982, and gave a talk on the early history of the grand jury.

Mark Heyrman, Clinical Fellow and Lecturer in Law, supervised students (Charles Weisselberg ’82 and Patricia Weik ’83) who represented 40 patients at a state mental hospital in a case before the Illinois Appellate Court. The court vacated an injunction entered by the Circuit Court of Cook County, which deprived the patients of their liberty without a hearing.

Stefan Krieger, Staff Attorney and Clinical Fellow, has been appointed by Governor Thompson to the 17-member Task Force on Utilities Regulation, which is to review public utility regulations and make recommendations for their improvement.

An article by John Langbein, Max Pam Professor of American and Foreign Law, appeared in the February 1983 issue of Past and Present, an Oxford-based historical journal. Mr. Langbein’s article, “Albion’s Fatal Flaw,” is a critique of current Marxist writing about the history of criminal procedure. Mr. Langbein is serving as a member of the Study Group on Trusts of the Secretary of State’s Advisory Group on Private International Law. The group is advising on American interests in a proposed treaty on the transnational recognition and enforcement of private trusts.

Associate Professor Gary Palm, Director of the Mandel Legal Aid Clinic, spoke on “Teaching Trial Advocacy through the Preparation of Actual Cases” before the Clinical Education Section of the American Association of Law Schools, at its annual meeting in Cincinnati in January. In a case handled by Mr. Palm and his students, McCombs v. Scott, the Supreme Court denied certiorari in a case in which the Seventh Circuit Court of Appeals ruled that prisoners are entitled to due process when they are being considered for parole by the Illinois Prisoner Review Board.

Professor Fazlur Rahman, a member of the Department of Near Eastern Languages and Civilization and a teacher at the Law School, has published Islam and Modernity: Transformation of an Intellectual Tradition (University of Chicago Press, 1982).

Margaret Rosenheim, Dean and Helen Ross Professor of Social Welfare Policy, School of Social Service Administration, and Lecturer in Law, has contributed an article, “Juvenile Justice: Organization and Process,” to the Encyclopedia of Crime and Justice (ed. Sanford Kadish [Free Press, in press]).

Professor Geoffrey Stone testified last fall before the Senate Judiciary Committee in opposition to the Reagan administration’s proposed constitutional amendment concerning school prayer, and an article by Professor Stone on the same topic appeared in the November 1982 issue of the Chicago Lawyer. He also addressed the Chicago Press Club last fall on the First Amendment right of the press to obtain information from the government, and he has contributed an analysis of the First Amendment and the crime of sedition to the forthcoming Encyclopedia of Crime and Justice. In April Mr. Stone gave the Cutler Lecture on Constitutional Law at the Marshall-Wythe School of Law of the College of William and Mary.

Assistant Professor Cass Sunstein spoke on the equal protection clause to the Legal and Social Theory Workshop at the University of Southern California.

In October 1982, Mark Weber, Staff Attorney and Clinical Fellow of the Mandel Legal Aid Clinic, appeared as a panelist in a conference sponsored by the National Lawyer’s Guild concerning federal court litigation on behalf of the handicapped.
S. K. Yee Scholarships for University of Chicago Law Students

This fall the University of Chicago Law School will begin awarding 20 annual scholarships of $5,000 each, which are supported by the S. K. Yee Scholarship Foundation of Hong Kong. The donor of the funds, General S. K. Yee, is chairman of the United Chinese Bank of Hong Kong, which he has headed for more than three decades. General Yee received financial assistance when he was a foreign student in the United States in the twenties. He believes strongly in the moral obligation of those who benefited from scholarship aid while they were students to extend a helping hand to current and future generations of students. He is especially committed to the legal profession, from which a high proportion of the United States' and the world's leaders derives and whose work should contribute to the advancement of justice and the protection of liberty. The scholarships will be open to law students selected by the Dean of the Law School without regard to race, color, sex, creed, or country of origin.

Dean Gerhard Casper said of the generous gift: "As someone who first came to the United States as a foreign student, I am most appreciative of the sentiments which have moved General Yee to support this as well as a handful of other American law schools. My present responsibilities as Dean of this law school have made me understand even better the contribution the University of Chicago and other universities have made in a non-parochial manner to the education of American and foreign leaders. I am very pleased that these scholarships will help ensure access to the University of Chicago Law School for men and women of ability who are in need of financial aid. Those of us who are responsible for private higher education have been only too aware that without a sense of moral obligation on the part of former students and others we could not perform our tasks adequately."

General Yee, whose service with the Chinese armed forces in World War II included helping the British defend Hong Kong, attended universities in this country as a young man. As a beneficiary of financial aid at that time, General Yee believes that he has an obligation to reciprocate. Therefore, he has established the S. K. Yee Scholarships. Recipients of Yee scholarships, in turn, will be asked to contribute to the education of future law students. Once they have become established in their careers, they will be asked to contribute to the Law School amounts at least equal to those they received.

This annual contribution of $100,000 has been made at a critical time for student financial aid. It will help students of exceptional ability who face both rising tuition costs and reduced federal loan programs.

The Irving Trust Company of New York will administer the financial structure of the program, including payments to scholarship recipients through the Law School.

The S. K. Yee Scholarship Foundation has established identical programs at the University of California at Berkeley, Columbia University, and the University of Michigan.

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The 1952-53 Law Review editorial board: Seated, left to right: Lawrence Reich; Dale Broeder; Marvin Chirelstein; Alexander Polkoff, editor-in-chief. Standing, left to right: Howard MacLeod, Richard Stillerman, Robert Bork, Merrill Freed, Jean Allard. All are members of the class of '53. The Law Review is celebrating its fiftieth anniversary in 1983.
George Stigler and the Law School

George J. Stigler, the Charles R. Walgreen Distinguished Service Professor Emeritus of American Institutions at the University, is the recipient of the 1982 Nobel Prize in Economics. He has been formally associated with the faculty of the Law School for more than 20 years, and his informal association dates back even further. At present he conducts the Workshop in Economic and Legal Organization jointly with Professors William Landes and Sam Peltzman.

Mr. Stigler has been a frequent contributor to the Law School's Journal of Law and Economics, which dedicated a special issue (August 1976) to him in honor of his sixty-fifth birthday.

Palmer Gives Schwartz Memorial Lecture

Geoffrey Palmer, M.P. (J.D., 1967), spoke at the Law School on "The New Zealand Accident Compensation Scheme: Personal Injury without Tort." His address, given on October 25, was the 1982 Ulysses S. and Marguerite S. Schwartz Memorial Lecture.

Mr. Palmer was elected to the New Zealand Parliament in 1979 and is currently Deputy Leader of the Opposition (New Zealand Labour Party). He has practiced law and has taught both law and political science at Victoria University in Wellington, and also spent several years as a professor of law at the University of Iowa. He has advised governments in New Zealand, Australia, the United States, Cyprus, and Sri Lanka on accident compensation, and has published books on constitutional and tort law, accident compensation, and social welfare.

Planning Under Way for Law School Capital Campaign

In conjunction with a University-wide effort, the Law School has begun planning for a capital campaign to raise urgently needed funds for faculty and student support, a 30,000-square-foot addition to the library, and four Law School programs: the Mandel Legal Aid Clinic, the Law and Economics Program, the Legal History Program, and the Center for Studies in Criminal Justice.

The volunteer Planning Committee for the campaign will consist of more than 20 members. It will be headed by Chairman Howard G. Krane (J.D. '57) of the Chicago office of Kirkland and Ellis and Deputy Chairman Richard L. Grandjean (J.D. '67) of the New York office of Salomon Brothers, Inc.

IJLI Honors Adolf Sprudzs

The International Journal of Legal Information dedicated its December 1982 issue to Adolf Sprudzs, Foreign Law Librarian and Lecturer in Legal Bibliography, on the occasion of his sixtieth birthday and "in recognition of his achievements in the field of national and international law." Mr. Sprudzs is secretary of the International Association of Law Libraries and an associate editor of IJLI (formerly the International Journal of Law Libraries), the association's official publication.

The December issue of IJLI includes an introductory note by Dean Gerhard Casper describing Mr. Sprudzs's work at the Law School, especially his development of the Law School Library's foreign and international law collection.

Placement

Director of Placement Paul Woo reported in February that, in spite of the tight market for legal jobs, almost all second- and third-year students had already obtained a legal position. During the fall interview season, 420 employers came to campus, a 4.75% increase over the previous year.

The summer job market for first-year students is tighter than in past years, but Mr. Woo hopes that changes made in first-year interviewing procedures will help students cope with the smaller number of openings.

White Leaves Law School

Professor James B. White has resigned from the Law School effective July 1, 1983. He will join the faculty of the University of Michigan. Mr. White, who has taught at the Law School since 1975, is the author of The Legal Imagination and has taught courses in criminal law, criminal procedure, legal imagination, and studies in argument.
STUDENT NEWS

Moot Court

The four finalists in this year's Hinton Moot Court Competition are William Engles, Mark D. Gerstein, Will S. Montgomery, and Gail L. Peek. Messrs. Gerstein and Montgomery and Ms. Peek are members of the class of 1984, and Mr. Engles is a candidate in a combined J.D./M.B.A. program and will graduate from the Law School in 1985.


Final oral argument in the competition will be heard on May 10. The panel will consist of Chief Judge Walter J. Cummings, Jr., of the U.S. Court of Appeals for the Seventh Circuit; Judge Richard S. Arnold, of the U.S. Court of Appeals for the Eighth Circuit; and Judge Robert H. Bork ('53), of the U.S. Court of Appeals for the District of Columbia Circuit.

Law Women's Caucus

Sponsors Talk by Darrow

The Law Women's Caucus invited Katherine P. Darrow, general counsel of the New York Times Company and a member of the Board of Trustees of the University, to speak at the Law School in February. Ms. Darrow noted that First Amendment issues, while important, are a much smaller part of her job than people generally think. In fact, much of her work concerns the business transactions of the New York Times Company, both in this country and overseas. She also described a training program she has established for attorneys with the company's affiliated newspapers and radio stations.

Milk time in Beecher Hall, former Law School residence, 1953

The University of Chicago campus in 1907, looking northeast at the corner of Ellis Avenue and 59th Street. The old Law School is the third building east on 59th Street.
Washington Reception Honors Dam, Bork, Scalia

On November 10 alumni in the Washington, D.C., area attended a reception in honor of Kenneth W. Dam, deputy secretary of state, and Robert H. Bork and Antonin Scalia, both judges of the U.S. Court of Appeals for the District of Columbia Circuit. Mr. Dam and Judge Scalia are former faculty members of the Law School, and Judge Bork is a member of the class of 1953.

The reception was held at the offices of Michael Nussbaum '61, president of the Washington chapter of the Law School Alumni Association.

Attending from the Law School were Dean Gerhard Casper, Professor Geoffrey Stone, and Assistant Dean Holly Davis.

Other Alumni Events

The Alumni Association sponsored a luncheon for Los Angeles-area graduates on November 19 at the St. Tropez restaurant. Cheryl Mason '76, executive director of Public Counsel in Los Angeles, spoke on "Public Interest Law in a Hostile Environment: Is Altruism Dead?"

At an alumni luncheon in New York on December 13, Dean Gerhard Casper discussed "Can and Should the Alliance between the United States and Europe be Saved?" The luncheon was held at the offices of Skadden, Arps, Slate, Meagher, and Flom.

Dean Casper hosted a reception for graduates of the Law School at the annual meeting of the Association of American Law Schools, held in Cincinnati in January. Both Cincinnati-area alumni and alumni in teaching attended the reception.

Chicago Events

The Loop Luncheon series, sponsored by the Chicago chapter of the Law School Alumni Association, continues to be one of the most popular alumni activities. At two lunches in September, Jerry Reinsdorf, co-owner of the White Sox, discussed the future of professional sports, and U.S. District Court Judge Prentice Marshall spoke on "The Myth of the Overburdened Judiciary." In January, Judge Milton Shadur '49, of the U.S. District Court for the Northern District of Illinois, gave a talk entitled "Law and Society—Not Law and Economics." Also in January, Edward R. Vrdolyak '63, Tenth Ward alderman and chairman of the Cook County Democratic Organization, discussed "A Democrat's View of Democracy."

Women graduates of the Law School attended a luncheon on April 4 at which Suzanne Kobasa, assistant professor in the Department of Behavioral Sciences at the University, spoke on the topic "The Pressure of Practicing Law: Living with Stress."

Weissbourd '48 New University Trustee

Bernard Weissbourd (J.D. '48), a prominent Chicago real estate developer, was elected to the University of Chicago Board of Trustees in February. Mr. Weissbourd, who received a B.S. in chemistry from the University in 1941, is chairman of Metropolitan Structures, Inc., a real

ceral Judge Richard E. Robinson in Omaha, and then worked for Senator Roman L. Hruska of Nebraska from 1959 to 1965. In 1965 Mr. Kutak established the Omaha law firm of Kutak, Rock, and Huie, which he built from a three-person firm to one of the country's largest law offices, with branches in Atlanta, Denver, and Washington. Mr. Kutak was on the board of the Legal Services Corporation from 1975 to 1982 and took part in numerous bar activities in addition to his chairmanship of the Commission on Evaluation of Professional Standards.

Robert J. Kutak, 1932-1983

Robert J. Kutak, who received his J.D. from the Law School in 1955, died January 23 in Minneapolis. Mr. Kutak headed Nebraska's largest law firm and since 1977 had served as chairman of the American Bar Association's Special Commission on Evaluation of Professional Standards, which became known as the Kutak Commission.

Under Mr. Kutak's leadership, the 13-member commission drafted a proposed code of professional ethics. Commission member Geoffrey C. Hazard, Jr., of Yale Law School, said of Mr. Kutak's contribution: "For the ABA Commission on Evaluation of Professional Standards Bob Kutak provided both inspiration and enormous personal efforts. The inspiration led both to bold rethinking and, what is perhaps more difficult, to controlled retreat from some more adventurous proposals. The personal efforts must have amounted to a quarter of his time for six years. Since Bob's "time" was about 16 hours a day, and was supported by the whole resources of his firm, the gift was generous beyond any professional comparison I have witnessed."

After graduating from the Law School, Mr. Kutak clerked for federal Judge Richard E. Robinson in Omaha, and then worked for Senator Roman L. Hruska of Nebraska from 1959 to 1965. In 1965 Mr. Kutak established the Omaha law firm of Kutak, Rock, and Huie, which he built from a three-person firm to one of the country's largest law offices, with branches in Atlanta, Denver, and Washington. Mr. Kutak was on the board of the Legal Services Corporation from 1975 to 1982 and took part in numerous bar activities in addition to his chairmanship of the Commission on Evaluation of Professional Standards.
estate development firm that has undertaken projects in Chicago, Detroit, Montreal, and several other cities.

Mr. Weissbord has taught urban studies and has written extensively about urban issues. He is a member of the Central City Council of the Urban Land Institute, a director of the Urban Renewal Division of Action, Inc., and a former director of the Metropolitan Housing and Planning Council. He is also a director of the Center for the Study of Democratic Institutions and the Center for Psychosocial Studies, a trustee of Michael Reese Hospital, and a member of the Fine Arts Music Foundation.

Granby '63 Heads San Diego County Bar Association

James J. Granby (J.D., 1963) has been elected 1983 president of the 3,500-member San Diego County Bar Association. Mr. Granby had previously served as editor of *Dicta*, the association’s monthly magazine, and as co-chairman of the Committee on Continuing Education of the Bar.

Asked what he thinks is the most pressing problem facing the local bar, he said the reduction in legal aid and the result it will have on the court system. “We’re going to have to assist, perhaps on a volunteer basis, on civil cases that are in the courts now, and the courts may be faced with hundreds of cases without legal aid.”

Mr. Granby is a partner in the San Diego firm of Procopio, Cory, Hargeaves, and Savitch, and specializes in business and corporate law and in international business transactions. He serves on the advisory council of the international division of the San Diego Chamber of Commerce and was a member of its Mexico Trade Mission in 1981. He has been a delegate to the Conference of Delegates of the State Bar of California since 1973, and he is president of the San Diego chapter of the Law School Alumni Association.

Classes of ’72 and ’73 Are Subjects of Study

A University of Chicago graduate student, Marlene A. Bernstein, has sent questionnaires to all members of the classes of 1972 and 1973, as part of a study entitled “The Determinants of Success in the Legal Profession.” Her sample includes graduates of three other area law schools in addition to the University of Chicago. All responses are both anonymous and confidential, and the findings of the study will be publicly available.

Alumni Authors

The Law School Library is eager to receive books on any subject written by alumni. Any alumnus(a) who is uncertain whether the Law Library has a copy of his or her book should write or call: Ms. Judy Wright, Law Librarian, The University of Chicago Law Library, 1111 E. 60th St., Chicago, IL 60637 (312/962-9616). Donations of books should also be sent to Ms. Wright’s attention.
Class Notes Section – REDACTED

for issues of privacy
Barry Sullivan has become a partner in the Chicago firm of Jenner and Block.

Jayne W. Barnard and Eugene R. Wedoff have become partners in the firm of Jenner and Block in Chicago.

Steven Fiffer, Class Secretary, 2512 N. Burling Street, Chicago, IL 60614.

Expecting: John and Mimi Hancock; W. Kirk and Pamela Liddell; Richard and Gay Litzman; Arthur and Linda Sampson.

New Parents: Richard and Sharon Nehls.

Engaged: Steven Fiffer and Sharon Sloan.

Newly Married: Marcia McAllister.

On the Move: Martha Gifford is now with the Justice Department's Anti-Trust Division. Edward Roche, now a professor at the University of Denver, passed the Colorado bar exam.

Moving Up: Thomas Fitzpatrick, an attorney with the Seattle firm of Karr, Tuttle, Koch, Campbell, Mauer, and Morrow, has been named chairman of the American Bar Association's Standing Committee on National Conference Groups.

Partner: David J. Bradford and Donald R. Cassling at Jenner and Block in Chicago; James Goold at Kirkland and Ellis in Chicago, Anne Kimball at Wildman, Harrold, Allen, and Dixon in Chicago (named in 1981).

In the News: Valli Benesch was the subject of the cover story in the January 1983 Working Woman magazine: "At 31, she has committed herself to a career at Fritzi, the $58 million sportswear company founded by her father and mother in San Francisco. . . . It's understood [she] eventually will take over as top executive."

Irving Geslewitz was recently quoted on a local Spanish language television station (channel 26) concerning a client matter. According to highly placed sources, Irving is known to his clients as Irvingo, there being no formal translation of his first name into Spanish.

Staughton Lynd was the subject of a New York Times profile, "Antiwar Activist of 60's Now a Workers' Lawyer." He practices labor law with a legal services firm in Youngstown, Ohio. He has published a handbook, Labor Law for the Rank and Filer, and is currently publishing The Fight against Shutdowns: Youngstown's Steel Mill Closings.

Class members, please note: I would like to devote the next column to a discussion of civic activities and pro bono work. Please let me know about such work in the community or in the courts.

Thomas Balmer is now practicing with Lindsay, Hart, Neil and Weigler in Portland, Oregon. He is the co-author of "Conflicts between State Law and the Sherman Act," the opening article in volume 44 of the University of Pittsburgh Law Review.

Barbara Goering and her husband, Jim Murray, have a daughter, Rebecca Goering Murray, born September 24, 1982.

Mitchell D. Goldsmith has become a shareholder of Sachnoff, Weaver, and Rubenstein, Ltd., in Chicago.

Tony Stemberger and his wife, Judith M. Phillips, announce the birth of their first child, a son, Curt Anthony Phillips Stemberger, on October 8, 1982.

Bobbie Jo Quimby Winship has a son, Andrew Christopher, born September 12.

Gregory G. Wrobel has been elected a vice president of the University of Chicago Alumni Association.


Debra Hurwitz Snider has returned to work at Hopkins and Sutter in Chicago after a six-month maternity leave following the birth of Anne Jessica on August 1, 1982.

Anna Ashcraft married Warren Johnson on October 16 at Bond Chapel.

Cheryl A. Chevis spoke on "Tax Aspects of Bankruptcy and Forgiveness of Indebtedness" at the thirtyninth annual Federal Tax Course sponsored by the Illinois Institute for Continuing Legal Education. Ms. Chevis is an associate with Mayer, Brown, and Platt in Chicago.

Two papers written by members of the class of 1980 when they were students in Professor John Langbein's English legal history seminar have been published. "The History of Imprisonment for Debt and Its Relation to the Development of Discharge in Bankruptcy," by Jay Cohen, appeared in the September 1982 issue of the Journal of Legal History (London); and Susan C. Towne's "The Historical Origins of Bench Trial for Serious Crime" was published in volume 26 of the American Journal of Legal History.

Mark A. Stang and his wife, Cathy, have a daughter, Rebecca Rand, born December 7, 1982.

Joel N. Bodansky has published a paper written for Professor John Langbein's English legal history seminar (see also class of '80 above). Mr. Bodansky's "The Abolition of the Party-Witness Disqualification: An Historical Survey" appeared in volume 70, number 1, of the Kentucky Law Journal.

Charles F. Rule is now a special assistant in the Antitrust Division of the U.S. Department of Justice.

Deaths

1923
Dan H. McNeal, November 4, 1982

1929
Melvin F. Abrahamsen, March 14, 1983

1931
Edward J. Schmitt, October 10, 1983

1937
Jack W. Loeb, March 1, 1983

1948
Ira J. Bergman, November 10, 1982

1954
Edwin A. Strugala, January 31, 1983

1955
Robert J. Kutak, January 23, 1983
The Law School Record Invites Your Comments

The staff of the Law School Record would like to know your opinions about the magazine. Please take a few minutes to answer the questions below, and send your completed questionnaire to:

Law School Record
University of Chicago Law School
1111 East 60th Street
Chicago, Illinois 60637

Results of the survey will be published in a future issue.

How often would you like to receive the Record?
□ Twice a year, as now
□ Three or four times a year

How often do you read these features?
Feature articles
□ Always □ Sometimes □ Never
Profiles of alumni
□ Always □ Sometimes □ Never
Memoranda (news of the Law School)
□ Always □ Sometimes □ Never
Alumni Notes
□ Always □ Sometimes □ Never

Do you prefer articles written by:
□ Faculty?
□ Graduates?
□ Other?

What kinds of articles would you most like the Record to publish? Rank the following topics in order of preference.
□ Law practice
□ Teaching of law
□ Legal scholarship
□ News of the Law School
□ Other

In this issue, which article or department interested you most?

Articles in the Record tend to be
□ Too short
□ Too long
□ A good length

Do you prefer issues centered around one theme, or issues containing articles on several topics?
□ One theme
□ Several topics

Would you like to see book reviews in the Record?
□ Yes
□ No

How would you rate the appearance of the Record?
□ Attractive
□ Adequate
□ Dull
□ Needs more photographs and drawings
□ Other comments

Would you like to read more news about current Law School students?
□ Yes
□ No

Does the Record keep you well informed about the Law School?
□ Yes, well informed
□ Adequately informed
□ Inadequately informed

What percentage of the Record do you usually read?
□ 75% or more
□ 50%-75%
□ 25%-50%
□ Less than 25%

Do you have any other comments or suggestions? (Please use back of this questionnaire.)

THANK YOU