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*Front Cover: Warren E. Burger, Chief Justice of the United States Supreme Court*

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Prognostication is at best an inexact science. It is doubly so when the object of prophecy is an institution whose membership is subject to change—and as events of the past year suggest—often quite unexpectedly. As is sometimes pointed out, the strength of the academic critic of the judicial process derives almost entirely from his capacity for 20-20 hindsight. One is sometimes able to point out judicial errors. It is usually necessary, restricting somewhat the pens of regular contributors to legal scholarship, that they first be committed. Professor Thomas Reed Powell used to say that he could analyze Supreme Court opinions by feeling the bumps on the heads of the Justices. However accurate that observation, the bumps on a crystal ball give considerably less guidance.

The Supreme Court’s docket for the recent Term indicates that the sharp change in personnel has not been reflected, at least immediately, in a similar change in its business. This may be a temporary situation, for the nine Justices have the enviable opportunity to pick only one hundred cases from the approximately three thousand that are proffered to them each year. On the other hand, it is the kind of business disposed of by the State courts and the lower federal courts that largely determines the substance of the Supreme Court’s work.

As in preceding years, the 1969-70 calendar contains problems of administration of criminal justice; problems of racial discrimination; problems of church and state; problems of freedom of expression for dissenters; and problems of reapportionment. In short, the staple of the last few years will continue to confront the “New Court” as it did the old one. But these problems will not come to the Nixon Court with the same virginal qualities they had when the Warren Court first met them. Too much has been done that cannot be undone. Nor will a Court with but two new members—or even four—wish to undertake a broad restructuring of recently made constitutional law. Indeed, the new Court, from what little we know about its new members, is likely to feel more compelled to adhere to the principle of stare decisis than did the Warren Court.

For the most part then, I do not think that there will be any major retreats from recent decisions. The concepts of racial desegregation, of judicial control over reapportionment, of the application of most of the first Eight Amendments to the States are, I think, here with us to stay. But if the Court is not likely to retreat, neither is it likely to break much new ground. It will, I predict, be more cautious than was its predecessor in seeking judicial solutions to society’s most difficult problems.

Let me talk then of some of the major areas of problems that will most likely confront the Nixon Court. Certainly the decisions of the Warren Court...
that have aroused the most opposition from the public and the States and, not least, in the halls of Congress are those opinions concerned with appropriate procedures for the administration of criminal justice. It is of importance that myth be dissipated and that catchwords be rejected if the Court is properly to deal with these problems. The myth is that the Court by its decisions is responsible for the increased crime wave in the country. This notion is dependent solely on the fact that during the existence of the Warren Court there has been an increase in the crime rate. The conclusion is offered that because of this coincidence, there must be a cause and effect relation between the two. I submit that there is no validity to this conclusion. The Court can no more be blamed for the increase in crime than it can be blamed for the Vietnam War or the unabated prosperity that also accompanied the tenure of Chief Justice Warren.

On the other hand, to the extent that the Warren Court has not adequately justified its conclusions in these cases and the others that it has decided, it has contributed to a disdain for law and its processes, not only among the criminal elements in the community but equally among the more respectable portions of the community. When three Presidents and five Congresses can condone a war that lacks constitutional sanction, when a Governor of a State can use troops to forestall the effectuation of a federal judicial decree, when unions and other organizations can set their own views as superior to those of the courts and the legislatures, when universities can protect their students against punishment for illegal acts, when police can ignore the requirements of judicial due process by taking punishment into their own hands, we are dangerously close to the dissolution of a society governed by law instead of by will. Lawlessness is indeed rampant. But the Court’s decisions in the areas of criminal procedure cannot bear the responsibility for it. Nor are we helped by resort to the rhetoric of political campaigns in criticism of the Court. It was long before the Warren Court began its program to make the State courts conform to the same rules that the Constitution makes applicable in the federal courts that Mr. Justice Frankfurter warned us against the danger of using slogans as answers to hard problems. In *On Lee v. United States*, he said:

Loose talk about war against crime too easily infuses the administration of justice with the psychology and morals of war. It is hardly conducive to the soundest employment of the judicial process. Nor are the needs of an effective penal code seen in the truest perspective by talk about a criminal prosecution’s not being a game in which the Government loses because its officers have not played according to the rule. Of course criminal prosecution is more than a game. But in any event it should not be deemed a dirty game in which “the dirty business” of criminals is outwitted by “the dirty business” of law officers. The contrast between morality professed by society and immorality practiced on its behalf makes for contempt of law. Respect for law cannot be turned off and on as though it were a hot water faucet.

As I said, I do not expect the Nixon Court to retreat from the expansion of federal rules of criminal procedure to the State courts. I do think, however, that changes of these structures brought about by legislative action will be readily accepted. If either Congress or the State legislatures were to turn their attention to reform of their criminal procedures in order to achieve the ends of ordered liberty, I expect the Court would be receptive to these efforts. And I would be surprised if the Court would not prove amenable to change if the States were to come up with some means other than the exclusionary rule for effectively policing their police. I do not mean, of course, that anything the legislature does will prove acceptable. Like Senator Sam Ervin, I am dubious that a law authorizing “preventive detention” can be drawn in such a way as to satisfy the clear mandates of the Constitution.

There is one aspect of this field in which, I should
hope, the Court may break new ground. One of the
most serious challenges to the efficacy of our systems of
criminal law enforcement derives from the failures of
these systems to afford speedy justice. I know of noth-
ing that creates such disdain for American criminal law
as the failure to impose sanctions within a rea-
sonable period after arrest of a guilty person.

All in all, I believe that the new frontiers that will
be pushed by the Court in the area of adminis-
tration of criminal justice will be few. These problems
are essentially now left with the legislatures and the
other branches of the judiciary for successful adminis-
tration.

In another area of the Warren Court’s efforts, I ex-
pect a similar judicial restraint to be exhibited by the
new Court. The “simplest” one-man, one-vote rule—
the adjective is Professor Paul Freund’s—has been car-
ried about as far as it can go. The problems to be faced
by the new Court here will be different ones. Most im-
portant, of course, will be questions of gerrymander-
ing, which the one-man, one-vote rule has made easier,
not harder. It was, I submit, the gerrymander that first
brought the Warren Court into the “political thicket.”
But *Gomillion v. Lightfoot* was concerned with the
most patent use of the gerrymander for imposition on
Negroes. It was decided under the Fifteenth Amend-
ment, not the Fourteenth. I should think that gerry-
manders that would be brought within the *Gomillion*
rule would still be subject to abatement by the Court.
On the other hand, the Warren Court itself was re-
luctant to enter the arena on such questions, and I do
not expect that the Nixon Court will be more ame-
nable to such action.

The *Baker v. Carr* line of cases, however, will create
another challenge. For, when the one-man, one-vote
thesis is combined with the decision striking down
California’s infamous “Proposition Fourteen,” they
raise questions about all sorts of State and local gov-
ernment procedures that call for more than a major-
ity vote for the promulgation or repeal of legislative
acts. I do not expect an outburst of new doctrine from
the new Court on these questions. But they will have
to be faced. And the proper answers are anything but
clearly marked.

In the third major subject of the Warren Court’s
business, the effectuation of desegregation, the Nixon
Court is unlikely to have need for the creation of new
rules. Again, one should not look for a retreat. The
problem is now largely in the hands of the national
legislature and the national executive. Their powers
are far greater than any the Court can bring to bear.
And the essential issue of a peaceful resolution of the
Negro Revolution is certainly not within the power of
the High Court to resolve. Such legislation as Con-
gress enacts or will enact, and such executive action
as the President may take, will probably receive sym-
pathetic treatment from the new Court. Whether the
Court will be as amenable as the Warren Court was in
reading the 1866 legislation or even the 1965 Civil
Rights Act may be questioned. But a responsible judi-
iciary will be hard put to find adequate reasons for
playing dog-in-the-manger with reference to actions
taken, however reluctantly by the politically responsi-
ble divisions of the national government. If legisla-
tures, State or federal, should make provisions for “in-
verse discrimination,” for example, I expect that the
Nixon Court will sustain them.

One open question for the Nixon Court may well
arise with regard to the church and state cases in
the offing. Strangely, I expect that the new Court will
prove more reluctant rather than less to approve aid to
parochial schools, a problem certain to reach the Court
as a result of *Flast v. Cohen*. On the other hand, I
expect the new Court will rely on history—for I doubt
that it will be willing, any more than the Warren
Court was willing—to sustain the various exemptions
from taxation afforded to religious bodies, which will
also be subject to attack. I suggest that it will rely on
history, for reason is hard put to explain why a direct
subsidy by way of relief from obligations that all oth-
ners must bear should be valid. And I expect some form of evasion of the question that will come to it in a multitude of forms—just as the Warren Court evaded the issue by the most blatant rewriting of a Congressional statute—the question whether exemption from military service can rest on religious affiliations or beliefs.

Two starts of the Warren Court can be developed rather freely by the Nixon Court. The first is represented by Shapiro v. Thompson, the case holding invalid a local residence requirement for qualification for certain welfare benefits. There are two ways that the case could expand. One is solely with reference to other similar State requirements of residency, in such highly important areas as voting for example, or with regard to some less important matters, such as hunting and fishing licenses. Any such residency requirements might well fall for the same reason that felled the welfare residence requirement, because of its inhibition on what the Warren Court regarded as the right to travel. Implicit in Shapiro v. Thompson, however, is a broader doctrine. That case could prove to be the lever to pry open the heretofore closed provisions of the Fourth Article and the Fourteenth Amendment, the Privileges and Immunities Clauses. I think that the Warren Court was reluctant to utilize these clauses because their benefits were, by the very language of the Constitution, confined to citizens. Inasmuch, however, as the Court has already precluded distinctions between citizens and noncitizens because of the demands of the Equal Protection Clause, this reluctance should be dissipated. Moreover, it would seem that the historical intent of the writers of the Fourteenth Amendment was for the Privileges and Immunities to be an explosive principle. Having made Negroes citizens by reason of the first sentence of the Fourteenth Amendment, the Reconstruction Congress expected to protect the rights of the newly-made citizens through other provisions of the Fourteenth Amendment, and not least through the Privileges and Immunities Clause. Shapiro v. Thompson, I submit, can better be read as a Privileges and Immunities case than as a "right to travel" case. For the right to travel might properly be placed, as it once was, in the Privileges and Immunities Clause. Here is a tabula rasa on which the Nixon Court could make its reputation, whatever that reputation might prove to be.

The other open invitation for the Court of the future to impose its own will is to be found in the Warren Court's revival of the concept of substantive equal protection. Substantive equal protection is, of course, but another name for that hated substantive due process that was supposed to have died when the Nine Old Men were converted into the Roosevelt Court. It had never really disappeared. For, as must be clear to everyone, every legislative, executive, judicial or administrative act involves a problem of classification. Even the so-called void-for-vagueness cases—which I prefer to call the vague-for-voidness cases—can be rationalized in terms of improper classification and, therefore, as a violation of equal protection. If memories of Truax v. Corrigan give rise to doubts as to the desirability of such a doctrine, I can only suggest that they should.

Insofar as the new Court feels bound by precedent, its decisions will be restrained by those made by the Warren Court in the major areas of its operation: criminal procedure, reapportionment, desegregation. But with these two tools, with an expansive Privileges and Immunities Clause and an even more expansive substantive equal protection concept, the Nixon Court will be able to work its will at least as effectively as did its predecessors. But when I say at least as effectively, I do not mean to suggest that the Warren Court has been effective. Segregation is still the rule rather than the exception; police misbehavior is pretty much unreduced; school prayers and similar breaches in the wall of church and state are limited to but a small degree; and, if reapportionment has occurred widely, it has been reapportionment designed by the political parties and not an accommodation to the ideals of representative democracy.
There are a few strong personal beliefs that I have about the Supreme Court. The first is that the Court is not a democratic institution, either in makeup or function. It should be seen for what it is, even at the cost of that grossest of contemporary epithets: “elitist.” It is politically irresponsible and must remain so, if it would perform its primary function in today’s harried society. That function, evolving at least since the days of Charles Evans Hughes, is to protect the individual against the Leviathan of government and to protect minorities against oppression by majorities.

Essentially because its most important function is antимajoritarian, it ought not to intervene to frustrate the will of the majority except where that is essential to its functions as guardian of the interests that would be otherwise unprotected in the government of the country. It must, however, do more than tread warily. It must have the talent and recognize the obligation to explain and perhaps to persuade the majority and the majority’s representatives that its reasons for its frustration of majority rule are good ones.

The Warren Court accepted with a vengeance the task of protector of the individual against government and of minorities against the tyranny of the majority. But it failed abysmally to persuade the people that its judgments have been made for sound reasons. Its failure on this score was due to many causes of which I can catalogue but a few. One is that its docket was so overcrowded with lesser business that it could not concentrate its efforts on the important constitutional questions that came before it. A second is that its communication with the public had to come essentially through the distortions of the news media, who would not invest the time, effort, or space to the careful job that is necessary exactly because the Court has no power base of its own. A third reason for the failure, if I may say so, was the judicial arrogance that refused to believe that the public should be told the truth instead of being fed on slogans and platitudes. The fourth problem was that many of the Justices were incapable of doing better. There is need for intelligence and integrity on the high bench that goes far beyond an average I.Q. and a distaste for venality.

For the Court, in performing what is, by definition, an unpopular task, is none the less dependent upon popular support to keep it a viable institution.

If the Court’s substantive function is impaired by these defects, so too is its important symbolic office. Some time ago Felix Frankfurter wrote:

A gentle and generous philosopher noted the other day a growing “intuition” on the part of the masses that all judges, in lively controversies, are “more or less prejudiced.” But between the “more or less” lies the whole kingdom of the mind, the difference between “more or less” are the triumphs of disinterestedness, they are the aspirations we call justice. . . . The basic consideration in the vitality of any system of law is confidence in this proximate purity of its process. Corruption from venality is hardly more damaging than a widespread belief of corrosion through partisanship. Our judicial system is absolutely dependent upon a popular belief that it is as untainted in its workings as the finite limitations of disciplined minds and feelings make possible.

And here again the Warren Court failed us. What Arthur Schlesinger has termed a crisis of confidence clearly extends to the Supreme Court. The restoration of that confidence is vital to the continuance of the rule of law in this country. For above everything else, the Supreme Court is symbolic of America’s preference for law over force as the ruling mechanism of a democratic society. If it fails, the vital center disappears, and we “must ultimately decay either from anarchy, or from the slow atrophy of a life stifled by useless shadows.”

The Nixon Court has awesome tasks before it: To match the Warren Court aspirations for the protection of individuals and minorities. To restore the confidence of the American people in the rule of law. One or the other is not enough.
Torts is not my field. But in one sense neither is it Guido Calabresi’s, although he is a professor of tort law at the Yale Law School. In neither The Cost of Accidents nor the series of earlier articles of which the book is a summation and amplification will the reader find more than passing mention of the rules and concepts that constitute the body of accident law or of the procedures and institutions by which that law is formulated and applied. Few cases are discussed and, if I recall correctly, no statutes.

To note the untraditional character of Calabresi’s concerns is not to criticize, but to mark a new direction in legal scholarship. It is no secret that many law professors have lost interest in the traditional undertakings of legal research. These were two: determining what the law was and determining what it should be. But in practice they usually turned out to be the same. In both cases, one first sought to isolate the basic premises or policies underlying an area of the law by a close reading of judicial opinions and, where applicable, statutes and legislative history, and then comparing the specific rules of law developed by the courts with these premises. If a rule was found to be inconsistent with the premises, it was rejected as an aberration or, if too well established for that, as bad law. To be sure, rules were sometimes found wanting on grounds other than inconsistency with the dominant policies in the field—usually these had to do with the fact-finding or remedial limitations of the judicial process—but for the most part logical consistency with premises derived from legal documents was the touchstone of analysis. Legal scholarship consisted of the interpretation and logical elaboration of legal materials.

This is not the complete story, because from at least Brandeis’ time there was also a branch of legal scholarship that emphasized facts rather than logic, generally facts that demonstrated that the premises of a body of law were out of touch with contemporary social reality. They can more accurately be described, without invidious intent, as anecdotes: The “facts” marshalled by Brandeis and other fact-oriented legal reformers were for the most part stories (not necessarily untrue) told to legislative committees, rather than a product of rigorous empiricism.

The limitations of textual analysis, logic, and anecdote as tools of inquiry should be apparent. But they do not explain why the traditional approach has fallen into disfavor among a number of legal scholars. Today there are legal scholars—I would guess a growing number—who believe that over a broad range of subjects they will make greater progress utilizing the theories and empirical procedures of the social sciences than continuing to depend exclusively on the methods of traditional legal scholarship.

The Cost of Accidents is an ambitious effort to employ a social science perspective in a field of law in which, when Calabresi started his work, there was no supportive tradition, no pioneering work by economists or other social scientists on which to rely. In its bold break with conventional legal analysis of tort questions, Calabresi’s work may be a portent of the future direction of legal scholarship in fields that, unlike antitrust, remain bastions of the traditional approach.

By this time the reader must be impatient to find out what exactly the book has to say. Its salient points can be summarized briefly.

Accidents impose costs. Those costs, in the Calabresian terminology, are primary (personal injuries and property damage), secondary (economic dislocation resulting from failure to compensate the victim of an accident), and tertiary (the costs of administering any scheme designed to reduce primary or secondary accident costs). The object of accident law or policy should be to bring about the socially preferred accident-cost level. Notice that the goal is not to minimize accidents or accident costs, unless by accident costs we mean costs net of any benefits. Traffic accidents could be eliminated by banning motor vehicles. But the price would be too high. The goal, rather, is to optimize accident costs.

Its attainment is complicated by the reciprocal character of the components of those costs. A plan that reduced secondary costs—for example, a scheme of compulsory social insurance against accidents—might increase primary accident costs by reducing the incentive to avoid an accident. A plan designed to reduce accidents by (say) forbidding liability insurance would concentrate accident costs and thereby aggravate the secondary-cost problem. Schemes to reduce tertiary (administrative) costs could increase both primary and secondary costs. And so on.

He distinguishes two basic approaches. The first is the market, or in his terminology “general deterrence,” approach. In its pure form, the market approach involves no government regulation of accident-producing activities at all; the level of accidents is determined entirely by voluntary arrangements among members of society. Thus, the number of coal miners killed each year would be a resultant of the demand for coal, the attitude of coal miners toward risk, the costs of safety devices, and the costs of other inputs. If the demand for coal was very large, if safety devices were very costly, and if the supply of coal miners willing to work for moderate wages despite highly dangerous conditions was also large, then the mortality rate among coal miners would be relatively high. But suppose instead that prospective coal miners are highly risk averse. They will demand very high wages, or safety devices, or both. The costs of mining coal will now be higher and the output smaller, unless coal operators can readily substitute other inputs for labor. Either way fewer miners will be employed; perhaps there will be safety devices, too. Mortality in the mines will be reduced. The important point is that whatever the risk preferences of miners may be, the level of mine accidents will be determined by voluntary transactions in the marketplace.

Unfortunately, it costs something to negotiate in the marketplace, and on occasion the costs of voluntary arrangements determining the number of accidents may be prohibitive: Pedestrians cannot get together and negotiate with drivers in the same fashion that coal miners can with coal operators. Where, as in this example, private contracting is precluded by high transaction costs, it may still be possible, through law, to simulate a market result. The trick is to impose the costs of the accident on that participant or contributor who, by a change in his activity, can reduce those costs net of any benefits. This would produce the same result as would private contracting. However, it may be unclear which accident contributor should be induced to alter his activity. A rule making the driver always liable in a car-pedestrian accident might induce auto manufacturers to install safety devices in in-
stances where a cheaper way of avoiding the same number of accidents might be to build pedestrian overpasses.

Calabresi’s criticism of the market or general-deterrence approach to the problem of primary accident costs sets the stage for a discussion of the alternative approach, “specific” or “collective” deterrence. The term means direct public regulation of safety, as in traffic rules and in laws requiring the installation of seat belts in all new cars. The distinction between market and collective deterrence is unfortunately quite unclear. Some types of safety regulation, such as traffic rules, can, it seems to me, be explained better in market-deterrence than in collective-deterrence terms. Imagine a state in which the highways were privately owned and there were no traffic laws. One would expect the highway owners to establish rules of the road, speed limits, and the like for the same reason that auto manufacturers installed some safety devices even before they were required by law to do so—in order to promote use of their product by meeting the user’s demand for safety. These rules might be more lax or more stringent than those imposed by governments; my point is only that many safety regulations, and specifically the traffic regulations that loom large in Calabresi’s discussion of specific deterrence, need not reflect any dissatisfaction with the level of accidents determined by the market. These regulations are imposed by the community because the community is the proprietor of the transportation facility, the road.

Even where the government is not a proprietor, its safety rules may instance market rather than collective deterrence. Collective deterrence, as a functionally distinct mode of regulation, comes into play when the government decides that the violator of a rule shall be made to pay a fine or be imprisoned rather than merely held liable for any injuries or damage that he may cause.

Safety-belt, mine-safety, and like laws are something else again. Their rationale is pure paternalism. They force people to pay more to protect themselves (not strangers) than they would voluntarily pay.

Calabresi concludes that a mixed system of general and specific deterrence is desirable. The appropriate proportions he regards as a mixed empirical and political question. Having established the goals and methods of accident control, he then asks whether the prevailing system of accident control in this country, the “fault system” (negligence law), is a rational system for optimizing accident costs. He concludes that it is not. The fault system not only ignores the problem of secondary costs, save by permitting private insurance; it actually aggravates them by delaying compensation until the conclusion of an often lengthy jury trial or settlement negotiation. The dependence on costly and time-consuming judicial processes also multiplies tertiary (administrative) accident costs. The fault system is not good at optimizing primary accident costs either. The notion of “fault” is freighted with moral concepts that get in the way of so allocating liability as to reduce the net costs of accidents. Furthermore, liability is determined by the facts of each particular case rather than by those of an entire class of cases. Moreover, the judge considers only who between the parties before him is better able to reduce accident costs, although someone not before the court at all (e.g., the auto maker) might be even better. Finally, the ability of the fault system to devise discriminating rules of liability is limited by the degree to which insurance companies find it commercially feasible to establish different risk classes. Calabresi concludes that the fault system is “absurd” and “ineffective” as a system of accident control.

So brief a summary of The Cost of Accidents cannot do justice to the author’s graceful if somewhat sinuous and elusive style or to the excellent if sometimes protracted discussions of detail with which the book abounds. But it can indicate the dominant characteristics of his approach, which are two: reliance on economic theory, and a weak sense of fact. His debt to economic theory is most obvious in the use of a variety
of economic doctrines to establish key points in the analysis: to show why wide cost spreading might not increase the welfare of society, why schemes of secondary-cost reduction could impair incentives to avoid accidents, why the complete elimination of accidents would not promote welfare, what the market can and cannot do to bring about a socially preferred level of accidents, how the presence of monopoly might alter the analysis, and in a host of lesser ways.

At points I find myself in disagreement with his use of economic doctrine. For example, the unwillingness of contemporary economists to ascribe an automatic increase in total welfare to any redistribution of income from a wealthier to a poorer person stems not from rejection of the assumption of the diminishing marginal utility of income, but from recognition that the interpersonal comparison of utilities is arbitrary. But on the whole, Calabresi’s handling of economic doctrine seems, to me at least, highly competent.

Calabresi’s debt to economic theory is greater than I have indicated. That theory supplies the very structure as well as the details of analysis. The form of The Cost of Accidents is that of “cost-benefit” or “systems” analysis. These terms describe techniques of applied economics that involve (1) an initial specification of goals, (2) the arraying of alternative methods of achieving these goals, and (3) the costing out of each alternative. Calabresi begins by setting forth the goals of accident law. He derives these goals from broad considerations of social policy rather than from tort cases or other legal materials. He then describes the full spectrum of alternative methods for achieving these goals; and this procedure immediately carries him beyond the conventional bounds of tort doctrine and into areas usually thought to belong to the administrative and criminal law fields. Although he never actually costs out these alternatives, it is significant that his analysis is cast in terms of comparing their costs and that he subordinates considerations (such as “justice”) that are not susceptible of precise and objective description. In principle, his analysis could provide a framework for a quantitative evaluation of alternative accident-control schemes; at least, the considerations relevant to evaluation have been carefully marshalled.

The utilization of this systematic procedure to bring elementary but profound insights of economic theory to bear on the accident question proves a powerful forensic and analytical machine with which Calabresi easily sweeps rival approaches, employing more conventional legal analytic methods, from the board. He demonstrates that these methods overlook important consequences of different accident-control schemes, proceed on no coherent theory, and provide little useful guidance to policy makers; and that an approach grounded in the procedures and theorems of economics offers greater promise. This is the heart of his achievement. His failure is in exaggerating the utility of the economic (or any other) approach when uninformed by facts.

One sees this most clearly in his discussion of the fault system. I noted previously the strong language in which Calabresi rejected the possibility that the fault system might approximate the model of an effective accident-control system that emerges from his analysis of goals and alternative methods for achieving them. But his reasoning is analytic rather than empirical and the analysis is not compelling. That “fault” is not a term that an economist seeking to optimize accident costs by identifying the cheapest accident avoider would use is hardly dispositive. The question cannot be answered by reference to a dictionary.

Nor is it clear a priori that in deciding tort cases judges consider only the relative abilities of the particular parties before them to minimize net accident costs. It is open to a party to prove that not it but a stranger to the proceeding—the manufacturer of the automobile, the contractor who built the roadway, the city that installed (or failed to install) the traffic signals—was the one “at fault,” or to seek contribution from some other party, alleging it to be a joint tort-
feasor. And perhaps the experience accumulated in a series of trials involving accidents of similar types does enable insurance companies to identify accident-prone activities, people, procedures, and equipment and fixed premiums accordingly. A more disturbing characteristic of present insurance practices is that the accident costs of the most dangerous drivers are systematically shifted to the less dangerous. Compulsory-insurance schemes now widely in force require insurance companies to insure, at rates not much above normal, those drivers whose driving records or other characteristics make them such poor risks that no company would voluntarily insure them at rates that the driver would be willing to pay. Such insurance is written at a loss, the deficit being made up by other policyholders.

With features such as these, the fault-cum-insurance system is open to valid criticism. But a compulsory-insurance scheme that encourages accidents is not inevitable. We could if we wished require that drivers obtain adequate liability insurance at whatever was the competitive rate for their risk group—this to assure that the costs of their accidents be made costs to them—and simply bar from the roads any driver who failed to obtain that insurance. Otherwise we are subsidizing accidents—more concretely, permitting people to kill and maim without bearing the costs of such conduct. The weakness is not in the fault system; it is in the public regulation of the insurance industry.

While it is apparently true that the ratio of administrative overhead to claims paid is higher in the fault system than in most nonfault social or private insurance schemes, that is the wrong comparison. The fault system has a function beyond compensation: the deterrence of accidents. However large the administrative costs of the system in relation to the compensation paid under it, they may be well worth incurring if the tort system is responsible for even a small reduction in the accident rate—traffic accidents alone cost society billions of dollars every year—unless the same deterrence could be obtained at lower cost by the use of another system. Finally, since I reject Calabresi's assumption that people are psychologically incapable of voluntarily protecting themselves by insurance, I conclude that the fault system need not entail an intolerable problem of secondary accident costs.

My argument is not that the fault system is in fact superior to alternative systems of accident control but that a judgment is impossible without studying how the system operates. Economic theory will help us to design the necessary studies, but in this instance, at least, it will not yield the answer in advance.

The book, in short, furnishes a useful perspective on the problem of accident control but not a predicate for deciding between competing solutions, and this I suspect will be a frequent characteristic of the new version of legal scholarship exemplified by The Cost of Accidents; at least it is a major pitfall. A taste for proposing new organizing principles need not be accompanied by interest in devising methods of empirical research that will enable us to use those principles to add to our knowledge of how the legal system operates and could be improved. Indeed, it may imply a lack of interest in a useful and familiar if insufficient technique of empirical legal research: the close reading of cases.

Calabresi's defense, offered early in the book, is that "if we waited for such facts concerning the actual operation and effects of accident law to be adequately proven before we made societal changes, we would rarely if ever depart from the status quo." But one could as plausibly argue the reverse: The status quo that Calabresi so deplores—the fault system—is likely to continue to resist change in the area of his primary concern, traffic accidents, until the alleged shortcomings of the present system are verified by empirical research. This need not mean forever. Empirical research has already proceeded further in the accident field than in most other areas of the law, although one would hardly guess this from The Cost of Accidents. Calabresi cites exhaus-

continued on page 21
I shall speak to you tonight sombrely about what I conceive to be a sombre period in the history of the Republic, whose citizens we are, in the history of the law, whose servants we are, in the history of justice, toward which, as citizens and as lawyers, we aspire.

Just two years ago, suddenly, unexpectedly and, as it turned out, briefly, a new spirit of hope was at large in the land. The results of the presidential primary in New Hampshire, a state which has long been known for the almost cynical corruption of its politics, suggested that the system could, on its own terms, still be made to work. Despite the extraordinary progress that had been made in the provision of techniques for controlling the thought and predicting the behavior of the electorate, the unexpected, it appeared, could still happen. There were sources of energy, hitherto unsuspected, which could be tapped. The dead slogans, the worn-out clichés of an apparently closed political system could perhaps be invested with vitality and freshness in a newly opened society. Previously alienated young people came, in impressive numbers, to explore the possibilities which Senator McCarthy’s lonely winter travels had revealed. Their state of euphoria—and ours—did not survive the assassinations in April and in June of that year.

It was fashionable, not so many years ago, to say that ideology was dead. All the great social problems had been solved—or, at the least, their proper solution was apparent to anyone who cared to look into the matter. All that remained to be done was to maintain and service the great machine, which could be expected to go on running indefinitely. That, the technicians could do for us. This curious idea sounds suspiciously like the early Marxist fantasy about the withering away of the state, once the revolution has been achieved. It was in fact the received doctrine among the social theorists—if that is the right name for them—during the placid years of the Eisenhower administration. The world, we were told, would no longer be a particularly exciting place. The last mountain peak had, indeed, been climbed. The quest for the Holy Grail had been indefinitely postponed; it was no longer entirely certain that there was such a thing as the Holy Grail. We might, in the future, be bored but we would be well taken care of—comfortable, secure, content, even quietly happy. Ecstasy was not in the cards—but who wants ecstasy?

Utopia, as we have always been told by the specialists who have considered the point, is an intolerable state—like some Sunset Village where everything has been conceived and designed for the comfort and convenience of its elderly, broken-down and mentally infirm residents. So we need not be surprised that the Utopia which was so confidently proclaimed in the 1950’s—the decade, we might say, of the senior citizen, aptly symbolized by its genial presiding officer—

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Remarks by Grant Gilmore, Professor of Law, The University of Chicago Law School on the occasion of Alumni Day, February 27, 1970.
A Question of Governance
There are different points of view from which one might phrase the question as to the role of students in the governance of law schools. There is one which, to me, seems particularly appropriate. It is this: How can student participation in the governance of law schools improve the quality of law schools and of legal education?

Starting from that point of view, I may as well begin with a forthright disclosure of my own benighted convictions, confident that I shall at least perform the humble service of providing a decent target for those who will follow me. I see little reason to hope that our current absorption with the formal modes of student involvement in the governance of law schools is a path toward the improvement of legal education. I think it is a dreary road that leads to a dead end, one that exacts a heavy toll in time, uses the least important talents of our students and faculty, and carries us toward an environment that is more stifling than invigorating.

This view, which may be shocking, is not based on antipathy toward students nor on mistrust of their objectives, although I know that it may be misunderstood. Nor, I think, does it reflect a lack of appreciation of the contribution that some of them can make in proper ways to a better perception of the aims and methods of legal education. My antipathy is not to students but to the idea of governance as a guiding principle in the enterprise of education. My concern is that preoccupation with the role of students leads inevitably to preoccupation with governance, and magnifies the role of governance in an endeavor that should have as little of it as possible.

Questions of student participation apart, it is unlikely that we would find ourselves today talking about problems of the governance of a law school. Some rather drab subjects have from time to time made their way into programs of this Association or into the pages of the Journal of Legal Education but happily the topic of governance has not been prominent among them. I suppose that until now most would have regarded it as a non-subject, and it is a significant but gloomy commentary on the state of affairs that we could muster this much of an audience to hear a discussion of it now.

The students who seek formal modes of exerting their influence on the character of a law school have a misconception about the nature of the enterprise and an illusion about how it in fact operates. What is true of universities is equally true of law schools, and I cannot put the point better than Harry Kalven has recently done in speaking of universities: “The heart of the activity—what one studies, thinks about, teaches, does research on—those activities which are the reason for his being at a university, are by a proud tradition placed virtually beyond the reach of governance. Ideal-

Statement by Phil C. Neal, Dean of the University of Chicago Law School, at a panel discussion of “The Role of Students in the Governance of Law Schools: at the American Association of Law Schools’ Convention in San Francisco, December 28, 1969.
ly, a university is a collection of anarchists, each being allowed to pursue truth in his own way. In a deep sense, the better the university the less there is to govern." And the least interesting aspects of university life are those which are subject to governance. The organizational principle of the university . . . is anarchy—the right kind of anarchy.

This is not mere rhetoric designed to parry student ambitions and not a mere statement of an ideal. It is closer to a description of the reality than any table of organization would be.

How little there is of governance in the ongoing business of a law school is something soon learned by most faculty members and all deans. It will be said, and of course it is true, that there are committees on this and that, there are meetings, there are reports, and the faculty occasionally does something by vote. But ordinarily this is a fitful and desultory process. The issues of policy that get resolved by this process in ordinary times are surprisingly few. The number that are important is even smaller, and the number having to do with improving the quality of legal education is almost negligible.

We need to ask ourselves how it is that innovation and reform come about in law schools. It is not by governance. It is seldom by committees. And even where a significant committee report can be identified, I am confident that investigation would show that it was largely the work of one man. The reason is not obscure. Our problems are in the realm of ideas and, even more important, the elaboration and implementation of ideas. They have little to do with arriving at a common will, which is the business of governance. A committee may resolve that urban studies should be developed, or even that particular courses should be offered. Nothing will come of it, and indeed the idea itself is unlikely to be propounded, unless there is a particular individual who sees it as important to engage in the painful creative task of exploring the field, organizing its problems, and putting together a course. To take but one example, can one imagine that Henry Hart's course on the Legal Process could have been born in committee? Where is the striking course or the important field of the law whose addition to the law school curriculum owes its genesis to the work of a committee or the deliberations of the faculty?

When one turns to other areas of the enterprise in which committees customarily function, such as admissions, administration of academic rules, and the appointment and promotion of faculty members, the problems are different but the same general question is appropriate: What reasons are there to believe that participation by students will improve the overall quality of the judgments that are made? Putting aside all other difficulties, how are the students to be found who will have the capacity, the sustained interest, and the desire to spend their time in such unproductive fashion, that will enable them to do a better job than the faculty members who presently carry out these generally unwelcome responsibilities?

The number of faculty members who function effectively on committees is itself small. It seems to me extraordinary to suppose that there are significant gains in the efficiency or quality of these activities to be found in any available procedure for choosing students or of using them in the short time they can serve. To the contrary, I am reasonably confident that the effort to do so involves substantial losses in the efficiency if not the quality of the process.

Such negative views do not imply that students have nothing to contribute to the policy of a school or to the direction in which legal education will move. The point is that there are abundant opportunities for that contribution to be made without obsession with the empty questions of structure and governance. We need ideas. We need to take account of the criticism and the special perspective that new generations of students bring to our problems. Those students who have something to say should find no difficulty in getting attention for compelling ideas. I cannot imagine a faculty that would not welcome or be influenced by a thoughtful and well-reasoned report of an individual
student or a group of students on any problem of legal education. Such reports being as rare as they are in the case of faculty members, the opportunity is in a sense very great.

One would think that law students especially would respond to this challenge if they are interested in the problems, since they have chosen a career that puts high value on the arts of reasoned analysis and persuasion. But this kind of contribution is one that not many students are able or willing to make. Hard work is involved. The stock of ideas that students can bring to old and difficult problems is understandably limited. The most capable students will recognize the difficulties and, for the most part, will rightly conclude that there are better and more interesting ways to use their time. The result is, I am afraid, that most efforts of students to become involved in these matters take the form of superficial proposals based on whatever happen to be the current clichés of reform that leap from one law school to another.

We should by all means encourage thoughtful consideration of the problems of legal education by students, and listen to what they have to say. I doubt very much that the process is going to be much advanced in the long run by institutional arrangements, whether in the form of joint committees, parallel committees, representation at faculty meetings, or whatever other devices a particular school may see fit to adopt. There seems little reason to believe that whatever contributions students can make cannot be made by them as students rather than as participants in governance. The elements that make for excellence in law schools are ideas, intellectual climate, and incentives. More governance will not improve these elements. In relation to the environment of a law school, governance is really a form of pollution. If we would preserve the vitality of our institutions, we must hope that we will recognize governance for what it is before it is too late. Perhaps it is already too late.

...tively to the economic literature on an obscure point of theoretical welfare economics, but he does not enlighten the reader as to the state of empirical research in the accident field. From a casual survey, it appears that the existing empirical work is almost exclusively concerned with the compensation aspect of the accident-control problem. And studies of the level, costs, and timing of the reparations received by accident victims do not illuminate what should be the central question of public policy in this area: whether the fault system is better at reducing the net costs of accidents than alternative systems. But it is possible to conceive of studies that would cast considerable light without immoderate length, cost, or complexity. Let me suggest three:

1. One could compare accident rates in jurisdictions having different accident-control schemes or rules (are pedestrians more careless in jurisdictions in which contributory negligence is no longer a defense?), and in the same jurisdiction before and after a change in tort law or other relevant institutional change.

2. As my colleague Harold Demsetz suggests, one could collect either instances where changes in technology altered the relative costs of accident avoidance and ask whether the rules of liability were changed to conform, or instances where the rules changed and ask whether the changes followed technological developments that affected the relative costs of accident avoidance.

3. One could ask how many of the doctrines of accident law currently in force can be deduced from the premise that the purpose of such law is to reduce the (net) costs of accidents.

Perhaps such projects would prove more difficult to undertake than I think. There is ground for optimism in the fact that accidents, unlike some other important subjects of interest to the student of legal institutions, such as collusion, are not covert. At all events, I see no other way of making substantial forward progress in the accident-control area; and perhaps this is a point with general application to legal scholarship.
Gary H. Palm has recently been appointed Director of the Mandel Clinic and Assistant Professor of Law at the Law School.

Mr. Palm received his A.B. in 1964 from Wittenberg University and his J.D. in 1967 from the University of Chicago Law School. At the Law School he was Order of the Coif and active in the Mandel Clinic.

Prior to returning to the Law School to resume his present position, Mr. Palm was an associate for three years with the Chicago law firm of Schiff, Hardin, Waite, Dorschel & Britton. In addition, for the past several years he has been active in the Neighborhood Legal Assistance Center, an agency on the near north side providing free legal assistance to the poor.

Professor David P. Currie has recently been appointed Co-ordinator of Environmental Quality for the State of Illinois. As such he will act as Advisor to Governor Richard Ogilvie on all matters relating to the environment. His department will have responsibility for directing the investigation of environmental problems and making recommendations on appropriate legislation. His Chief Deputy will be Michael G. Schneiderman '65. Prior to the appointment, Professor Currie had been a recently appointed member of the State of Illinois Air Pollution Control Board.

Currie received his A.B. from the University of Chicago in 1957 and his LL.B. from Harvard Law School in 1960. Following graduation he served as law clerk to Judge Henry J. Friendly of the Second Circuit Court of Appeals during 1960-61 and to Justice Felix Frankfurter of the United States Supreme Court during 1961-62. In 1962 he was named Assistant Professor of Law at the Law School and Professor of Law in 1968.

His major fields of interest have been Conflict of Laws and Federal Jurisdiction. His most recent publications include: Federal Courts: Cases and Materials; with Roger Crampton, Conflict of Laws: Cases and Materials; The Federal Courts and the American Law Institute: Part I, 36 U.Chi.L.Rev.1; Part II, 36 U.Chi.L.Rev. 268; and Appellate Review of the Decision Whether or Not to Empanel A Three-Judge District Court, 37 U.Chi.L.Rev. 159.

His most recent interests have concerned environmental questions. In 1968 he reviewed Sax, Water Law in the University of California Law Review. Last year he published Motor Vehicle Air Pollution: State Authority and Federal Pre-emption, in the University of Michigan Law Review. In addition, last year he began teaching courses in Urban Renewal and Land Use Planning, and Natural Resources. The latter was an effort to draw together materials from scientific, economic and political science journals as supplements to traditional legal materials in the fields of administrative law, federalism, and local government in an effort to intelligently define resource problems and formulate and evaluate appropriate legislation for dealing with them.

Currie will be on leave from the Law School during the period of his appointment.

Professor Dallin H. Oaks has recently been appointed Executive Director of the American Bar Foundation, succeeding Professor Geoffrey Hazard in that position. Oaks had recently been on leave from the Law School serving as Counsel to the Bill of Rights Committee of the Illinois Constitutional Convention. His appointment was effective June, 1970.

Oaks received his A.B. in 1954 from Brigham Young University and
his J.D. in 1957 from the University of Chicago Law School where he graduated *cum laude*, and Editor-in-Chief of the *Law Review*. Upon graduation he served as law clerk to Chief Justice Earl Warren of the United States Supreme Court. After three years in private practice with the Chicago law firm of Kirkland, Ellis, Hodson, Chafeetz & Masters, in 1961 he returned to the Law School to become Associate Professor of Law.

His major teaching and research interests have been in the areas of trusts, estate and gift tax, criminal procedure and judicial administration. His most recent publications include a revision of Bogert's *Cases on the Law of Trusts* and with Warren Lehman, *A Criminal Justice System and the Indigent: A Study of Chicago and Cook County*. In addition, Oaks was author of *The Criminal Justice Act in the Federal District Courts*, published as a Committee Print for the Subcommittee on Constitutional Rights of the Senate Judiciary Committee. The Criminal Justice Act of 1964 made provision for counsel for indigents accused of federal crimes. The study was based upon the experience of six Federal Districts in administering the Act and upon numerous interviews and correspondence in other Districts with judges, United States attorneys, defendants, their counsel, probate officers and administrative personnel.

Drawing upon his diversified experience in legal services areas, Oaks was the organizer of the Law School’s Summer Fieldwork Fellowship Program. This program has provided financial support to date for over 75 law students working summers in a variety of legal services agencies such as the public defender, community renewal, probation and parole services, correctional institutions and juvenile courts. The program was intended to provide a full summer’s exposure to types of legal services and social problems other than those typically studied in the formal curriculum.

Over the years Oaks has held a wide variety of administrative positions in the University and in the Law School. He was Associate Dean and Acting Dean at the Law School for six months in 1962. He has been Chairman of the Curriculum Committee. In 1969 Oaks acted as Chairman of the nine-man University disciplinary committee. This committee processed charges against 150 students, all of which grew from the student occupation of the Administration Building at the University of Chicago in 1969.

Like Professor Hazard, Professor Oaks will maintain partial teaching responsibilities at the Law School during the period of his appointment at the Bar Foundation.

This year’s first-year course in research and writing will again be supervised by Professor Norval Morris. In addition to their primary responsibilities in research and writing, the Bigelow Fellows will again be given the opportunity to teach in small sections as part of the first-year course in Criminal Law.

The Bigelow Fellows for 1970–71 will be: *Jannette Barnes* who received her LL.B. degree from the London School of Economics in 1968, and LL.M. degree from New York University Law School in 1969, and is currently a candidate for the J.S.D. degree at the University of Virginia Law School; *Donald W. Fyr*, who graduated Order of the Coif in 1964 from Northwestern University Law School where he was Associate Editor of the *Law Review*. Since 1964 he has been associated with the Chicago law firm of Wilson & McIlvaine; *Wayne McCormack*, who received his J.D. degree from the University of Texas where he was Associate Editor of the *Texas Law Review*, and was recently law clerk to Judge Walter Ely of the United States Court of Appeals for the Ninth Circuit; *Mrs. Pauline Vager*, from New Zealand, who received her LL.B. degree and M.Jur. degree with First Class Honors from the University of Auckland; *Donald J. Weidner*, who received his J.D. degree in 1969 from the University of Texas Law School where he was Project Editor of the *Texas Law Review*. He was recently an associate with the New York firm of Willkie, Farr & Gallagher.
The Law Women’s Caucus, on February 9, 1970, filed a complaint with the Equal Employment Opportunity Commission charging the Law School and three law firms with violation of the Civil Rights Act of 1964. The discrimination alleged was the Law School’s operation of a Placement Office which made its facilities available to firms that discriminate against women, and the School’s failure to adopt an exclusionary policy toward those firms.

The incidents prompting the charge took place during the last interview season. Women students had complained of employers’ statements indicating discrimination against women: by refusing to hire, by applying higher standards in hiring or advancing women, by paying them lower salaries or by assigning women only to traditionally “female” departments such as trusts and estates. Other statements involved a law firm’s “fair share” of women, their stereotype “submissive” and “passive” qualities or the “demands” of the clients.

All of the above practices appear to be violations of the Act. The Law School’s involvement is derivative. The Act provides: “It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against any individual because of race, color, religion, sex, or national origin . . . .” The argument is, first, that the Law School Placement Office is an “employment agency” within the terms of the Act and that it “otherwise discriminate(s)” when, after being informed that a firm has illegally discriminated against a woman student, it continues to make its placement facilities available to that firm.

Following the incidents of the fall, the women suggested that the School clearly articulate its position on sex discrimination and then establish an enforcement mechanism which would prohibit groups practicing sex discrimination from using its placement facilities. In recent years, allegations of sex discrimination had become increasingly frequent.

The School responded that, since the policy proposed by the women would not take effect until the fall of 1970, a faculty committee should be appointed to fully review the matter. The women preferred to begin sooner. On February 4, 1970, in a letter to the Dean, they stated they would file a charge with the EEOC “to help clarify the nature of these obligations and to assist in working out a policy toward discriminating law firms which is consistent with the requirements of Title VII.”

On April 3rd, the faculty committee, consisting of Professors Fiss, Kaplan and Meltzer, issued its ten-page report. The report recommended that a statement be included in the placement brochure stating clearly the legal profession’s obligation to comply with the federal prohibition of discrimination on grounds of race, religion, or sex. “We trust that our placement facilities will be used only by those who are prepared to discharge that obligation.” The report also recommended that an additional statement be included which would describe various types of sex discrimination: “The purpose of the statement would be informative and educative, . . . (to) remind the recruiters of the fact that they are likely to interview a significant number of girls at the Law School; that the federal laws and our commitment to equal employment opportunity cover discrimination on the basis of sex; and point out to them the kinds of practices that we would regard as discriminatory by way of summarizing the nature of the complaints we received during the past fall.”

The reasons for the absence of the recommendation of strict enforcement mechanisms was also discussed in the report: “The statement we recommend simply sets forth the requirements of law and a limitation of the invitation to use the placement facilities. We also believe that the statement avoids making any commitment to an elaborate enforcement mechanism. The Law School must rely on the honesty, good will, and professional integrity of lawyers—perhaps all that we can rely on. We make no pretense of being committed to any independent surveillance of the employment practices of the law firms and agencies that use the Placement Office. We do not have the resources to make such a commitment, and such a commitment would seriously divert our energy and resources from our overriding educational purposes.”

The report instead recommended that when instances of discrimination are alleged, the School should inform the firm, by letter, of the complaint
and invite a response, to dispel misunderstandings and to clarify the firm's policy.

The Law Women's Caucus responded to the faculty report memorandum in a letter entitled, with some preview of disagreement, “One Step Forward, Two Steps Back.” Their chief complaints were with the strength and clarity of the “statement” on discrimination and, as a practical matter, the absence of effective enforcement mechanisms.

They felt the faculty report language, “We trust that our placement facilities will be used only by those who are prepared to discharge that obligation” would, in effect, be read by employers as a “hope” by the School that the employers “would behave themselves.”

Their more serious disagreement was in the area of enforcement. They felt that the normal response to the letter would be a full denial of all the specifics of the complaint—for example, that the triggering statement was taken out of context, that the interviewer did not make the alleged remark, and that, regardless of the interviewer’s remark, the employment practices of the firm indicate that there has not been any discrimination. Instead, they suggested that as a precondition to the use of the placement facilities employers be required to sign an exculpatory statement disavowing all types of discrimination.

They suggested, next, that the letter of inquiry request that the firm provide employment information similar to that included in the EEO-1 form filed with the EEOC. This information would include the number of women lawyers presently, and previously, employed by the firm, their length of service, their area of specialization, and the promotional and work assignment practices and experiences of the firm with respect to their women attorneys. They proposed the excluded group would include not only those who admitted discriminatory practices in response to the letter of inquiry, but also those whose responses to the above questionnaire would indicate a practice of differential treatment toward women.

After consideration of the Faculty report and the various comments of student groups and individual students, the Law School adopted the following policy. The printed brochure of the Placement Office now contains a statement on discrimination. An additional letter of instructions has been sent to all groups seeking to use the placement facilities. The action chosen in response to specific complaints will be determined by the Director of Placement acting in consultation with the Dean and, to the extent necessary, with members of the Faculty.

The statement of policy describes the most frequent instances of alleged sex discrimination listed above, and contains the following language: “We believe that the goal of equal employment opportunity, which is, of course, embodied in federal and state laws forbidding discrimination in employment, is inherent in the ideals of the legal profession and represents a special obligation of the profession as well as of the Law School. We assume that prospective employers using the facilities of our Placement Office acknowledge that obligation, and we expect that their employment policies will be consistent with it.

“Special concern as to discrimination based on sex has arisen in recent years as a result of the increasing number of women graduating from law school. In our Law School as in others there are now a substantial number of women students of high ability and with serious professional aims. As law students they show not merely intellectual capacity but the full range of other qualities likely to make effective lawyers. We believe that their opportunities in the legal profession have not been as wide as for men. To a considerable extent this is no doubt a matter of tradition, due in part to the fact that in the past only a small number of women have chosen to follow legal careers. We strongly hope that as wider opportunities are afforded women lawyers to demonstrate their talents this tradition will change.”

The instructional letter sent to prospective interviewers contains the following information: “Questions or complaints concerning possible discrimination have occasionally arisen in the past as a result of interviews at the Law School. Should such questions arise, it will be the policy of the School to inform the firm, by a letter addressed to the partner or associate who conducted the interview, of the pertinent complaint and to invite an appropriate response, in order to dispel misunderstandings and to clarify the firm’s policy.
This past winter, the Moot Court Committee sponsored a series of evening meetings dealing with appellate practice. They were intended to supplement, rather than replace, the practice arguments which have long been the staple of Moot Court. Each meeting focused upon the circumstances of an actual appeal. The “instructor” for the session was the attorney who wrote the brief and argued the appeal. “Faculty” for the series included prominent members of the Chicago Bar.

The seminars were designed to reduce two long-standing Moot Court problems. First, while Moot Court can provide practice in brief writing and oral argument there should be some mechanism for providing competitors with the informed criticism upon which the subsequent practice can effectively build. Second, the program is too often simply an extension of the classroom experience—the dissection and analysis of cases and the hypothetical variations based on those cases.

In the past, criticism has come principally from the student-advisors and judges. The experience of the student-advisors—not significantly greater than that of the second-year competitor—does not lend itself to useful criticism. Further, because the advisor is not as familiar with the law or record as his advisee, he seldom evaluates critically the strength or weakness of the potential arguments and strategies available to the competitor.

The judges—whether members of the judiciary, attorneys from downtown, or faculty—are often in a similar position. The extracurricular nature of this work for them makes it impossible for them to spend a great deal of time on the law or record. Moreover, judges—other than faculty—are understandably reluctant to comment harshly upon student performance. Judges’ comments tend to be general. They are seldom directed to the questions of strategy, such as the choosing and phrasing of issues and arguments.

In sum, most of the learning experience in Moot Court has come from the practice itself and the competitor’s own evaluation of his decisions. The value of this type of experience is understandably limited.

The second problem has further limited the value of Moot Court. Because it deals largely with case analysis, student argument, both written and oral, tends generally to be objective.

The oral argument itself is often little more than a duplication of the classroom exercise of analyzing majority and minority prose. The competitor is badgered—most ably by the faculty, considerably practiced, and thereby skilled in this art—and through the competitions he gains some measure of poise and the ability to state accurately where he stands on the issues. But there is little chance for the competitor to practice persuading judges as opposed simply to stating his legal position. Indeed, frequently the competitor does not realize there is more to achieve than a coherent set of legal conclusions.

The seminars helped considerably in reducing these deficiencies. Prior to each meeting, some students would prepare legal arguments and statements of facts based on the materials available to the attorneys, but without reference to the attorneys’ work. The other participants were supplied with the student work as well as the actual briefs in the case. At the seminar, the attorney would open with a general statement of the strategy of the appeal, with particular reference to the legal and factual strengths and weaknesses of the case for each side. The attorney would then evaluate the student work. The discussion would then focus on the comparison of the student work with that of the attorney, using the frequent differences as specific examples of the larger principles of argument development, case use, tone and language.

In the seminars, the students received advice from one who had spent far more time on the case than the students, who knew thoroughly what could and could not be argued, and who therefore could more understandably evaluate the student work. Also—and, I think, more importantly—through the comparison of the attorney’s work with that of the students, it was possible to analyze, from specific examples, the skills of appellate advocacy. It was this comparison which was the heart of the seminar. As the discussion focused upon the comparison, all seminar participants—not just the ones who prepared material for that week—were able to benefit.

John M. Friedman, Jr. ’70
Chairman, Hinton Moot Court Committee
Cambodia and Kent State

A mass meeting was held by students on Tuesday, May 5, to determine an appropriate student response to the events in Cambodia and at Kent State. Over 300 students were in attendance. Most of the discussion centered on the appropriateness of a "strike" as a means of symbolic protest. A motion not to attend classes from that day through Monday, May 11, was overwhelmingly approved.

However, the sense of the group was that the time taken from classes should be efficiently used, devoted to peace-promoting activities. It was to be clear that the action was not a strike against the University or Law School but rather an effort to "free-up" time for concentrated political protest and action.

No request was made of the Faculty to suspend classes during the period. No coercion was to be directed to students not wishing to participate. Those students not participating in the peace activities continued to attend classes.

The following were some of the activities engaged in by students during the period of the strike: First, a resolution was drafted expressing "concern over the war, the 'erosion' of Constitutional government, and of the violence erupting in the Nation." The resolution was then distributed in both the Law School and surrounding community. Ultimately, approximately 6,000 signatures were obtained in support of the resolution.

There was also an effort to discuss the issues in the community at large. There was simultaneous effort to urge citizens to greater involvement, to express their own concerns. Part of this process was achieved during the petitioning campaign. It took place in the Loop, shopping centers in northern and western suburbs, as well as the surrounding Hyde Park and South Shore communities. Additional material was distributed concerning the availability of reduced-rate "public" telegrams. Cards indicating disapproval of the escalation of the war were distributed and passers-by were asked to sign them and send them on to the Congress.

A small group of students traveled to Washington as part of the nationwide lobbying effort. The mass migration to Washington of some of the eastern schools was rejected as financially impractical. It was felt, however, that some representation from the Law School would be appropriate.

A group of students have worked this summer in a variety of key Congressional races. More plan, at this point, to work this fall. In any event, one of the clear effects of this effort has been a mobilization of the energies of a substantial portion of the student body in the political process.

The following is the statement made by Dean Neal on behalf of the Faculty on May 10, 1970, articulating the policy of the Law School after the recent events in Cambodia and at Kent State:

"We understand the deep feelings aroused in many students by the events of recent days. We share the sense of crisis. But we also believe, with utmost earnestness, that the Law School should continue its educational functions in the normal manner through the remainder of the academic year. Students who consider that their time during the remaining weeks can best be used by continuing their educational tasks, and in some cases completing the training necessary to enable them to be admitted to the bar this summer, are entitled to nothing less. In addition, the Faculty considers that it has a responsibility to the University and the society to persevere in maintaining the essential character and aims of the University. A society has no less need of the values a university holds in trust—including free and dispassionate inquiry—in times of political crisis than in times of calm. Indeed the need is greater.

"In our view, it would not serve these aims to abandon the regular program of instruction or to alter or dilute academic standards and requirements. The faculty appreciates that the overriding national concerns present difficult questions of priority for all of us and make difficult the maintenance of a commitment to studies. While we hope that most students will nevertheless feel capable of carrying on as students in a manner compatible with their obligation as citizens, we respect the need for individual choice in this matter and recognize that some students may conscientiously feel unable to continue their academic studies during the remainder of the quarter.

"We have considered methods by which individual students who conclude that they must suspend academic work may make up the work
without having to repeat the quarter. We have decided that where, upon petition of a student, the Dean of Students after consultation with the instructor concludes that special consideration is warranted, the student will be permitted to take the examination in the course, or submit any required written work, after the close of the quarter. As soon as petitions are received, the timing of any make-up examinations will be determined promptly. Consideration will be given to setting a make-up period during the week preceding the opening of the fall quarter.'

The University of Chicago Law School has been well represented in the recent Illinois Constitutional Convention. Alumni who are delegates to the Convention, and their committee assignments, include: Frank Cicero, Jr. '65 (Revenue, Drafting); Ray H. Garrison '49 (Revenue); Elmer Gertz '30 (Chairman, Bill of Rights); Malcolm S. Kamin '64 (Education); Mary Lee Leahy '66 (General Government, Drafting); David Linn '40 (Judiciary); Paul E. Mathias '27 (Chairman, Education); Bernard Weisberg '52 (Bill of Rights, Rules).

In addition, a number of members of the Faculty have also been involved. Two members of the Faculty were authors of resource papers on probable Convention issues which were published in Con-Con, Issues for the Illinois Constitutional Convention by the University of Illinois Press. Professor Jo Desha Lucas was author of "Legal Aspects of Revenue"; Professor Edmund W. Kitch was author of the paper on "Business Regulations: Transportation." Professor Dallin Oaks spent a portion of his sabbatical leave from the Law School as Staff Council to the Bill of Rights Committee. Professor Frank Zimring testified before the Bill of Rights Committee on hand guns and gun control. Professor Philip Kurland testified before the Judiciary Committee and a joint meeting of the committees on the Bill of Rights and Education.

A number of students, as well, were involved in preparing research material for the Convention. David Kroot and Catherine Soffer, both second year students, prepared a number of research materials on job discrimination issues discussed by the Convention.

The Managing Board of the Law Review has decided to expand the past year's experimental writing competition to make it available to the entire first-year class. The writing competition will be held during the summer.

All first year students interested in the competition have been invited, after June 9, to select among a variety of comment topics on file in the Law Review office. During the summer the competitors and editor to whom they are assigned will engage in the traditional comment-writing process. The communication, of course, will be by mail instead of by conference.

During the course of the summer all competitors who have completed a preliminary comment draft "of promise" will be invited to join the Review. On August 15, when all first year grades have been completed, the Editor-in-Chief will determine the number of students who have been invited by that time to join the Review through the competition. An estimate will then be made, on the basis of the reports from the Editorial Board, of the number of additional competitors who are likely to produce qualifying drafts within the following month. On the basis of these figures, to complete the staff, an additional number of students will be invited to join the Review on first year grades.

This selection process has been chosen to give the writing program a primary position in staff selection and to make certain that there are positions available for all who are successful in the competition.

All students who are invited by late August either on the basis of the writing competition or their grades will return to the Law School to begin work on the Law Review on September 9. Those in the writing competition who have not been invited to candidacy by late August will be encouraged to continue working on their topics. Upon their return to school in late September they will have the opportunity to continue their work with a special group of third year Law Review editors.

The writing competition will conclude on November 16, 1970. At that time all of the competitors' work will be evaluated. All members of the competition who have produced satisfactory comment drafts "of promise" will be invited to join the Review.
Senator Edmund S. Muskie was the speaker at the traditional dinner of the entering class held on September 29, 1969. His remarks dealt with the potential contributions to society which may be made by lawyers. Some excerpts from his remarks follow:

"There are also aspects of our present governmental crises which cannot be written off by the absence of clear solutions or the explosiveness of the issues. What is in a way most troubling is our growing paralysis before an alarming number of practical problems for which we do have plain answers. . . . In too many areas . . . such as air and water pollution, urban transportation, and medical facilities, to name only a few, we know what is wrong; we know how to stop it; there is no ideological bar and no emotional resistance to doing what it takes; the cost is not prohibitive—and yet desperately little is done."

"Partly, I suppose, the problem is the familiar one of remoteness. For many of us, the government is no longer "we" but "it"—not plural but singular, not first person but third, not personal but neuter. It was not meant to work that way. Self-government is a delusion if we can no longer affirm in some meaningful sense that the government is ourselves."

"Lawyers bring certain skills to this sort of work which will serve them in good stead. As a group, they have intelligence, articulateness, and a certain primitive aggressiveness . . . They are trained to be analytical and to make their passions work for them and not against them. Most important, they are the best and most experienced persuaders we have."

"There is work enough . . . for all the lawyers and all the radical spirits in the country. I very much hope that you will take the work and like it."

A conference on The Legal and Economic Aspects of Conglomerates, sponsored jointly by the Law School and Business School, was held at the Law School on October 17-18, 1969. Over three hundred leading lawyers and corporate executives were in attendance. The Conference consisted of four sessions featuring both speakers and discussants. The conference was supported by the Charles R. Walgreen Foundation.

At the opening session Peter O. Steiner, Professor of Law and Economics at the University of Michigan, spoke on "Conglomerates and the Public Interest." He was followed by Edwin M. Zimmerman of Covington & Burling, formerly head of the Antitrust Division, Department of Justice, who spoke on "Conglomerates and Antitrust Policy." William Kenneth Jones, Professor of Law at Columbia University, was the discussant.

At the second session, Michael Gort, Professor of Economics at the State University of New York at Buffalo, and Thomas F. Hogarty, Professor of Economics at Northern Illinois University and a former member of the U.S. Federal Trade Commission, spoke on "Conglomerates—Their Magnitude, Differential Success, and Effects on Securities Prices of Merged Firms." The second paper at the session was given by James H. Lorie, Professor of Business Administration at the University of Chicago, and was entitled "Conglomerates: The Rhetoric and the Evidence." The discussants at this session were Willard F. Mueller, formerly Chief Economist and Direc-

At the third session David Tillinghast, partner in the New York law firm of Hughes, Hubbard & Reed, spoke on "The Impact of the Tax System on Conglomerate Acquisitions: The Mills Bill and Beyond." Sidney Davidson, Dean of the Graduate School of Business and the Arthur Young Professor of Accounting, discussed "The Accounting Aspects of Conglomerates." Edward C. Schults, partner in White & Case, spoke on "Defensive Tactics Against Takeovers." Wilbur Katz, former Dean at the University of Chicago Law School and now Professor of Law at the University of Wisconsin, was the discussant.

At the final session, Manuel F. Cohen, former chairman of the U.S. Securities and Exchange Commission, spoke on "Conglomerates—Effects on Corporation Law, and Legislative Responses." George J. Stigler, the Charles R. Walgreen Distinguished Service Professor of American Institutions at the University of Chicago, concluded the conference with "Conglomerates: An Overview."

F.B.I. for self-serving budgetary purposes. He argued the chief evidence offered by the proponents of the concept—the Appalachian meeting in 1957, Joseph Valachi's testimony before the Kefauver Committee, the 1967 President's Task Force on Organized Crime—clearly failed as support for the existence of such a national organization.

The significance of the dispute over the existence or nonexistence of a national organization was summarized by Hawkins: "As long as we are determined to continue by means of criminal law to prevent people from obtaining goods and services which they have clearly demonstrated, and continue to demonstrate, that they do not intend to forego, criminals will supply those goods and services. It is a myth that it is all due to a gigantic organized conspiracy and that all we need to do is catch the conspirators." More importantly, he suggested that "belief in this myth prevents us from looking at the real nature of the problem."

The first session of the conference dealt with the general factual question: the existence or nonexistence of a national crime organization. Papers at this session were delivered by Hawkins, Dwight C. Smith, Jr. of the State University of New York at Albany, and Charles Siragusa, Executive Director of the Illinois Crime Investigating Commission.

The second session dealt with the nature and extent of the impact of organized crime, whether or not national in scope, on society. Speakers at this session included Daniel Walker, former president of the Chicago Crime Commission, Thomas Schelling, Professor of Economics at Harvard University, and Milton G. Rector, Director of the National Council on Crime and Delinquency.

The final session of the Conference involved the counter-measures available to counteract organized criminal activities. Speakers at this session were Earl Johnson, Jr., of the University of Southern California Law Center and Donald R. Cressey, Professor of Sociology at the University of California at Santa Barbara.
A conference on Clinical Education and the Law School of the Future was held October 31 and November 1, 1969. It consisted of both the presentation of papers and panel discussions. Among the topics discussed at the conference were: Financing Student Clinical Programs; Clinical Experience in American Legal Education: Why has it Failed; Clinical Teaching in Medicine: Its Relevance for Legal Education; Goals, Models and Prospects for Clinical-Legal Education; The Practice of Law by Law Students: An Analysis. The participants included: Robert A. Burt, John M. Ferren, W. Burnett Harvey, William Pincus, J. Wayne Reitz, Prebel Stolz, William P. Creger, Robert J. Glaser, Steven M. Fleishes, and conference co-ordinator Edmund W. Kitch. Student participants included Carol Cowgill, William G. Hoerger, and Michael D. Ridberg. Conference resources papers have been published and can be obtained by writing to the University of Chicago Law School.

An Alumni Day was held at the Law School on Friday, February 27, 1970. More than 250 alumni were present. The program began with a series of small seminars led by members of the faculty: Questions of Federal Tax—Walter Blum; Air Pollution—David Currie; a discussion of the Law School curriculum with members of the Faculty Curriculum Committee. An ample cocktail hour was held for those classes which were holding mini reunions during the period. Over thirty members of the Class of 1949, with their spouses, were in attendance. The speakers for the evening were Dean Phil C. Neal and Professor Grant Gilmore. The text of Gilmore's remarks can be found on page 15 of the Record. Based upon the number of alumni present, and their general enthusiasm—for the event, the camaraderie or, in some rare cases, the ample cocktail session—the event was very well received.

The Fifth Henry Simons Lecture was delivered by James Tobin, Sterling Professor of Economics, Yale University, on April 16, 1970. The Simons Lecture is an institution at the Law School established in honor of Professor Henry Simons, the distinguished economist who for many years was both a member of the Department of Economics and Professor of Economics in the Law School. The title of Professor Tobin's lecture was "On Limiting the Domain of Inequality."

James Tobin, second from right, talking prior to Simons Lecture with, among others, Ronald Coase and Milton Friedman.
The Annual Dinner of the Alumni Association of the Law School was held on April 30, 1970 at the Guild Hall of the Ambassador West. The principal speaker was Edward H. Levi, President of the University of Chicago. More than 550 alumni were present. It was the largest Annual Dinner in the history of the Law School and quite clearly a tribute to the former Dean of the Law School.

The three-year Fund For The Law School is now in its final year. The Fund is an effort to raise $5,000,000 of capital support to meet the School’s most urgent needs. The Alumni portion of the goal is $1,600,000.

The three-year effort began in January of 1968. It will end this December. To date, $1,400,000 of the $1,600,000 goal has been contributed or pledged.

The credit to date must go to the Alumni responsible for The Fund For The Law School. The General Chairman of the campaign has been Harry N. Wyatt ’21. The Chairman of the Special Gifts Committee has been Bernard G. Sang, ’35. The Co-Chairmen for Class Organizations have been Andrew C. Hamilton, ’28 and Jean Allard, ’53.

A great deal of the early success of the campaign has been a result of the extraordinary efforts of Bernard Sang and his Special Gifts Committee. For the remainder of the campaign, the Class Organizations will be particularly important. A considerable number of individuals with records of regular support of the Law School have not yet contributed for each year of the three-year effort. This is not a small group.

There are approximately 4,200 alumni of the Law School. Almost 70 per cent have contributed to one or more of the past annual campaigns. In 1967, the last annual campaign prior to the three-year effort, 45 per cent of the alumni contributed. In 1968, the first year of the campaign, 28 per cent contributed. That represented 714 fewer alumni participating than the prior year. That reduction is partially explained by the emphasis which had been directed to the Special Gifts effort during that period. Broad participation was not stressed.

Last year, 1969, 37 per cent of our alumni contributed. That represented a gain of 8 per cent or 379 alumni. This is still far below the 45 per cent of alumni participation achieved by Chicago in 1967 or the 50 per cent figures recently achieved by the law schools at Columbia and Yale.

The future strength of the Law School will be dependent upon a broad base of alumni support. The re-establishment of such a base will be the goal of the Class Organizations during the final solicitation in The Fund For The Law School which will take place during the fall.

The Board of Directors of the Law School Alumni Association, which has responsibility for selecting and supervising all of the alumni activities at the Law School, at its last meeting on April 23 made two significant changes in its organizational structure. First, a third class of Directors was appointed. One third of the Board will be elected each year. In addition, the Board adopted a provision requiring that retiring members of the Board be ineligible for reappointment for one year following the expiration of their term. These provisions were adopted to give more diversified membership to the Board and to encourage broader participation in the determination of the activities of the Association.

Second, an Executive Committee was created. It consists of the Officers of the Association: William G. Burns ’31, J. Gordon Henry ’41, Richard H. Levin ’37, Milton I. Shadur ’49, Jean Allard ’53, James McClure, Jr. ’49, Alan R. Orschel ’64, Ronald J. Aronberg ’57, Arnold J. Shure ’29; and five other members appointed from the Board: Jerome S. Weiss ’30, Lee C. Shaw ’38, Miles Jaffe ’50, Elmer W. Johnson ’57, and Joseph V. Karaganis ’66.

The new President of the Association, William Burns ’31, requested that a report be prepared for a meeting of the Executive Committee on July 29 reviewing the past activities of the Association, the types of activities carried out by alumni associations at other law schools, and activities at the Law School in which greater alumni participation would be helpful.

Committees have since been established to develop the ideas discussed at that meeting.