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An after-dinner speech should, I am sure, be soothing to the digestion even when, as usual, it fails to stimulate the cerebrum. I am afraid I may be about to defy that cardinal principle. I want to indulge for a few minutes in what may well be considered a kind of viewing with alarm. I hope you will find, however, that it is offered in a buffered form, and that any excess acid will be neutralized.

The law schools, as almost everyone knows, are faced these days with an unprecedented wave of new aspirants to the legal profession. My purpose is not to try to explain this phenomenon but to consider how we should greet it, and, more particularly, to respond to what seem to me some regrettable misgivings being manifested by segments of the bar. Unless I read the signs incorrectly, there is a growing sense of concern that the legal profession has been oversold to the oncoming generation and that in ways not yet clearly apparent we will soon have cause to regret it.

My suggestion is that such a pessimism would betray the faith we should have in the law and our profession, and may distract us from making the most of our opportunities. In short, I view with alarm those who would view with alarm.

Of course my own fears may be exaggerated; the attitude I perceive may be nonexistent. If so, I hope you will be indulgent, and remember that one of the time-honored and not least worthy devices of a law professor is setting up and demolishing straw men. But I think you will not consider the Chief Justice of the United States a straw man. In a widely noticed interview some months ago, noticed especially by law students, he expressed "an uneasy feeling" that the dramatic growth in law school enrollments "may be another one of the situations in this era that we are living in of creating expectations that are beyond fulfillment." A report emanating from the mid-winter meetings of the American Bar Association—dare I call it another straw in the wind?—refers to fears among leaders of the bar that the profession will be torn by controversy over whether to limit the number of young people permitted to become lawyers. We are invited to consider the prospect that thousands of disappointed young people, trained in the skills of lawyers and unable to find work, may turn against the system. In response to such concerns the American Bar Association has created a special nine-member Task Force to propose a program for finding jobs for young lawyers. More recently, we have had a report from another special committee of the Bar Association to study the possible impact of the new wave of lawyers on the standards of professional conduct. Among its suggestions is a search for novel ways of screening law students as to their character and moral fitness.

These expressions are not necessarily ominous. They have been properly accompanied by affirmations of the bar's commitment to an open profession, and they point to some problems that are surely worthy of study. The Task Force on Lawyer Ut-

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*Talk delivered by Phil C. Neal, Dean of The University of Chicago Law School, at the Annual Dinner of The University of Chicago Law School Alumni Association on May 11, 1972.*
lization in particular has highly constructive possibilities. But at the same time there is surely some paradox here. The theme of countless Law Day speeches of recent memory was encouragement to the young to abandon self-help, to move their discontent from the streets to the orderly processes of society, and to look to law for change and improvement. Perhaps they have misread the message. Perhaps, even, they have not been much influenced by it, for certainly other and quite different forces have had their part in stimulatimng applications to law school. But it would be surprising if there were not a good many who thought they could detect a considerable change in tune from the themes of only two or three years ago.

The apprehensions about the new generation of lawyers seem to be stirred by two different but related causes.

First, there is the simple matter of numbers. There are about 95,000 students in law schools this year. The number of lawyers presently engaged in practice, either private or governmental, is reported as 325,000. The specter that is seen is of a bar that will suddenly find itself with four lawyers for every three now active. The specter is of course exaggerated, if past experience is a guide. In 1950, for example, there were 53,000 students in law school as compared with about 200,000 lawyers in practice. Yet from 1951 to 1954 the number of lawyers rose by only about 17,000. For two decades the enrollment in law schools has been rising, although at an accelerated rate in the last two years. In the same period the number of new admissions to the bar has paralleled quite steadily the number of third-year students. For the country as a whole, the number of third-year students has regularly been far lower than the number of first-year students, and in recent years has fallen to about one-half. In the current year there are about 22,000 third-year students in approved law schools, a slight rise in the proportion of third- to first-year students, who this year numbered 36,000. If all of the present third-year students are admitted to the bar the increase in the lawyer population will be about seven per cent, a substantial increase but hardly a deluge. For the past fifteen years the growth rate has averaged about three per cent a year.

Can the society absorb lawyers in such numbers? From an economic point of view, the answer is clear. Of course it can, although perhaps at a reduced rate of return, either for the new lawyers or for old lawyers or for some mix of both. And such a lower rate of return, should it occur, will of course have its impact on the new enrollments of law students. The supply of lawyers is not immune from the laws that govern the supply of pork.

But the more interesting question is not the economic but the social one. Are we on the verge of having too many lawyers for the good of society? Are we really worried about whether there is useful work to do for all who can be induced to join? The answer we give will say much about our self-esteem and our perception of the role of lawyers in the national life.

Television has helped glamorize somewhat, for the moment, the public image of the lawyer. But when this season's attractions have lost their ratings lawyers will be left with their traditional burden of a layman's view of them that does not fully understand, that depreciates, and that is often impatient with their role. It has always been easy to stir antipathy for the vision of a lawyer-ridden society. Perhaps that is the vision many would see in the fact that the lawyer-population has increased much more rapidly than the population as a whole during the last two decades. A more sober and perceptive view, which should come most naturally to lawyers, would understand this trend to be an inevitable product of our changing society: on the one hand, a reflection and not a cause of the increasing complexity of social organization; and on the other, an index of our rising social wealth and its ability to provide a quality of life that includes more help from the legal profession.

It is this last aspect that especially needs emphasis now. Abundant needs and opportunities for the wise use of lawyers' talents confront us. There is scarcely an area of social concern in which, could we afford them, an infusion of legal resources might not make a difference. The most conspicuous present example is the criminal justice system, that aspect of law that touches the most elemental of social needs and the most acute of human plights. What would it do for the performance of those institutions if every major police department had a skilled legal staff, if corrections administrators had lawyers at
their elbows, if our prosecutors' offices could deal
with cases rather than with numbers, if we had
public-defender establishments equivalent in re-
sources and efficiency to large private law offices?
How shall we manage the new burdens of criminal
defense that are sooner or later—and probably very
soon—to be imposed by a constitutional rule requir-
ing counsel for indigents in misdemeanor cases?
And what of the next development after that, which
seems likely to make the right to counsel even in
civil cases an expanding benefit in our society?

But these present and impending necessities can
hardly exhaust the field of good that lawyers could
do if given the opportunity. The present administra-
tion of the State of Illinois, if I judge by the number
of our own outstanding graduates who have been
attracted to it, has shown what opportunities there
are for the effective use of additional legal talent.
It seems unlikely that there is any agency of state
or local government that could not gain from the
addition of able lawyers. Our legislative processes
from the bottom to the top, and the executive offices
that feed legislation into them, could be far more
professional and technically competent than they
are. We need legal skills at least as much for the
making of good laws as for the repair business that
comes from defective ones. And all of this says
nothing about the countless individuals who from
time to time might cope better with the world had
they the helping hand of a sympathetic lawyer.

Apart from the mere question of numbers, there
appears to be a concern that the new generation of
lawyers may be a disillusioned or frustrated group,
and perhaps even cantankerous—as if that would be
a mutation in lawyers! The new students do seem
to come with different and perhaps more idealistic
motivations than those of a decade or a generation
ago. There seems more zeal to take part in solving
social problems, a tendency to identify with causes
or goals, a stronger sense of commitment to par-
ticular kinds of careers. Perhaps also there is a
stronger conviction about the humanitarian potential
of the lawyer's career, and an urge to perform in
that role, even at some economic sacrifice. Certainly
there is a rising interest in the arts of litigation and
the uses to which they may be put.

It is hard to see legitimate grounds for anxiety in
these qualities or attitudes. Perhaps the fear is that

an army of such lawyers will reinforce pressures
that are already straining our processes and unset-
tling many time-sanctioned legal principles. The
new openness of the law to untraditional claims; the
recognition of group interest through judicial and
not merely legislative action; the proliferation of the
class action; the assumption by judges of increas-
ingly managerial and directing powers—all these
raise difficult and even profound questions about the
modes through which official processes can best
mediate the claims upon our society. But these are
questions about the content and processes of law,
not about the value of lawyers. It would be error
to wish the claims to fail for lack of lawyers to ad-
advance them. It is the business of the legal system
to attract and channel the interests that press for
satisfaction, to shape the right processes for testing
them, and to effect a more stable and enduring res-
olution because the claims have been recognized
and weighed. Our attitude toward the youthful tide
of new lawyers puts to the test our faith in law itself.

It is also, I think, a test of the profession's belief
in education. Edward Levi has spoken eloquently of
the nature of law as a special commitment that
brings its own force and values to the vectors that shape society—primarily neither an instrument of change nor a bulwark against change, but a commitment "to develop concepts, and to maintain and operate procedures which enable a sovereign community to be governed by rule for the common good . . . and to make that rule effective." To impart an understanding of that commitment, of its strengths and its limitations, of its historical roots and of the social and behavioral forces with which it interacts, is a necessary function of legal education.

If lawyers carry a burden of inadequate appreciation of their role by the society at large, law schools perhaps carry the burden that lawyers do not always seem fully to appreciate the values that legal education should serve. It is often suggested that law graduates might do as well to learn less in school and leave more to learning on the job. To be sure, not all law schools need be alike; there should be room for experimentation, perhaps with two-year law schools for some and with more limited kinds of training for others that will prepare them for special tasks in assisting lawyers—a need, incidentally, that seems to refute the idea that we may be about to have too many hands to do the work. But I trust there will always be support and enthusiasm for the kind of education our own school has tried to give and in which I think it has been a leader. I mean an education that looks beyond the merely utilitarian or manipulative essentials of the lawyer's art and invites a deeper understanding of the complexities and variety of the law—an education concerned with causes and effects, that searches for the values law serves and the means by which they may be realized, and that may lay a foundation for wisdom as well as technique.

For such an education, the new students seem to me at least as promising subjects as their predecessors now at the bar. Let us look upon them as a resource and not a problem, and let us hope that whatever visions of a rewarding life have brought them to the study of law will not soon fade away.
I am grateful to the Committee for its invitation to express my views on the proposed amendment to the Constitution that is presented in Senate Joint Resolution 106. With your permission, and in the hope of saving time, I should like first to read a short prepared statement and then to attempt to answer such questions as you may propound to me.

The Resolution being considered here offers a plan—reduction of judicial tenure to renewable eight-year terms—that has a long lineage. Dissatisfaction with particular or general federal judicial actions has not infrequently resulted in Congressional proposals to diminish judicial independence, whether by reducing the term of office, by providing less cumbersome methods of judicial removal, or by changing the method of appointment. Indeed, the essence of the present proposal may be traced back to no less an eminence than Thomas Jefferson.

Although Jefferson was, as revealed in Professor Haynes’s book, Selection and Tenure of Judges, once committed to judicial independence, he later changed his mind. His early position was encapsulated in his own words in this way: “The judges . . . should not be dependent upon any man or body of men. To these ends they should hold estates for life in their offices, or, in other words, their commissions should be during good behavior.” After engaging in battle with the Federalist judiciary led by John Marshall, however, Jefferson came to the view, again in his words: “A better remedy, I think, (than making the Senate a Court of Appeal on constitutional questions) would be to give future commissions to judges for six years (the senatorial term) with re-appointment by the president with the approbation of both houses. If this should not be independent enough, I know not what should be such, short of the total irresponsibility under which they are acting and serving now.”

The proposal for fixed, renewable terms of judicial office is not only ancient but contemporary. There have been a plethora of such proposals since the Supreme Court’s decision in Brown v. Board of Education. Thus, a quick glance at recent legislative history reveals that in each of the 89th, 90th, 91st, and 92nd Congresses there have been at least three proposed constitutional amendments to the same effect as S.J. Res. 106, although the proposed terms varied from six years to ten years. (See, e.g., H.J.R. 1077, 1140; cf. H.R. 14183.) This scanty survey also suggests that, with the exception of S.J. Res. 38, offered in the first session of this Congress, and the proposal before you, this form of restraint on the federal judicial authority has usually originated in the House of Representatives. It appears that, until these hearings, none of these proposals has received even committee consideration, no less the approbation of either House.

I think it is evident why this proposition has not met with success in the past and why it should not meet with this Committee’s approval now. There are few propositions more likely to reduce the in-

Statement by Philip B. Kurland, Professor of Law at The University of Chicago Law School, to the Subcommittee on Constitutional Amendments of the Committee on the Judiciary of the Senate of the United States, May 19, 1972.
dependence of the judiciary than to compel each judge to account for his judgments periodically to one part of what has been considered, until now, a coordinate branch of government. History reveals the grave constitutional defects that derive from a judiciary subordinate to either the executive or the legislature. The Declaration of Independence records as a grievance against King George III that: “He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”

I commend to your attention on this subject all of Hamilton’s Federalist No. 78, but I shall quote here just a few passages from it. He asserted that:

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenet of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing...

That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.

Certainly our history reflects an acceptance of these arguments and a commitment to them. However distasteful the actions of the federal judiciary may have been from time to time, the American people, through their legislatures, have opposed any incursions on that judicial independence that they have regarded as essential to the concept of American constitutional democracy. Thus, the most powerful leaders in our history have been thwarted in their attempts to curb judicial independence. Jefferson failed in his attempts to bring the judiciary to heel; Jackson in his. The Radical leaders of the Reconstruction Congress could not persuade of the desirability of limiting the judicial power. And Franklin Delano Roosevelt’s Court-packing plan met defeat in this very body.

In this era when government has, for better or worse, entered into control of and participation in so much of the lives of every American, the need for an independent judiciary becomes greater not less. It is in the judiciary that the individual and the minority can sometimes find succor from impositions that no governmental agency should have the right to impose. I do not mean by this, of course, that the judiciary alone is capable of protecting our liberties. But I do contend that it is only with the participation of an independent judiciary that the other branches of our government will assure the rights of the individual against the behemoth of government. An independent judiciary is a necessary if not a sufficient condition of our liberty.

A renewable term, as proposed in S.J. Res. 106, seems to me the most destructive of devices for limiting the independence of judges. For, it must be remembered, that such authority as the judicial branch of our government may have, vis-à-vis other branches of the government, is totally dependent on the force of public opinion. And so, whether or not judges would, under the proposed scheme, actually make their decisions with a concern for legislative approbation by way of reappointment, it is likely to become true that the public would regard this as the basis for their decision. Only if the purpose of the proposal is further to sap the strength of the judiciary should a renewable term be regarded as desirable.

There is some experience with judicial terms renewable at the will of the legislature, although it is
remote. In 1951, judges of the German Constitutional Court were given renewable eight-year terms, renewable at the decision of the legislature. After 19 years of experience with this system, it was abandoned in 1970 in favor of a fixed twelve-year term.

A short, fixed, nonrenewable term, would make more difficult the problem of securing men of appropriate talents to undertake the job. But at least those who did would not be performing it with the knowledge that they would some day be accountable to the political predilections of a majority of the Senate for their continuance in office.

Indeed, I am of the view that we already have too much of this problem by reason of the fact that we now permit "promotions" from within the federal judicial system. For there are some lower court judges who indulge their task with recognition that, if they please the appointing powers, they may receive a new or better position. If I had my way, I should provide that, in order to preserve the independence of the federal judiciary, a federal judge should be forever barred from any other post in national government, judicial or non-judicial, elected, or appointive.

I am, I think, sufficiently on record to show that I am not an unqualified admirer of the efforts of the federal judiciary. I am, by study and experience, committed to the desirability of and need for judicial restraint. But I am equally of the view that that restraint must be self-imposed; that the impositions of external restraints such as those contained in this Resolution would be far more disastrous in its effect than even the most headstrong judiciary.

In fact, the existent deficiencies of the judiciary, as I see them, are in no small measure attributable to the failure of this body to exercise the discretion
The Age of Antiquarius: 
On Legal History 
in a Time of Troubles

Grant Gilmore

During the greater part of the past hundred years the American law schools enjoyed a spectacular success. The students, the professors, even the deans, shared a buoyant self-confidence, an ebullient enthusiasm, a pervasive intellectual and spiritual euphoria. It is only during the past twenty years or so that we have begun to doubt, to question ourselves, to wonder whether, after all, we were on the right track. The self-confidence of our predecessors has given way to a disquieting intellectual disarray. Various proposals have been put forward in the attempt to rekindle the enthusiasm of the past in the service of new causes. One such proposal, which has recently enlisted a considerable amount of support, is that, abandoning the antihistorical bias which has characterized most American legal writing in this century, we should, at long last, become historians and turn our energies to the reconstruction of our long despised past. I should like to explore here some of the problems which the historical approach to law—or anything else—poses in the declining years of the twentieth century.

The legal profession in this country has always taken pride in being up to the minute. This present-mindedness has indeed been quite as apparent in the law schools as in the market place. Our case books must be revised every year or two, so that the old cases can be weeded out and replaced by new ones. Our treatises must receive annual infusions of new blood; for the truth, the whole truth and nothing but the truth, you must consult the Pocket Part. Our course offerings must be realigned year by year to reflect our current crises and concerns: how to rebuild a city; how to clean up our sadly polluted environment; how to make the poor people content with their station in life.

Our present-mindedness has led us to hold jurisprudential theory in low esteem. We have looked on ourselves as problem solvers, not as system builders. But lawyers can no more escape jurisprudence than people can escape humanity. If we do not have one system, we shall have another system; the one thing we cannot conceive of is that there is no system. Our pretense that we are all pragmatic anarchists has never been more than skin deep.

I

We have, I suggest, been living for a long time—too long a time—within the mainstream of nineteenth century thought. Our current malaise may reflect the obscure realization that the nineteenth century ended some time ago. Still, it was a great century while it lasted and we may congratulate ourselves on having been able to go on living in it as long as we have. A review of some of the characteristic features of nineteenth century theory will help us understand both why the promise it held out was a peculiarly attractive one to lawyers—practitioners and academics alike—and why it has taken us so long to break out of its magic spell.

To the nineteenth century mind it was self-evident

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that the course of events was arranged in a developmental sequence and was not a merely random series of accidental happenings.\footnote{1} That was the common thread which ran through many celebrated nineteenth century formulations in apparently diverse fields. From that basic assumption it naturally followed that if we could catch hold of the process which had been at work in any area of human endeavor or of the physical universe, we would already know what the end result must be: the end is contained in the beginning as the flower is contained in the seed. Belief in the existence of some developmental process usually went hand in hand with the belief that the process, at least in the long run, was one of progressive improvement—toward some vaguely conceived, perhaps distant, yet realizable Utopia where clean-limbed men, beautiful women and well-behaved children would live in peace and abundance, devoting themselves to exercises of intellectual exploration and spiritual contemplation.\footnote{2}

Thus to Darwin came the hypothesis that the process of natural selection was that of the survival of the fittest. To Marx came the hypothesis that the process of political organization was the successive dominance of the several classes into which he found society divided—from feudalism, to capitalism, to communism. To Auguste Comte, the father of sociology, the successive stages of human thought ran in linear sequence from the theological through the metaphysical to the scientific; in Comte’s mind there was no doubt that there was a clear gain as revelation was succeeded by philosophical speculation and speculation by empirical knowledge.\footnote{3} To Herbert Spencer—whose Social Statics, we once had to be reminded, were not written into the fourteenth amendment—\footnote{4}it was clear that the law of development was “an advance from homogeneity of structure to heterogeneity of structure.”

\footnote{1}The nineteenth century invented history, as it invented so many other things. The nineteenth century historian looked on himself as engaged in the same line of work as other scientists and theorists—his being different from theirs only in that the materials he worked with related to the past instead of the present. But his function, like theirs, was to lay bare the development sequence which would explain the progress of human society and thus reveal the goal toward which it was headed. Most nineteenth century historians shared the pervasive Utopianism of the time—which no doubt explains why such an inordinate amount of time and energy was spent in trying to account for the dissolution of the Roman Empire and the regression of European society for five hundred years into something like barbarism. Extraordinary ingenuity was lavished on the demonstration that the Empire had not really dissolved and that society had not really relapsed into barbarism—at most there had been a few minor setbacks and temporary reversals in the steady march toward the good life.\footnote{5}

The various emerging disciplines, both in the natural sciences and in what were later called the social sciences, were looked on as being merely so many alternative routes toward the ultimate truth which would some day be revealed—the ultimate truth about man, about his society, about his environment, about his universe. The philosopher, the scientist, the economist, the sociologist, the historian were all brothers-in-arms in the prosecution of this essentially theological enterprise. And just as every river must some time reach the sea, so their divergent labors would some day all come together in the final, stupefying revelation of all the truth about everything.

The underlying hypothesis of nineteenth century theory was that, once we had correctly identified the relevant developmental process, we held not only the explanation of why things are as they are but also the key to unlock the future. In practice it proved quite as impossible as ever to predict what was going to happen next year or next decade or next century. The past could be plausibly arranged in sequence but what the next link in the chain was going to be remained as unpredictable as ever. The theorists, particularly those who concerned themselves with the organization of human society, seem
to have reacted instinctively to this uncomfortable fact of life with the reassuring belief that the process had almost come to its predetermined end, the goal had been nearly reached. Utopia was just around the corner if it was not already here and now. Indeed any one who had the good fortune to be born into the late nineteenth century establishment in Western Europe or England or the United States might reasonably have felt that further progress was unimaginable, just as a reversal of fortune—a decline and fall—was inconceivable. Thus most nineteenth century social theory, including nineteenth century historical theory, seems to come implicitly to a dead stop as of the date of publication. Just as the theologians had concluded that the age of miracles was over, so their successors concluded that the age of mutations was over. The theorists, however ingenious their reconstruction of the dynamism of the past had been, ended by presenting us with a static model which, it was assumed, would hold good for all time to come. Even in the Marxist version there was only one more revolution to look forward to. History and the other social sciences became, we might say, the continuation of theology by other means.

II

In the history of American legal thought the half century which preceded World War I was a period of prodigious and unprecedented achievement. The major categories into which we have subdivided our legal systems were, one by one, reduced to order and certainty in treatises which were as notable for their intellectual excellence as they were for the uncontrolled exuberance of their footnotes. We may take the Restatements of the 1920s as the last gasp of this explosion of intellectual energy.

All this literature was inspired by the nineteenth century predisposition to believe that the age of miracles and mutations was over. It was clear enough that the common law had changed since its emergence in England after the Norman Conquest. The early writs had given way to the forms of action which had in turn been consigned to the grave, from which, it may be, they still rule us. Equity had arisen to supplement the common law and then to disappear within it. Rules and doctrines had emerged, flourished for a while and vanished. The law book writers arranged the past in sequence and then, like their counterparts in the social sciences, came to a dead stop. In law, as elsewhere, we ended up with a static model, assumed to be incapable of further development or change. The one, true rule of law having been discovered and proclaimed, there was no need to give the matter further thought. By 1910 or 1920 we had apparently arrived at our legal Utopia.

All this was carried out not in the name of history but in the name of science. Dean Langdell of Harvard, who had as much as anyone to do with making us what we have become, once remarked that "law is a science" and that "all the available materials of that science are contained in printed books."

[T]he library [he went on] is to us all that the laboratories of the university are to the chemists and physicists, all that the museum of natural history is to the zoologists, all that the botanical garden is to the botanists. Implicit in Langdell’s analogy of law to the natural sciences was the assumption that legal theorists, like his chemists, physicists, zoologists and botanists, were engaged in research designed to lead to the progressive discovery and revelation of truth. The essential quality of scientific truth, as the nineteenth century saw it, was its immutability. From the same cause the same effect must always follow. The controlled experiment must always lead to the same result. Once the classification of animal life and plant life has been completed, we know, for all time, what the classification is. The legal scholar in his laboratory, the library, was engaged in a comparable endeavor. The rules and doctrines which his patient labors illuminated, the fundamental principles of the common law which they illustrated, all shared the immutability of scientific truth.

Langdellian jurisprudence led its adepts to the conclusion that law is a neat and tidy structure of interlocking logical propositions. Holmes began his first lecture on the common law with the celebrated epigram: "The life of the law has not been logic: it has been experience." The flashing thrust was apparently meant as, and understood by his audience as, a direct attack an Dean Langdell, who may in-
Indeed have been seated in the front row. Holmes, a nineteenth century man, was not without his own ideas of process. He hypothesized that the inevitable course of legal development is from a starting point at which rules of law are based on moral judgments about subjective fault or guilt toward an end point at which all moral content will have disappeared and the defendant’s state of mind will have become irrelevant. At the hypothetical end point, law should become, as he liked to put it, formal, objective and external. However, Holmes succeeded, as the Langdellians did not, in keeping his theory open-ended by his insistence that rules of law merely reflect changing social conditions and must change as they change. Thus the process which he hypothesized was a never-ending one, never quite to be completed, always to be started again from scratch. The true Langdellians rejected or ignored that complicated thought and pursued their own simple-minded search for truth. Never, I dare say, has any field of law appeared to be as perfectly structured, as free from any kind of fault or flaw, as the law of contracts in Williston’s great treatise.

The legal realists, after World War I, found the entire Langdellian structure absurd and, during the period of their ascendancy, effectively demolished it. The realists, however, did not in the least challenge the basic idea that “law is a science.” Langdell’s error lay in having analogized law to the natural sciences. According to the realists, what law was like—indeed what law was—was a social science. It soon came to be an article of faith that our fellow social scientists had outrun us in the quest for truth and that we had much to learn from them. Therefore—under the bright banner of “interdisciplinary studies”—we turned to the “models” which the economists, the anthropologists, the sociologists, the psychologists and the psychoanalysts were more than willing to provide us with. The interdisciplinarians were most successful when they remained at the highest possible level of abstraction. When they attempted to prove, through “empirical studies,” the relationship of the theoretical model to the real world, with which lawyers cannot help but be concerned, they mostly came to grief.

After World War II the eager faith of the realists came to seem as absurd as the simple dogma of the Langdellians had seemed after World War I. Now that the natural sciences and the social sciences have successively failed us, we are, it seems, to look to history as our guiding star and steer our course by that. I dare say that if we had started by looking on ourselves as historians instead of scientists a hundred years ago, we would have come out approximately where we have, since nineteenth century ideas about history were quite as heavily influenced by the ideas of process, development and sequence as were nineteenth century ideas about science. But we are proposing to become historians in the 1970s, not in the 1870s. I trust that the historical approach to law will not be made the vehicle or the excuse for a further prolongation of our already over-long affair with the nineteenth century.

Belief in the inevitability of progress has not quite disappeared from among us. Mr. Chiao Kuan-hua, Vice-Minister for Foreign Affairs of the People’s Republic of China, remarked in the course of his first address to the General Assembly of the United Nations:

> Countries want independence, nations want liberation and the people want revolution. This has become an irresistible trend of history.

> Human society invariably makes constant progress, and such progress is always achieved through innumerable revolutions and transformations.

The advance of history and social progress gladdens the hearts and inspires the peoples of the world and throws into panic a handful of decadent reactionary forces who do their utmost to put up desperate struggles.

> . . . Although there are twists and turns and reverses in the people’s struggles, adverse currents against the people and against progress, in the final analysis, cannot hold back the main current of the continuous development of human society.

> The world will surely move toward progress and light, and definitely not toward reaction and darkness.

No doubt the Davids of this world who have, against the odds, finished off some pitiful, helpless Goliath are, forever after, inclined to take the optimistic view. But what about the rest of us?

To people who are professionally situated as law-
yers are, the idea that the future is, or can be made, predictable is almost irresistibly appealing. “The object of our study,” Holmes told us, “is prediction” and went on to say that the very idea of law comes down to “prophecies of what the courts will do in fact, and nothing more pretentious . . .”16 Instinctively, we nod approvingly. Indeed, if we are not certified soothsayers, qualified fortune tellers, expert readers of the crystal ball, what is it that we are supposed to be doing? Lawyers in practice advise their clients on the legality or illegality of their proposed course of action or on whether they will win or lose their case if it comes to litigation. Professors who write law review articles and treatises look on themselves as a sort of service of supply, whose function is to provide the shock troops in the law offices and courtrooms with the weaponry which will insure victory. The good lawyer is the one whose predictions are consistently correct—whose prophecies turn out to coincide with what actually comes to pass.

Closely allied, in the legal mind, with the idea of predictability is the idea of certainty. The two ideas, in the legal context, are so closely related as to be very nearly identical twins. If the law is certain, then we shall be able to give our clients sound advice on what they should or should not do. If the law is uncertain, if the precedents are ambiguous, if the statute is badly drafted, then the best we can say (if we are honest) is that the question is interesting, but no one really knows what the answer is.

Our obsessive need for certainty has led us to place a high premium on unity of doctrine. Few things are more frustrating to a lawyer than the situation in which it appears that there are competing rules but that nobody really knows which rule is followed in state X.17 Even worse is the situation in which it appears that within a single jurisdiction there are divergent lines of cases, never cross-cited to each other, which, on identical facts, lead to opposite results.18 The great treatises of the golden age before World War I were essentially attempts to reduce the evident diversity of case law to a formal unity. If the “majority rule” and the “minority rule” could not plausibly be collapsed into a single rule, then the “better rule” was confidently stated, with the regretful notation that a few aberrant jurisdictions had not, as yet, seen the light. In the 1920s the first series of Restatements pursued the same goal on what could be called a quasi-statutory level. The draftsmen and sponsors of the current second series of Restatements do not appear to be entirely clear in their own minds what they are about.

Our obsession with unity, certainty and predictability has led us to convert those values into absolutes. Our goal—our Utopia—has been complete unity, total certainty, absolute predictability. (Of course if the goal had ever been reached or reachable, there would have been no need for lawyers and our venerable profession would have been one with the dodo and the dinosaur.) Our understandable professional concerns made us unusually vulnerable to nineteenth century theories which seemed to promise exactly the things we most wanted and needed. No doubt the same professional concerns account for the fact that we were able to go on living in the nineteenth century long after the bleak light of the twentieth century had, in most quarters, revealed that the bright Victorian promise had been a hollow fraud.

The word "historicist" has come into use to describe the idea that the past can be arranged in a meaningful sequence which will not only explain the present but reveal the future. Let us by all means become historians; let us not become historicists.19 Let us resist the temptation to make the real world conform to some all-purpose theoretical model borrowed from our betters, the economists or the sociologists, or even created for our own use. Let us particularly refrain from saying that anything that cannot be made to fit the model is "wrong" and should be disregarded if it cannot be forcibly repressed or turned into its own opposite. I do not in the least mean to suggest that whatever is is right or that we should always float with the stream or vote with the majority. I am, however, deeply suspicious of value judgments which are presented as the logically inevitable consequences which flow from the unchallengeable premises of whatever theoretical model is assumed to be true.

Historicism in its origins looked to the future, which was usually conceived to be utopian. We have the misfortune to live in the future which the first generation of historicists could only dream of. Most of us find that the present condition of the human race leaves much to be desired. Our twen-
tieth century despair has led some of us to a sort of perversed historicism in reverse which finds utopia at some more or less distant point in the past. Once upon a time economic laws worked as they are supposed to; the streams of legal doctrine ran sweet and pure; order, tranquility and harmony governed our society. If, by a strict construction of the Constitution and a stern repression of all antisocial behavior, we can return to our lost paradise, all will be well. This reverse historicism has the merit of being active instead of passive. I cannot see that there is anything else to be said for it.

However, apart from some version of historicism, what point can there be to the study of the past? If, say, the doctrine of consideration is moribund or dead, why waste our time—and our students' time—in reconstructions of what the doctrine was once supposed to mean? If we eschew historicism, can we escape the reproach that our historical studies are mere—as it is usually put—antiquarianism?

III

This lecture inaugurates a series of lectures on legal history named in honor of the late William Winslow Crosskey. The thesis of Professor Crosskey's great work Politics and the Constitution was that the Constitution had been intended to establish a central government of plenary powers. That intention, he argued, had been subverted as the result of the political controversies—particularly the question of slavery—which raged during the first half century of the life of the Republic. The advocates of the position that the Constitution established a central government of severely limited powers eventually prevailed—and that has, of course, ever since been the orthodox view of the matter, even while the federal government has been in process of becoming, de facto if not de jure, the sort of government which, if Crosskey was right, we were originally meant to have. Failing health made it impossible for him to complete his work. The two volumes which he published were devoted to establishing what the original intention of the Founding Fathers had been. The volumes which would have detailed the process by which their intention was subverted were never written.

The Crosskey thesis was savagely attacked by most of the constitutional law experts of the time. I am not in any sense a constitutional law expert, so that my own opinion carries no great weight. However, for what it is worth, my thought is that the attacks on Crosskey were most successful when they were directed to peripheral aspects of his argument—such as the question of judicial review—with the reader being invited to conclude that, if Crosskey was wrong (or had overlooked much available evidence) on this point, he must be wrong on all the other points too.

I have heard it said, however, that, even if Crosskey was right, it was all a great waste of time and effort. Suppose that Madison and others had indeed falsified the historical record. Their hoax or fraud or forgery having succeeded, what difference can it make what the Constitution was originally supposed to mean? Surely it is not seriously proposed to scrap a hundred and fifty years of history simply because words like "commerce" and "among" and "states" carried different meanings in the late eighteenth century from the meanings they now have. And, if that is not what is being proposed, what is there in Politics and the Constitution except antiquarianism—and mere antiquarianism at that?

I take it that the thought which is implicit in the "mere antiquarianism" line is that historical study is worthwhile or justifiable only if the result illuminates—is, as we said a year or two ago, relevant to—our present condition. Absent relevance, there is only an aimless rooting around in the trash heap of history, which is no more to be recommended than any other type of scavenging operation.

The idea that the only use of the past is to explain the present illustrates, I suggest, another of the vices of historicism—which is its tendency grossly to oversimplify the historical process. At any given moment in time, there exists an indefinite number of possibilities for future development. We know that this is true when we look around us. But when we look backward in time, we can see that, of all the things that might have happened, only a few were made flesh. In the historicist reconstruction, only the things that actually happened count; the things that might have happened, but did not, are cast out of the equation. Under the historicist hypothesis that the course of history is predetermined and inevitable, the only relevant facts about the past are those which can be made to fit into what later
turned out to be the actual course of events. By picking out a few “relevant” facts and ignoring everything else, we succeed in reducing the past to a logical and orderly sequence and in persuading ourselves that what happened in fact was the only thing that could have happened.

It was the great merit of Professor Crosskey’s work to have demonstrated that the conventional reading of our constitutional history involved a considerable amount of historicist oversimplification. He restored to public view a great deal which had been swept under the rug for the past hundred years. Scorn and derision were heaped on him because, ultimately, he failed to prove that his own reading of the constitutional text was the only one which a competent lawyer or a reasonably well-informed citizen could have entertained in the 1780s and 1790s. He may indeed, in the heat of argument, have overstated his case. But he did prove that the reading of the text which was, for example, put forward by Hamilton and Madison and Jay in the Federalist Papers was not the only possible one either—which was already a considerable accomplishment.

The trouble with oversimplifying the past is that it leads us to be overly doctrinaire about the present and the future. Even though we know perfectly well that we cannot predict who is going to win the next election or the next war or the next revolution, we turn our straightline historicist reconstruction into a model which allows us—indeed compels us—to say that there is only one correct course to be followed. We become, in our own minds, prophets of a divine revelation and all those who disagree with us are consigned to eternal damnation. On the other hand, the historian who shows us that what in fact happened need not have happened the way it did or need not have happened at all enriches our understanding of the past and, consequently, puts us in a position where we can deal more rationally with the infinitely complex problems which confront us. The argument that historical study which has no direct and immediate relevance to our present condition is “mere antiquarianism” is simply another aspect of the historicist fallacy.

IV

The historical approach to the study of law has, if we go about it properly, much to recommend it. I doubt, however, that it will lead the law schools into another golden age. The Langdellians and the realists, in successive generations, promised their followers the truth. The promise of truth, so long as it is believable and believed, naturally generates an almost superhuman enthusiasm and leads to accomplishment of no common order. Without Langdell’s truth, we would not have had the extraordinary outpouring of energy which, for the first time, organized the scattered and disparate materials of the common law into a comprehensible pattern. We find today that they overorganized; their patterns had a geometrical precision which is not of this world. But the very failure of their attempt to confine the law within a formally perfect logical system has left us largely in their debt. Without the realists’ truth, we would lack many insights into the complexity of the decisional process which we owe them. We can see that they uncritically accepted as truths theories which were compounded largely of guesswork and error. But the truth is, if I may be permitted to use such a term, that the enthusiastic pursuit of error leads, as often as not, to major discoveries.

Situated as we are in time, we are in no position to offer our students—or ourselves—the consolations of Utopia. Only our new-found Chinese friends are still able to muster up belief in the inevitable march of history and in the progressive improvement of human society. Perhaps the law school of the University of Peking stands even now at the threshold of its golden age. The best we have to offer is a disenchanted rationalism which is not too sure of anything any more—which is not the sort of production which has ever brought any audience to its feet cheering.

Optimism in the late twentieth century consists in believing that the course of history is not predetermined. Luckily, there is no reason to believe that it is; a hundred years of effort to prove the contrary have not produced a single theory which has ever proved anything. There is no reason to believe that there are not real alternatives of choice. We can go this way or that way. We can sink but it is, so far as we can know, equally possible that we can swim. Only in retrospect will we—or the generations which come after us—know whether our choices have been wise or foolish—which need not inhibit us from mak-
ing them as wisely and rationally and responsibly as we know how.

Whether we look on ourselves as historians or as problem solvers, as philosophers or as activists, let us do what we can to preserve our students from the simplistic beliefs that there can ever be easy answers to hard questions, that the correct course which we should follow can ever be known in advance, that the process of decision can ever be reduced to one of logical deduction from infallible premises.

A major function of law is to provide a mechanism for the orderly and peaceful settlement of disputes. In times of order and tranquility the mechanism works smoothly and well. In times of disorder and conflict it works progressively less well. In such times it seems, to many people, both plausible and comforting to say that the breakdown of law is the cause of our disorder and that all will be well if we have more law and more laws and enforce them strictly. That misconceives the nature of law and overstates what, through law, can be accomplished. Law has never been the salvation of any society. A society is in good health when its legal system enlists the voluntary suffrage of the great majority of the citizens. A society is diseased when there is a widespread popular distrust of the system. But cramming more law down the throats of the people will merely aggravate the disease. It was said of the Romans that they made a desert and called it peace. It is equally possible to make a desert and call it law.

In a time of troubles the demand for truth far outruns the available supply. I trust we will not delude ourselves or others with the belief that we have, or ever will have, the truth—about man, about his society or even about the law.
1 M. MANDELBAM, HISTORY, MAN, & REASON: A STUDY IN NINETEENTH-CENTURY THOUGHT (1971) is a rich and rewarding essay in intellectual history. In the following discussion I have borrowed liberally from Professor Mandelbaum’s analysis.

2 There were, of course, exceptions to the prevalent Utopianism—such as Spengler’s apocalyptic visions in The Decline of the West (first published in Germany in 1918-22). Whether the fantasies of that eminent Victorian, Professor Toynbee, are to be classified as Utopian or the reverse depends on the reader’s predilections.

3 Comte seems to have followed Saint-Simon in this formulation. On the “law of the three stages,” see M. MANDELBAM, supra note 1, at 63 et seq.


5 H. SPENCER, PROGRESS: ITS LAW AND CAUSE, in 1 ESSAYS: SCIENTIFIC, POLITICAL AND SPECULATIVE 10 (1857), quoted in M. MANDELBAM, supra note 1, at 90.

6 The war was carried on, so to say, on two fronts. One line was that, despite the barbarian invasions of the late fifth century, the Empire, even in the West, continued to flourish (in somewhat altered form to be sure) for another several hundred years. See e.g., H. PIRENNE, MOHAMMED AND CHARLEMAGNE (Am. ed. 1939). For a variety of current approaches to Pirenne’s ideas, see THE PIRENNE THESIS: ANALYSIS, CRITICISM AND REVISION (rev. ed. A. HAIGHBURST, 1969), particularly LOPES, MOHAMMED AND CHARLEMAGNE: A REVISION, id. at 40-55). The other line was to persist in antedating the beginnings of economic and social recovery in Western Europe—back to, for example, the ninth or tenth century. On the origins of feudalism, see the altogether fascinating work by the late Marc Bloch, Feudal Society, (Am. ed. 1964).

7 Quoted in A. SUTHERLAND, THE LAW AT HARVARD 175 (1967). The passage quoted was from an address to the Harvard Law School Association in 1886. Langdell had expressed the same idea in the preface of his A SELECTION OF CASES ON THE LAW OF CONTRACTS (1871).


10 The series of lectures which makes up The Common Law is devoted to demonstrating that this hypothesis holds true in all the fields he deals with—criminal law, torts, contracts and so on. I do not know what the source of Holme’s hypothesis was or if, indeed, there was a source.

11 The following passage, from his 1897 address “The Path of the Law,” is no doubt the most celebrated, as it is the most eloquent, statement of this aspect of Holmes’s thought:
You can always imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place. We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind.


12 The first edition of Williston on The Law of Contracts was published in 1920–22.

13 Llewellyn, Some Realism about Realism—Responding to Dean Pound, 44 HARV. L. REV. 1222 (1931), might be described as the manifesto of the “realist school,” except for the fact that Professor Llewellyn consistently maintained that there was not, and never had been, a “realist school” or even a “realist theory.” In Gilmore, Legal Realism; Its Cause and Cure, 70 YALE L.J. 1037 (1961), I attempted to account for the emergence of realism during the 1920s with the suggestion that it represented a reaction to the progressive breakdown of a relatively pure case law system. Professor Llewellyn, in conversation, commented that I had gone wrong in assuming that there had even been a “realist theory.” All there was, he said, was a methodology.

14 One of the most elaborate studies of this type was undertaken by the late Underhill Moore, following the “theoretical model” of so-called stimulus-response psychology. See Moore & Callahan, Law and Learning Theory: A Study in Legal Control, 53 YALE L.J. 1 (1943).


16 O. W. HOLMES, supra note 11, at 167, 173.

17 For example, there were three common law rules (which were usually known as the New York rule, the Massachusetts rule and the English rule) on the priorities between successive assignees of the same chose in action. Following the decision in Corn Exchange Nat’l Bank & Trust Co. v. Klauder, 318 U.S. 434 (1943), it became of vital importance for banks and finance companies engaged in nonnotification accounts receivable financing to know which of the rules was followed in which states. According to Kupfer & Livingston, Corn Exchange National Bank & Trust Co. v. Klauder Revisited: The Aftermath of Its Implications, 32 VA. L. REV. 910, 914–15 (1946), fourteen states probably followed either the New York rule or the Massachusetts rule and three more states possibly followed one of those rules; seven states probably followed the English rule and possibly seven more did too; in the remaining states there was no way of telling what rule was followed, either because there were no decisions or because there were conflicting decisions. Following the Klauder case, financing arrangements of the type mentioned were unquestionably invalid in bankruptcy in all English rule states and were probably invalid in all Massachusetts rule states. Since a great deal of money was at risk, the New York rule was quickly adopted by statute in all states in which the issue was in the slightest degree doubtful. See 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 25.7 (1985). Such a happy legislative ending is usually not available to counsel who find themselves mired in common law confusion.
that, from the beginning, the Constitution committed to it. Too often, the Senate has treated and continues to treat federal judicial appointments as though they were mere matters of patronage to be dispensed at the whim of the Senators from the state of origin of the appointee. A look at the records of this Committee will, I think, reveal how lightly most hearings on judicial competence of nominees are actually treated.

So long as you have given me the courtesy of this forum, I will impose one suggestion for change in judicial tenure that I think is appropriate. And I believe that it is one that will not interfere with the essential of judicial independence. I refer to the desirability of a compulsory retirement age for judicial personnel. For history has shown us that, so long as retirement is a matter of discretion with the individual jurists, there are some who will sit as judges long after they have lost the capacity to do so. The history of the Supreme Court is replete with examples of Justices whose mental or physical conditions precluded them from exercising the arduous functions that must be performed by federal judicial officers. I cannot, of course, deny that many of our judges—Learned Hand is certainly a sterling example—have continued to serve with distinction long after any arbitrary retirement age would have called for their departure. But I have reluctantly come to the view that the price of physical or mental debility among some judges is too high a price to pay for the continuance on the bench of those few whose excellence is not dimmed by age.

I conclude by exhorting you to reject S.J. Res. 106. Its benefits are dubious at best; its costs are likely to be exhorbitant. We cannot afford the strains on our constitutional system that this subordination of the judicial power would effect.

continued from page 9
Good evening, ladies and gentlemen. I would like to welcome you to the first William Crosskey Lecture in Legal History at The University of Chicago Law School. The Crosskey Lectureship has been established to honor the memory of William Winslow Crosskey, the distinguished scholar and teacher of Commercial and Constitutional Law and legal history, who was a member of this faculty from 1935 to 1962. I know that our speaker will comment on Professor Crosskey, but I hope that you will forgive me if I say a word or two about him on this inaugural occasion.

Crosskey came to The University of Chicago after a distinguished career at Yale College and Yale Law School, a long clerkship with Chief Justice William Howard Taft, and a brief practice with the Davis, Polk firm in New York. He was brought to the Law School to create courses in Federal Taxation and Public Utilities, subjects which were newly being introduced to the curriculum during those early days of the New Deal. His great virtue, I take it, was thought to be his considerable practical experience and orientation, but as it turned out Crosskey’s career here was to be that of the pure scholar. Harry Kalven has described the curious way in which his research began. It was “gently” suggested to Crosskey that he ought to publish a Law Review article or two in order to justify his retention on the faculty, and Crosskey decided that the easiest thing to do would be to revise an extensive memorandum on the jurisdictional reach of the Securities Act which he had prepared while practicing with John W. Davis on Wall Street. He therefore descended into the basement of the old Law School library in order to begin his work, but not until twenty years had passed did he finally emerge (in 1953) with his great two volume study, Politics and The Constitution.

Crosskey’s thesis in his dramatically revisionist book was that the framers of the Constitution, when properly understood, had not intended to create a federal system in which the states would play a powerful and somewhat independent role. Rather, he argued, the Constitutional Convention intended a system in which the national government should be supreme, the states barely more than administrative subdivisions, and that Congress should have sweeping powers, subject only to the procedural review of the Supreme Court. The Bill of Rights, he thought, was clearly intended to be applicable to the states under the Privileges and Immunities clause. Crosskey’s thesis was worked out at great length and with infinite care, with a special reference to the precise contemporary meanings of language which the framers had employed.

The book startled its scholarly audience and found several distinguished reviewers, men such as Judge Charles E. Clark, Walton Hamilton, and our own colleague Malcolm Sharp, who praised it as the most important contribution ever made to constitutional history. A smaller number of equally eminent reviewers greeted the book with outrage and con-

These remarks were delivered by Stanley N. Katz, Professor of Legal History at The University of Chicago Law School, at the inaugural William Crosskey Lecture in Legal History on May 4, 1972.
tempt. The heat of the controversy is difficult to imagine at twenty years distance, but it can perhaps be best suggested in the language used by Henry Hart in his lengthy attack in Volume 67 of the Harvard Law Review. Hart referred to Crosskey as “the Don Quixote of Chicago,” “the Knight of La Mancha, the Knight of Hyde Park,” and spoke of Crosskey’s two volumes as “a farrago of fancy, rendered plausible only by a confident tongue, nice printing, and an abundance of notes and appendices referring to obscure documents and esoteric word meanings.” I think it is fair to say that professional legal and constitutional historians have come down on the side of Hart’s intellectual position, if not his etiquette, and yet, speaking personally, I must say that I cannot think of any dozen books on the Constitution which have taught me half as much as I’ve learned from Crosskey’s remarkable pair.

Crosskey the man must have been remarkable. Reading the tributes to him collected in Volume 35 of The University of Chicago Law Review, one gets a sense of the man. All of the commentators refer to Crosskey’s brilliant success as a teacher, his strength of mind, and his austere independence. He seems to have had a very warm side to his personality and he obviously made a profound impression on those who knew him well.

He was also a considerable character. Harry Kalven says, “I am confident he compiled one of the world’s great records for unbroken nonattendance at faculty meetings, thus realizing the secret dream of faculties everywhere.” Abe Krash remembers the opening lecture of his course on Constitutional History in 1947. On the opening day of the term, he arrived in the classroom a few minutes late, thumped the four volumes of Farrand’s The Records of The Federal Convention onto the desk in front of him with a loud bang, and began substantially as follows:

You have all heard, gentlemen, that James Madison is the father of the Constitution; that Oliver Wendell Holmes, Jr. of Massachusetts was our greatest Supreme Court Justice; and that Louis Dembitz Brandeis was the leading authority on the jurisdiction of the federal courts. Before I finish this summer, I propose to demonstrate to you that Madison was a forger—

he tampered with the notes he kept of the debates at the federal constitutional convention in order to suit his own political advantage and that of his party. Holmes undoubtedly knew a great deal about old English law, but he was not the most eminent authority on American constitutional history. As for Brandeis, his opinion in Erie v. Tompkins demonstrates that he did not understand the true meaning of the judiciary provisions in Article II of the Constitution.

Charles Gregory remembers that Crosskey never bothered to prepare his cases for the classes he attended as a student, although he was the first man in his class at Yale. “One day Charlie Clark called on Crosskey to state a case. I’m afraid we sniggered at his equivocal recitation; and he brought down the house by boldly declaring, ‘Professor Clark, if you can control your class, perhaps we could get somewhere with this case.’ Nevertheless Crosskey always insisted that before the final exam in each course he read every case in the book—a claim we had to believe when he turned up with the usual string of A’s.”

And Malcolm Sharp, who continues to be the most distinguished of the Crosskeyites, writes in a more serious vein, “His wisdom is concealed from the wise but revealed to the simple. He has restored the Constitution to the simple structure which every sixth-grader or high school student thinks it has. The powers of Congress, Executive, and particularly Court are seen to be much more modern, much more suitable to the current age, than the patchwork which the court has made of the Constitution since the Jeffersonians began to confuse our understanding.” It was only at a happy lunch I had with Professor Sharp two weeks ago that I began to get a true feel and appreciation for Crosskey the man—and to discover what apparently only Crosskey and Sharp have known all these years, that Huidakoper’s Lessee v. Douglas 7 U.S. (3 Cranch) 1 (1805) is the greatest case in the history of the United States Supreme Court.

Crosskey was a remarkable man, one of the most eminent scholars associated with this institution, and certainly the originator of what I hope will be a continuing tradition in legal history here.
Our speaker this evening is Grant Gilmore, who doubtless needs no introduction to most of this audience. There is no more distinguished scholar on this faculty nor anyone held in greater esteem by the student body as a teacher. The bare, biographical facts of his career are these.

He was born in Boston, Massachusetts and received his education entirely at Yale, where he was awarded the Bachelor's degree in 1931, the Ph.D. in 1936, and the LL.B. in 1942. Professor Gilmore's graduate work was in Romance Languages, and his dissertation a brilliant study of the poetry of Mallarmé. He taught French at Lehigh University for a year, and for three years at Yale. After switching to the law, he practiced briefly with the Millbank, Tweed firm in New York and served for a year in the Office of the General Counsel of the U.S. Naval Reserve. He began his law teaching career at Yale in 1946 and came here as the Harry A. Bigelow Professor of Law in 1965. His two major publications are The Law of Admiralty, published in 1957 in collaboration with Charles L. Black, Jr., and his treatise on Security Interests in Personal Property, which was published in 1965. The Security Interests book won the rarely awarded Harvard Law School Ames Prize in 1966 and the Coif Award of the Association of American Law Schools in 1967. After the death of Mark DeWolfe Howe, Professor Gilmore was selected to complete the multi-volume biography of Oliver Wendell Holmes, Jr., and that is his major scholarly interest at the moment.

His topic this evening is “The Age of Antiquarius: Legal History in a Time of Troubles.” It is a great pleasure for me to introduce Professor Gilmore to you.
From The Law School

Mr. Kimball is a leading authority in the field of Insurance Law. His teaching fields have included Contracts, Insurance, Legal History, and Jurisprudence.

KÖTZ, VISITING PROFESSOR OF LAW THIS FALL

Once again the Law School is privileged to announce that Hein D. Kötz, presently a member of the Faculty of Law of the University of Konstanz, Germany, will be Visiting Professor of Law in the Autumn Quarter 1972. Mr. Kötz will offer a course on Comparative Legal Institutions, one of the two courses he gave during his first visit to the Law School in the Winter and Spring Quarters 1971.

After initially studying law at the University of Munich, Mr. Kötz received his Master of Comparative Law degree from the University of Michigan in 1963. On the basis of a comparative analysis of the Anglo-American trust and its functional counterparts in German law Mr. Kötz was awarded a Doctor of Jurisprudence degree from the University of Hamburg that same year.

Formerly a Research Associate at the Max Planck Institute of Comparative Law and International Private Law in Hamburg, Mr. Kötz co-authored a two-volume treatise on comparative law with Konrad Zweigert, Director of the Max Planck Institute.

BIGELOW FELLOWS FOR 1972

Each year five Bigelow Fellows are selected from outstanding first degree graduates of law schools and/or practising lawyers who are interested in a teaching career. The Bigelow Teaching Fellowship was first established in 1947 in honor of the late Harry A. Bigelow, Dean of the Law School from 1929-1939 and a member of the Law School faculty from 1904 until his death in 1950. Bigelow Teaching Fellows receive the title of Instructor and assist in the First Year Tutorial Program.

Among those Fellows chosen for the academic year 1972-73 Bartholomew Lee, also a Bigelow Fellow for 1971-72, has been named Senior Bigelow Teaching Fellow and Instructor. Bart Lee, who was born in Teaneck, New Jersey, received his B.A. in 1968 from St. John's College in Maryland and his J.D. in 1971 from the Law School. For the last year he has been taking courses in the Graduate School of Business, pursuing his special interest in the field of Law and Economics, as well as carrying a full teaching load here at the Law School.

John Basten is another in a long line of Bigelow Fellows educated at Oxford University. This past year Mr. Basten has been working on his B.C. L., a post-graduate degree in Law, at Magdalen College. Although born in England, he received his LL.B. degree from Adelaide Law School, Australia, in May 1970,
where he was styled a "Stow Scholar," having received that prize for several successive years. Mr. Basten intends to practice at the Australian Bar.

Janet Sue Harring is presently working for The Honorable Thomas E. Fairchild, U. S. Court of Appeals for the Seventh Circuit in Milwaukee. A National Merit Scholar, Ms. Harring received a B.A. in 1968 from Macalester College in St. Paul, Minnesota. In 1971 she received her J.D. magna cum laude from the University of Wisconsin, where she was on Law Review and a member of the Order of the Coif. Her experience in 1971 as an instructor in legal writing for first-year students at the University of Wisconsin Law School should stand her in good stead as a Bigelow. Ms. Harring has also worked in a legal capacity for several firms; in 1971 she was a summer associate for the Wall Street firm of Cleary, Gottlieb, Stein & Hamilton. Ms. Harring is a native of Scottsbluff, Nebraska.

A 1972 graduate of the Law School, Donna Marie Murasky is a member of the Order of the Coif and a recipient of the Hinton Moot Court Competition Award to winners of the third-year competition in brief-writing and oral argument. Ms. Murasky was born in Detroit, Michigan and received her B.A. in 1969 from Barnard College in New York. This summer Ms. Murasky is working as a lawyer for Businessmen for the Public Interest in Chicago.

Born in London, England, Anthony Jon Waters represents a second British Bigelow chosen by the Law School this year. Having received his B.A. in 1972 from the University of Keele in Staffordshire, Mr. Waters has been working on a joint degree (the equivalent of the American LL.B.) in Law and American Studies there. In the summer of 1971 Mr. Waters clerked for the San Francisco firm of Heller, Ehrmann, White & McAuliffe. Mr. Water's article on one aspect of the Theft Act 1968, "Obtaining a pecuniary advantage by deception," was recently accepted for publication by The Criminal Law Review.

Prior to her Maremont position she had been associated with the Chicago law firm of Lord, Bissell and Brook and previous to that the Toledo firm of Fuller, Harrington, Seney and Henry. From 1956-1958 she was Assistant Dean in the Law School, in charge of the administrative coordination of the Ford Foundation Research and Foreign Law Student programs.

Allard Joins University

Jean Allard J.D. 1953 was appointed Vice President for Business and Finance at The University of Chicago on May 1st. In her new position she is concerned with the administration of The University's financial operations and business affairs.

Most recently she had been General Counsel and Secretary of the Maremont Corporation of Chicago. She received a B.A. degree from Culver-Stockton College and an M.A. from Washington University in St. Louis in 1947. She was graduated from The University of Chicago Law School in 1953. She served as Managing Editor of the Law Review.

Jean Allard

Honorary Doctor of Laws Received by Dawson

At the 340th Convocation of The University of Chicago on June 9, 1972 John Philip Dawson, a noted historian of Anglo-American law, was awarded the honorary degree of Doctor of Laws. Because of Mr. Dawson's scholarship a revived interest can be seen in the area of comparative legal history: A History of Lay Judges (1960) developed from his research in the Bacon Collection of manorial court records at The University Library, when he was a visiting member of the Law School faculty in 1955; The Oracles of the Law (1968) received the Association of American Law Schools' triennial Order of the Coif Award. Mr. Dawson is also a leading scholar of the modern law of restitution and an authority on law of contracts and equity.

Born in Detroit in 1902, Mr. Dawson received a J.D. from the University of Michigan in 1924, thereafter attending Oxford as a Rhodes Scholar, where he received a D. Phil. in 1927. From 1927 to 1956 he taught at the University of Michigan Law School; since then he has taught at Harvard Law School.

The presentation made to him by Dean Phil C. Neal is quoted in full below.
Presentation

I present, as a candidate for the degree of Doctor of Laws, John Philip Dawson, Fairchild Professor of Law at Harvard University.

During a career of more than forty years in legal education, Professor Dawson has by his scholarship left a deep imprint on a remarkable range of studies. He is the nation’s pre-eminent scholar of the law of restitution. His casebooks on contracts, equity, and restitution are used throughout the country. Professor Dawson is also among the most distinguished of American comparative lawyers, the author of several specialized studies on French and German law, and of a major contribution to the literature of comparative law.

Professor Dawson’s transcendent achievement has been his work in yet another subject, legal history. His teaching materials on English legal history have opened the field to many students. His two great works of comparative legal history treat the grand themes of the history of lay and of professional judges in the several Western legal cultures. These two books have won deserved scholarly acclaim. Indeed, they have been themselves historic events in the progress of legal history, reinvigorating the comparative tradition after a prolonged malaise.

It is my great privilege, Mr. President, to present Professor John Philip Dawson for the degree of Doctor of Laws.

The 1972 Fund for the Law School

The 1972 Fund for the Law School will commence on September 1st and conclude December 31st 1972. Now in its 19th Year the Fund for the Law School continues to provide the most important source of unrestricted funds available directly to the School.

Co-Chairmen of the Fund for the Law School will again be Maurice S. Weigle J.D. '35 and Elmer W. Johnson J.D. '57. Additional members will be invited to join the Dean’s Fund, which is open to all alumni. In order to become a member an alumnus is asked to contribute at least $250 to the Fund for the Law School. A special rate of $100 is extended to alumni who have been out of the Law School for less than 10 years (since 1962).

The following membership in the Dean’s Fund are available: Charter Member ($5000 or more), Sustaining Member ($1000 or more), Supporting Member ($500 or more), and Member.

All gifts received before December 31st will qualify an alumnus for membership in the Dean’s Fund.

The 1971 Fund for the Law School raised a total of $232,790.34. The solicitation publications used during the 1971 Fund for the Law School were accorded honors in recent publication competition of the American Alumni Council. Pieces were judged by one criteria—excellence. The Law School pieces were judged "the best of the good."

New Special Funds for the Law School

This past year several special funds have been established at the Law School.

The D. Francis Bustin Educational Fund for the Law School was established by a provision of the will of D. Francis Bustin, a 1917 alumnus of The University, to give awards or prizes from time to time for a valuable and important contribution, proposal, or suggestion for the improvement and betterment of the processes, techniques, and procedures of our Government or any of its branches, departments, at city, state, or Federal level.

The William B. Graham Endowment Fund was established by William B. Graham J.D. 1936 to assist in providing financial support to strengthen the faculty of the Law School.
The Stuart Cardell Hyer Scholarship Fund established as a memorial to Stuart C. Hyer J.D. 1955 by his parents Ebba Cardell Hyer and Stanton E. Hyer J.D. 1925.

The Archibald H. Kurland Memorial Book Fund was established in memory of Archibald H. Kurland by his family and friends.

The Morton C. Seeley Fund was established by a bequest under the will of Mrs. Rachel K. Seeley in memory of her husband, Morton C. Seeley, who was graduated from the Law School in the Class of 1910.

The Alta N. and Channing L. Sentz Loan Fund was established for worthy and deserving students by a bequest of Channing L. Sentz, a graduate of the Law School in the Class of 1908.

The Lester R. Uretz Memorial Fund was established in memory of Lester R. Uretz, a graduate of the Law School in the Class of 1948, by his family and friends.

The William W. and Tamara Wilkow Scholarship Fund was established by the William W. and Tamara Wilkow Foundation to provide an annual scholarship for a third-year student who maintained a superior academic record for the first two years of law school and who requires financial assistance to complete his or her legal education. Mr. Wilkow was graduated from the Law School in 1948.

Ronald Coase Figures in a Little Known Historical Episode

Recently a memo was circulated in the University community to “Students of Little Known Historical Episodes,” containing an item which may be of interest to those familiar with the work of Ronald H. Coase, Clifton R. Musser Professor of Economics in the Law School and Director of the Law and Economics Program. The item cited originally appeared in the Autobiography of an Economist by Lord Robbins:

Francis Hemming’s favorite official occupation was the correction of other people’s drafts. He would gather round him a small collection of his economists and statisticians and then, with pen ominously poised, he would meditate aloud and invite assistance on points of style rather than substance. One such occasion has become famous. A member of the section had written a report on the Timber Control, in the course of which he had passed certain strictures on the absence of reliable figures, adding, however, that improvement might shortly be expected since the Control had “now appointed a statistician.” The bald simplicity of this last statement worried our director. He seized his pen, erased the words “appointed a statistician,” and substituted with obvious relish “have instituted a statistical organization.” This was too much for his hearers who, one and all, protested that the appointment of Mr. Ronald Coase, though doubtless a very welcome event, did not add up to the institution of a statistical organization. Hemming listened gravely, and agreed that there was some point in the objection. Then, again taking his pen in that enormous hand, he inserted an omission mark before “a statistical organization” and, in the margin, inscribed the words “the nucleus of.”

The instigator of this memo is obscured in anonymity.

Creation of Associates Program in Law and Economics

An Associates Program in Law and Economics has been established at The University to encourage corporate support of the Program in Law and Economics. The Program is rooted in a strong tradition of inter-disciplinary studies at the Law School developed in the period of the mid-1930’s to the present under two distinguished economists, Henry C. Simons and Aaron Director. An important event in this development was the founding of the Journal of Law and Economics in the 1950’s. Under the editorship first of Professor Director and then of R. H. Coase...
of major antitrust decisions.

The Associates Program in Law and Economics is designed to interest a small number of corporations in becoming regular supporters of this field of research.

**Legal History Conference**

In May the Law School sponsored a Conference on Law and Economic Development in Nineteenth Century America. Chairman of the Conference was Stanley N. Katz, Professor of Legal History in the Law School.

Although earlier work in this relatively new field of American Legal History was mainly concerned with discrete problems in the colonial period, the present approach is essentially social scientific, studying the interaction between law and social change in the national period. Thus, "Law and Economic Development in Antebellum America" was chosen as the organizing theme, because it is the area in which the most promising work is currently being done.

Among the various topics discussed "Damage Judgements, Legal Liability and Economic Development Before the Civil War" was presented by Morton J. Horwitz, Professor of Law at Harvard Law School. The central issue of this first session was the economic significance of tort law: whether the formation of the negligence concept in itself created conditions for legal change, or whether it was a product of a change which had previously taken place.

Richard A. Posner, Professor of Law in the Law School, spoke on "The Accessibility of Legal Remedies." Problems discussed in this session were the following: how to assess the litigiousness of American society in the nineteenth century, the reliability of appellate cases as an index of the extent and nature of
private litigation in the past, the relationship between settlements out of court and the litigation of private disputes.

In the third session Harry N. Scheiber, Professor of History at the University of California in San Diego, spoke with the group on "Eminent Domain and the Concept of Public Purpose in State Courts." Mr. Scheiber discussed whether or not legal changes (in this case, eminent domain) acted to subsidize certain kinds of social activities at the expense of others. In particular, he wished to describe the transfer of public protection to private property in the eminent domain area.

In concluding the Conference, Professor Katz led a discussion on "A Critique of Research Areas and Methodologies in Nineteenth Century Legal History." Mr. Katz raised problems of the uses of quantification, the relevance of economic theory, the need for comparative study, the problem of regional variation within the American economy, and the difficulty of using appellate court cases as evidence.

This conference was funded by the National Science Foundation.

**Inaugural Crosskey Lecture in Legal History**

The inaugural William Crosskey Lecture in Legal History was held in the Law School Auditorium on May 4th. Grant Gilmore, Harry A. Bigelow Professor of Law, spoke to over 400 alumni, students, and friends of the Law School on "The Age of Antiquarius: Legal History in a Time of Troubles."

Professor Crosskey was a member of the faculty from 1935 until 1963 at which time he became Professor Emeritus of Law. In 1968 following his death the William Crosskey Memorial Fund was established in memory of Mr. Crosskey by his students. This past year, following an effort to raise money led by Abe Krash '49, the Fund was designated The William Crosskey Lectureship in Legal History.

Professor Gilmore's lecture appears in this issue of the Law School Record as well as the introductory comments made by Stanley N. Katz, Professor of Legal History.

**Johnson Delivers Simons Lecture**

On May 18th the Sixth Henry Simons Lecture was given by Harry G. Johnson, Professor of Economics at The University of Chicago. Professor Johnson spoke on "The International Monetary System and the Rule of Law."

Since 1959 Mr. Johnson has been Professor of Economics at The University; he has also been Professor of Economics at the London School of Economics since 1966.

Born in Toronto, Canada, Mr. Johnson received his B.A. degree in 1943 from the University of Toronto. In 1958 he received his Ph.D. in Economics from Harvard University. St. Francis Xavier University, the University of Winsor, Queen's University, and Carleton College have all awarded him the honorary degree of Doctor of Laws (L.L.D.).

In 1962 Mr. Johnson was elected a Fellow of the American Academy of Arts and Sciences; he was also elected Fellow of the British
Academy for the Promotion of Historical, Philosophical, and Philological Studies in 1969. Since 1966 he has been a member of the Executive Committee of the Royal Economic Society. Mr. Johnson is chairman of the Association of University Teachers of Economics, United Kingdom.

The Simons Lecture was established in 1956 by the Relm Foundation of Ann Arbor, Michigan. It honors the late Henry Simons, a professor at The University who served for 29 years on the faculties of the Department of Economics and the Law School. Mr. Simons was a leading spokesman for the classical school of economics and was a staunch advocate of free enterprise.

**HINTON MOOT COURT COMPETITION**

On the evening of May 8th the final argument for the Hinton Moot Court Competition was held in the Weymouth Kirkland Courtroom in the Law School. Mr. Justice William H. Rehnquist, Supreme Court of the United States, The Hon. Elbert P. Tuttle, U. S. Court of Appeals, Fifth Judicial Circuit, and The Hon. John Paul Stevens, U.S. Court of Appeals, Seventh Circuit heard the arguments for the case, *Medical Committee for Human Rights v. S.E.C.*

In the case before this court the Medical Committee for Human Rights appealed the decision of the Securities and Exchange Commission not to raise objection to Dow’s refusal to include in their proxy statements a resolution that Dow cease making napalm.

**John G. Jacobs** and **Donna Marie Murasky** were the third-year students who won the case on the basis of brief-writing and oral argument.

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**RHEINSTEIN REVIEW**

A recent review by René König, Director of the Institute of Sociological Research at the University of Cologne and leading sociologist in Europe, on Max Rheinstein’s recent book, *Marriage, Stability, Divorce and the Law*, made these commendations:

> The highest expectations are raised when a man of the experience and the caliber of Max Rheinstein puts together his investigations about the problem of divorce. These expectations are fulfilled completely. The book contains not only a masterly treatment of the enormous mass of legal and particularly comparative material, it also constitutes a product of serious sociological thought. If the work is properly received it will once and for all terminate the sterile disputes between legal scholars and sociologists. A new start is made not only in the matter of divorce but in the relation between law and sociology.

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Mr. Rheinstein’s book was published by the University of Chicago Press.

**A LEGAL NOTE ON CHAUCER**

**Bart Lee**, Senior Bigelow Teaching Fellow in the Law School, has written a note on “A New and Legal Pun in Chaucer: A Significatio for the Summoner,” which will appear in *Modern Philology*.

**STUDENTS INTERN IN GOVERNMENT AGENCIES**

Ten Law School students have been named Ford Foundation Summer Field Work Fellows for 1972. The three-year program of summer fellowships was set up under a Ford Foundation Grant in which first- and second-year law students intern in agencies in state and local government.

The aims of the program are to broaden the understanding of law graduates concerning the problem of government at the state and local...
levels; to interest students in the possibility of careers in government; to assist agencies of government by providing short periods of service by talented young men and women with legal training; and to encourage critical thought and scholarly research on law related aspects of state and local government.

Students receiving the awards this year are Kathleen W. Bratton, Christopher J. Duerksen, Philip E. Garber, Jean M. Hamm, James B. Jacobs, James Martin, Preston Moore, Michael E. Pietzsch, Carl W. Struby and Merideth Wright.

THE DEAN'S FUND
MEMBERS MEET

On May 11th members of The Dean’s Fund met for a seminar on “New Problems of Lawyers’ Liability: the SEC v. the National Student Marketing Corporation.” Conducting the seminar was Milton H. Cohen, a member of the firm of Schiff Hardin Waite Dorschel & Britton. Mr. Cohen had served as Director of the Public Utilities Division of the Securities and Exchange Commission (1943-1946) and Director of the Special Study of Securities Markets for the SEC (1961-1963).

Members of the Dean’s Fund also participated in a special exhibition of the Bacon Manuscripts on June 3rd at the Joseph Regenstein Library. Professors Stanley N. Katz and John H. Langbein discussed the plans of the Law School for studies in Legal History and the significance of the Bacon Collection for scholarship and English legal, social, and economic history. The Bacon Manuscripts are a rare collection of manilla records pertaining to the ecclesiastical estates of the Abbey of Bury St. Edmonds and the land holdings of the family of Sir Nicholas Bacon. They extend from the 13th through the 18th century. These records are part of The University’s rare book collection and were on exhibit in the special collections area of the new University library.

The Dean’s Fund is in its first year. Membership is available to all alumni of the Law School and is based on participation at certain levels of giving of unrestricted gifts to the Fund for the Law School.

SEMINAR ON LEGAL ETHICS

During the Spring Quarter, Professor Stanley A. Kaplan conducted a non-credit seminar on what is traditionally called “Legal Ethics” but what Mr. Kaplan prefers to describe as “Lawyers’ Obligations.” In the seminar students addressed themselves to the many significant, changing aspects of a lawyer’s obligations to his client and to the legal system. In further discussion problems of this character were developed in connection with the activities of lawyers in the areas of tax, labor and criminal law and in the handling of class action and administrative law, other fields of practice and the curriculum.

TRADITIONAL ILLINOIS SUPREME COURT VISIT

Once each year the Illinois Supreme Court is invited by the Law School to hear several cases in the Weymouth Kirkland Courtroom. This invitation primarily benefits the first-year law students who have the opportunity to hear oral argument in process.

On January 21, 1972 The Honorable Robert C. Underwood and other members of the Court heard the cases, Illinois v. Gary Handley, et al and Northwestern University v. County Collector. The issue in the first case concerned the constitutionality of the waiver provision of the Illinois Juvenile Court Act permitting the State’s Attorney to remove a case from the Juvenile Court when the act constitutes a crime even though a minor is involved. Appellants of several

President Edward H. Levi ponders an observation made at the 40th reunion celebration of the Class of 1932.
murder convictions argued that such removal is unconstitutional, since a hearing on removal is not required and there are no standards limiting the State's Attorney's discretion. In the case of Northwestern University v. County Collector the issue was the constituonality of Northwestern's exemption from taxation in its state charter as applied to property the University owns but leases for commercial use. Northwestern was appealing a lower court holding that this exemption is unconstitutional because the exemption deprived other educational institutions and individual non-exempt taxpayers of equal protection of the laws.

**Zeisel—Casper Study Applauded**

The study on “The Lay Judges in the German Criminal Court” which was conducted by Hans Zeisel, Professor of Law and Sociology, and Gerhard Casper, Professor of Law and Political Science, has been well received from many quarters. The Federal Minister of Justice in Bonn notes, “Your findings on the role of lay judges in German criminal procedure are of considerable importance for our pending reforms of the German criminal court system. The analysis of the sociological background is particularly enlightening.”

From the University of Konstanz Professor Friedrich Kübler writes, “In view of the century old debate (only recently Baur again called for the abolition of lay judges) you and Mr. Zeisel have rendered a great service to German law through the persuasive design and intelligent evaluation of your study.”

Joachim Herrmann of the Max Planck Institute for Foreign and International Criminal Law concludes, “It was extraordinarily interesting for me to see that the speculations generally prevailing about the significance of lay judges have been corroborated by your figures. However, your tables give information not only about the participation of lay judges but also about the other questions regarding criminal procedure for which so far there has been no data available.”

The study appeared in the first issue of the Journal of Legal Studies, a new publication at the Law School, edited by Richard A. Posner, Professor of Law.

**Convocation 1972 Honors**

At the 340th Convocation of The University of Chicago, held on June 9th, the following awards were made to students at the Law School.

The Joseph Henry Beale Prize, for outstanding work in the first-year legal research and writing program, was awarded to William Block, James B. McHugh, Stuart Oran, Fred Thomas, and James Whitehead.

The Jerome N. Frank Prize, for the outstanding comment produced by a third-year member of the University of Chicago Law Review, was awarded to Robert Paul Schuwerk.

The Hinton Moot Court Competition Awards, to the winners of the third-year competition in brief-writing and oral argument, were made to John G. Jacobs and Donna Marie Murasky.

The Karl Llewellyn Memorial Cup, for excellence in brief-writing and oral argument in the second Hinton Moot Court Competition, was awarded to Peggy L. Kerr and James R. Mikes.

The Casper Platt Award, for an outstanding paper by a student in the Law School dealing with legal problems in the field of criminal law, administration of justice, social legislation, or other problems of immediate social significance, was made to Vincent F. O'Rourke and Douglas H. Ginsburg.

The United States Law Week Award, to the graduating student who has made the most satisfactory scholastic progress in his final year in the Law School, was made to Michael Earl Chubrich.

The Wall Street Journal Award, to a student in the Law School for excellence in work in the field of Corporation Law, was made to Bruce Russell MacLeod.

Members of the Class of 1972 elected to the Order of the Coif were as follows:


The 340th Convocation of The University of Chicago, June 9th.
Gerhard Casper, Professor of Law and Political Science, discussed the six member jury at the Judicial Conference of the Fourth Circuit in White Sulfur Springs at the end of June.

Owen M. Fiss, Professor of Law, has just finished a casebook on Injunctions—a new subject, although an outgrowth of the Equity and Equitable Remedies courses taught here at the Law School. It will be published by Foundation Press in late fall 1972.

The second edition of New Perspectives on the American Past has been published by Little, Brown. Co-editors of this volume are Stanley N. Katz, Professor of Legal History, and Stanley Kutler. Mr. Katz has been elected to a two-year term on the Nominating Committee of the Organization of American Historians. This past year Mr. Katz has been a Visiting Fellow at the Newberry Library; a member of the Advisory Committee, Project in Legal History, American Bar Foundation; a member of the organizing committees of the American Society for Legal History, Conference on the Use of Plea Rolls in Legal History (April 1973) and of the new Midwest Conference of Early American Historians. Mr. Katz has recently been appointed Associate Editor, Reviews in American History (first issue to appear in April of 1973).

Edmund W. Kitch, Professor of Law at the Law School, has co-authored a book with Harvey Perlman entitled Legal Regulation of the Competitive Process: Cases, Notes and Problems on the Law of Unfair Business Practices, Trademarks, Copyrights and Patents, which was published in 1972 by Foundation Press.

This spring Philip B. Kurland, Professor of Law, has been involved in a variety of activities which included the filing of a Brief Amicus on behalf of the United States Senate in the case of United States v. Gravel in the United States Supreme Court. Mr. Kurland presented a paper on “Privileges and Immunities Clause” at a Symposium on the Fourteenth Amendment at Washington University in St. Louis. He gave a talk on the United States Supreme Court at the Association of the Bar of the City of New York. As chief consultant to the Senate Judiciary Subcommittee on Separation of Powers Mr. Kurland has been involved in hearings on Executive Agreements. Other Washington activities included testimony before the Senate Judiciary Subcommittee on Constitutional Amendments on Judicial Tenure. He also addressed the Convention of Justices of the Supreme Court of New York.
John H. Langbein, Assistant Professor of Law, is presently completing archive research on his forthcoming book, “The Criminal Process in the Renaissance.” Mr. Langbein was selected to receive a Younger Humanist Fellowship from the National Endowment for the Humanities to facilitate this research. This summer Mr. Langbein is attending a Roman Law Institute at Berkeley under the auspices of the American Council of Learned Societies.

This year’s Law Review dinner, held at The Quadrangle Club on the evening of May 19th, was privileged to have WFMT radio commentator Studs Terkel as its speaker. Mr. Terkel received his J.D. from the Law School in 1934.

The names of the new Law Review Managing Board were announced at that time by John J. Buckley, out-going Editor-in-Chief, who presided at the dinner. Eight first- and second-year students have been chosen as members of its Managing Board for 1972-73: elected to the position of Editor-in-Chief is Ronald G. Carr; the Managing Editor will be Kenneth V. Handal, and Frank H. Easterbrook will be Topics and Comments Editor; Douglas H. Ginsburg will be Article and Book Review Editor; Comments Editors are Ronald A. Cass, Robert W. Clark III, Richard F. Fielding and Stewart R. Shepherd.

Roy Lawrence, Law and Humanities Fellow in the Law School, has recently written a book, Motive and Intention: An Essay in the Appreciation of Action. Mr. Lawrence’s book has been published by Northwestern University as one of their series in Publications in Analytical Philosophy.

Hans W. Mattick has been appointed Professor of Criminal Justice and the Director of the Research Center in Criminal Justice in the Department of Criminal Justice, College of Liberal Arts and Sciences, University of Illinois, Chicago Circle Campus, effective September 15th.
Bernard D. Meltzer, James Parker Hall Professor of Law, has been elected to the Board of Managers of the Chicago Bar Association. He was installed during the Association's 99th Annual Meeting held on June 22nd.

Byron S. Miller J.D. '37, a member of the firm of D'Ancona Pflaum Wyatt & Riskind, was a Lecturer in Law this past Winter Quarter in the Law School. Mr. Miller taught the course in Federal Taxation III.

Norval Morris, Julius Kreeger Professor of Law and Criminology and Director of The Center for Studies in Criminal Justice, has been awarded a fellowship in the American Academy of Arts and Sciences. Other current activities include the organization of the first National Institute of Corrections for senior Federal and state correctional executives for three weeks in July at The University of Chicago Center for Continuing Education. Mr. Morris has co-edited with Mark Perlman a book titled Law and Crime: Essays in Honor of Sir John Barry, which has just been published by Gordon and Breach, New York.

Max Rheinstein, Max Pam Professor Emeritus of Comparative Law, is presently working with Mary Ann Glendon on a chapter “Husband and Wife” for the International Encyclopedia of Comparative Law. Mr. Rheinstein is Chief Editor of Volume 4 (Family Law) of the International Encyclopedia of Comparative Law. This summer Mr. Rheinstein is attending a conference on “The Role of Equity in the Legal Systems of the World,” being held in August in Bellagio, Italy. Two publications by Mr. Rheinstein appeared in 1971-72: Marriage, Stability, Divorce and the Law, published by the University of Chicago Press; and the Law of Decedents' Estates with Mary Ann Glendon, published by Foundation Press.

A seminar was offered this Spring Quarter in the Law School on “The Effects of Legal Change: The Case of the British ‘Breathalyser’ Legislation.” The seminar was taught by H. Laurence Ross, Visiting Lecturer in Law and Sociology. Mr. Ross, a sociologist specializing in study of the legal system, is Professor of Law and Sociology at the University of Denver College of Law, where he teaches courses on Law and Society, Arbitration, and Negotiation. He is currently in residence as a Visiting Scholar at the American Bar Foundation. His work includes a recent book on the settlement process in automobile accident cases, entitled Settled Out of Court. At the Bar Foundation he is working on a study of the effects of the British crackdown on drunken driving.
Harry Kalven, Jr. and an exceptionally large number of appreciative students in a course Spring Quarter on Freedom of Expression which involved a detailed study of problems of speech that have a constitutional dimension, including such topics as prior restraints, obscenity, the right of privacy, libel, group libel, fair trial and free press, congressional oaths, compulsory disclosure laws, sedition, public-issue picketing, symbolic conduct, and protest in public places.

Adolf Sprudzs, Foreign Law Librarian and Lecturer in Legal Bibliography, has published a comment in 66 The American Journal of International Law 365-376 (1972), entitled “Status of Multilateral Treaties—Researcher’s Mystery, Mess or Muddle?” With the assistance of a student library assistant, Mr. Peter True, Mr. Sprudzs has also compiled a Chronological Index to Multilateral Treaties in Force for the United States (as of January 1, 1972), which was published as No. 8 in the Law Library’s Bibliographies and Guides to Research series. The Chronological Index is available from the Law School at $6.00 a copy.

At the invitation of the United Nations Institute for Training and Research Mr. Sprudzs will submit a Working Paper and participate in panel discussions at the International Symposium on Documentation of the United Nations and Other Intergovernmental Organizations, to be held August 21-23, 1972, in Geneva, Switzerland.

Franklin E. Zimring, Associate Professor of Law and Associate Director of the Center for Studies in Criminal Justice, has been named a full Professor of Law.

During the academic year 1972-73 Mr. Zimring will be a Visiting Professor of Law at the University of Pennsylvania in the Fall Semester and at Yale University in the Spring Semester. He will be teaching a course in Criminal Law at both law schools.

Champagne Recepton in honor of the graduating Class of 1972.