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Settlement and Litigation: Of Vices Individual and Institutional

Richard A. Epstein

Amid the ebb and flow of intellectual fashion, one assertion steadfastly commands popular assent: people do not like lawyers. It is not that people do not like their own lawyer; he or she may be a fine citizen and a helpful counselor, nice to family and friends. Rather, lawyers as a class are regarded by the public at large as a necessary evil, as a harbinger of ill. Nowhere does the dislike for lawyers manifest itself more than in litigation. Even litigators made over into litigants share the popular dread. Their reasons are the same as everyone else's. Litigation arises when all informal means of settlement have failed. For a plaintiff it means that a stubborn defendant has left him no alternative but to sue. For the defendant it means that the plaintiff has marshalled the power of the state in aid of a cause that ought not to be pursued. For both it means that large sums of money will be spent to secure a bigger slice of a shrinking pie. One side must lose this struggle; often both do. Inject lawyers into the conflict, and normal modes of civility fail, as each party may use the other's ingratitude to justify his own

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questionable conduct. Early in teaching I received this advice from a shrewd and experienced lawyer. “You can tell the sign of a good deal—everyone leaves the room happy. You can also tell the sign of a good settlement—everyone leaves the room unhappy.”

My purpose here is not, however, to belabor the known truth that litigation is not the road to contentment, but rather to pursue two lines of inquiry: first to seek an explanation for the rapid rise in the frequency of litigation, second to ask what, if anything, can be done about it. In discussing these issues some commentators have attempted to identify some larger change either in the social fabric or in personal mores that could in turn be translated into an increased propensity to litigate. The massive increase in litigation, and the bitterness it spawns, have been attributed to an emerging claims consciousness in the American public who no longer reject informal dispute resolution in favor of litigation; to the rise of sensationalist journalism; to an increased level of greed fed by the profit system; or inversely to the decline of religion and the loss of faith. Alternatively, Chief Justice Burger has fastened a large portion of the blame upon lawyers themselves, for their failure to act as “healers” in civil litigation. The illness having been diagnosed, the remedy remains uncertain. Who can restructure society at large in order to control the excesses of litigation? And who can remove from lawyers the aggressive instincts that are part and parcel of their craft?

I do not want to deny that the enormous increase in the level of litigation over the past generation has social causes as well as social consequences. Nor do I want to deny, as President Derek Bok of Harvard University has suggested in a well-publicized report, that this upturn in legal business has diverted far too great a proportion of national wealth and talent to legal pursuits, to the exclusion of science, arts and business (I will not add government to the list). But I do want to argue that the phenomenon is often misunderstood. Bok is wrong to see the increase in litigation as a symptom of an irreversible social decline. The Chief Justice is wrong to locate the heart of the problem in the aggressive instincts of lawyers.

The sources and the cure of the present problem may have something to do with culture in the round and the character of the legal profession in particular. But the more powerful reasons have more modest and prosaic origins. The current situation is the regrettable but predictable outcome of a large set of crete social choices about the substantive and procedural rules governing litigation. These choices are often made by courts or legislatures. The net effect of the current rules has been to drive a wedge between private gain and the social good derived from litigation. As the rules are now structured, individual plaintiffs may gain from suit while the society at large will lose. As they can initiate the process unilaterally, defendants must then take whatever private steps will minimize their losses from suit. The repeated application of the current legal rules will leave most people (save lawyers) worse off than they otherwise would have been.

The answer here surely does not lie in praise or condemnation of the adversary system. Every lawsuit is adversarial if it is not collusive. The question is how to modify the incentive structures in which the adversaries operate. In this country the rules as they are now fashioned guarantee high expenditures in litigation. Once parties are involved in litigation, they do not act irrationally. Quite the opposite is true. There may be individual cases of self-destruction, but most cases settle short of litigation precisely because both parties can gain by reducing their litigation costs and eliminating the uncertainty of all-or-nothing judgments. Indeed, every study of the increase in litigation to which I am aware indicates that once the rules are taken as a given, the behavior of the
parties conforms in the aggregate to the predictions of classical economics. The central tendency is for litigants to maximize their private gain, net of their private costs.

"The incentives under the American system are quite the opposite of those at work in the Continental systems."

Moreover, that tendency is not upset by the occasional account of self-destructive behavior. The larger institutional agenda is set by institutional and not anecdotal evidence. The critical questions are systematic, not personal.

Let us start by examining one procedural rule: under the American rules of voir dire parties are allowed to dismiss potential jurors for cause. They are also allowed to question potential jurors extensively to see if cause exists. Any responsible lawyer can tell his client that a thorough voir dire could pay large dividends if it skews the jury in favor. The catch is that the same point is true for both sides. Each will examine at length in order to remove the jurors it dislikes most, carefully preserving peremptory challenges for the right moment. In the end their efforts largely cancel out. One could get a jury with about the same degree of partiality with far lower costs under the traditional English system (itself now under attack) in which the judge conducts voir dire and confines his attention to relations by blood, marriage and financial interest. The occasional question by counsel may be put to the prospective juror through the judge. Neither side can spend enormous sums of money even if it has them. The level of jury bias will be no greater than under the American rules, and perhaps less where skill of counsel or financial resources are unequal. Here the shape of the legal rules has increased the costs of the American legal system.

Consider next an even more fundamental point of procedure: the American rules of cost providing that each person should bear his own expenses in litigation, except under rare circumstances when the principal claim or defense is wholly frivolous. The rule in question contrasts sharply with the English and Continental procedures in which the party who wins is reimbursed his costs. Indeed, a feature of German practice carries the basic principle to its sensible conclusion. Suppose that a plaintiff claims $10,000 and receives judgment for only $1,000. The plaintiff has won, but only 10 percent of the case. He is then required to reimburse the defendant for 90 percent of the costs, receiving in exchange only 10 percent. The net effect is that the defendant gets 80 percent of his costs from the plaintiff, who of course bears his own in full. The fabulous ad damnum of American complaints cannot long survive a rule that exacts its heavy toll for an erroneous estimation of either claim or defense. There is no question that strict rules of cost will influence behavior. Under the present system any run-of-the-mill lawsuit may in principle yield an enormous verdict, as in the famous $125,000,000 jury verdict entered against the Ford Motor Company for its Pinto in a routine crash-worthiness case, later reduced to a still very substantial $3,500,000.1

Once the ad damnum gives the outer limit of the loss there is no reason for a defendant to commit millions of dollars in order to save thousands. But the effects of sound rules on cost go deeper. Since most private parties are averse to risk and fear uncertainty, a rule which makes the costs of litigation follow the outcome of litigation will reduce the level of litigation, and encourage quicker settlement of the litigation that does take place.

The incentives under the American system are quite the opposite of those at work in the Continental systems. Now the costs in litigation that are inflicted on the other side cannot as a practical matter be brought back upon the party who imposes them. Every good trial lawyer knows the proper way in which to handle discovery. It is to make a set of perfectly routine and inexpensive requests that impose intolerable burdens on the other side. Discovery is a way to punish the other side for resistance, to wear the opposition down until settlement becomes a form of surrender. But the catch again is that the aggressor with the first round of interrogatories is the victim of the second. Let the extent of damage awards increase, and there is more for both sides to gain from strategic behavior, and the creative use of the legal imagination. In order to quell this abuse one might think that some efforts to place limits on discovery would seem appropriate. But since the 1938 adoption of the Federal Rules of Civil Procedure, the American system has gone in quite the opposite direction. Discovery is routinely done on service of notice to the opposite party and outside of the direct supervision of the court. The scope of the examination is exceedingly broad because the formal rules of evidence, and the general requirement of relevance, do not bind the parties at this stage of the proceedings. Discovery can be conducted on any issue calculated to lead to admissible evidence. The efforts to control abuse against frivolous

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2See, e.g., Timothy J. Muris, Rules Without Reason—the Case of the FTC, Regulation Sept/Oct 1982 at 20, on the need for systematic evidence in agency rulemaking. The same point applies to any effort to understand institutional behavior. Reliance on anecdote guarantees biased information.

requests depend upon protective orders sought by the deponents, which are obtainable only at the discretion of the trial judges that is only rarely exercised on a case-by-case basis.

Those who support the modern discovery procedure claim that it allows persons to develop legal theories based upon the facts. Yet no amount of data will develop a theory of a case unless the applicable substantive principles are themselves independently understood. Discovery is also supposed to allow each side to probe the strengths and weaknesses of the adversary's case. Unfortunately, this benefit comes at a very high cost, for while it may yield useful information, it is also fraught with dangers. Each side can ransack the files of the opposition, or tie down its key personnel in depositions, all as a lever to secure a more attractive settlement. These costs may not have been apparent at the formation of the federal rules, which were drafted to cover the ordinary personal injury suit arising out of an intersection collision, rather than the complex business and statutory litigation that has become standard fare today. The cost of unsupervised discovery activities depends heavily on the nature of the underlying dispute. Though it may be attractive to let the facts speak for themselves independently under the rules, each side is more welcome when litigation examines, say, the hiring practices of the recent growth in litigation. The uncertainty of time, place, and action was often sufficient to determine legal liability in the routine cases. The uncertainty generated elsewhere (as in killing or wounding trespassers in defense of property) occurred with sufficient infrequency as not to overwhelm the legal system as a whole. As most litigation involved routine cases, the scope of discovery was thereby reduced while the certainty of outcomes was increased.

In sharp contrast, modern rules tend in quite the opposite direction since they ordain complex balancing acts to determine liability. In part this tendency is justified by the belief that this fine tuning is necessary in order to eliminate individual acts of injustice that are not caught by the general rules. But that hope is often delusive. Any refinement in legal rules will increase their error in application as well as their costs of administration; at some point the benefits of precision are overwhelmed by their costs. Perfect justice can only be done at an infinite price—which is another way of saying that it cannot be done at all. A willingness to entertain some tradeoff between simplicity and aspiration is not only the counsel of prudence, it is also a precondition for justice in the broad run of cases. Nonetheless, the judicial taste for fine tuning has lately proved irresistible. Let me give three examples drawn from different areas of the law.

The traditional body of property law adopted a powerful version of the ad coelum rule. So long as the conduct of one person did not invade (directly or by its physical consequences) the land of another, no cause of action followed. Applied to the question of light, the uniform rule was that it was never tortious to block the light of a neighbor, even if (as happened in the famous dispute between the Fontainebleau and Eden Roc hotels) it blocked the sunlight on a neighbor's swimming pool. More recently, however, the preoccupation with solar energy has led some courts to rethink this old position and to adopt a legal standard (the word is too flattering) to determine when it is reasonable for one neighbor to block the light of another. The reasons announced for the change stress that light is now used for

One characteristic feature of many common law rules was that they gave to private parties "bright lines" around which they could organize their behavior, both before and after litigation. A bright line for primary conduct indicated what conduct could be undertaken without fear of legal suit, and what conduct necessarily brought legal action in its train. The party who trespassed could be liable for entry; the party that did not trespass could not. A single fact was often sufficient to determine legal liability in the routine cases. The uncertainty generated elsewhere (as in killing or wounding trespassers in defense of property) occurred with sufficient infrequency as not to overwhelm the legal system as a whole. As most litigation involved routine cases, the scope of discovery was thereby reduced while the certainty of outcomes was increased.

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energy purposes and not aesthetics, or that the social demands for land development are not as pressing as they once were. Whatever one thinks of these reasons, however, it seems very clear that a great deal more is left to the legal imagination under the modern formulation of the easement of light than under the old view, for virtually everything that touches on the relevant gains and losses to both sides is now fair game for discovery in litigation. A clean, certain rule is displaced by a confused and uncertain one. The costs and frequency of litigation can only increase, while the gains to the one litigant are more than offset by the losses to the other.

The point may seem small, but in fact it influences the relationships between neighbors in subdivisions across the country. Of greater importance, however, the retreat from fixed rules occurs everywhere throughout the system. Consider the recent developments in the law of wrongful discharge. At common law most agreements could be terminated at will by either side. Again the delineation of rights was clear, and the scope for litigation minor: who wants to litigate the question of and the scope for litigation minor: whether the employee was fired? Today this rule is limited in every direction. By statutory command it is undercuts in cases where workers are dismissed for union activities or because of racial or sexual discrimination. And at common law it increasingly has been hedged in by rules that insist that all contracts may be terminated only for cause, no matter what the private understandings. One consequence of this shift is that scope of litigation necessarily increases. Rights and duties turn less on overt conduct, and more on motive. Motive itself can only be established by indirect evidence, and this in turn invites discovery on every aspect of individual and firm behavior. Personnel records for the aggrieved worker are the obvious place to begin. But any resourceful lawyer can show the

relevance of general firm policy; the treatment of comparable cases within the firm; the practices in other firms; the testimony of supervisors and employers; and the level of profitability of the firm, and of the industry at large. Thousands of pages of relevant information can be collected and motive may turn in the end on whether a supervisor provided the dismissed employee with a Christmas turkey. The social costs are enormous, for in addition to the costs of litigation, retaining one employee at the very least forecloses the hiring of a replacement. Where are the social gains that justify the pursuit?

One final example: today, actions for damages by automobile passengers against manufacturers who produced uncrashworthy vehicles are commonplace, even though they were virtually unknown before about 1968. But what are the standards? Simple compliance with statute and custom will not exonerate the supplier, so reasonableness tests again become relevant to examine every stage of the design and the production process. It is difficult to attribute any improvement in product design to a set of legal doctrines that are so amorphous and indeterminate as to be utterly useless in the planning process. Indeed, much the same can be said about most of products liability law. Shortly after its well publicized bankruptcy, Manville Corporation published an advertisement in which it noted that it had tried the issue of liability in five asbestos cases in the same court room before five different juries. The verdicts, all on the same evidence, varied from no liability to punitive damages. How does anyone respond to such conflicting signals? When this lack of clear substantive rules is linked to the modern procedural devices, the result is inescapable: an increase in the frequency and severity of litigation.

The second major shift in substantive rules concerns the number of parties that may be joined in a single lawsuit. In principle, the minimum number of parties is two. This is also the ideal number because the complexity of litigation increases exponentially with the number of parties. In many cases, as with suretyship litigation, multiple party suits may be unavoidable. But today the changes in underlying substantive theories positively invite a proliferation of parties. Modern rules on joint and several liability allow free suits between codefendants where the jury has broad discretion in determining the percentage of loss borne by each. Furthermore, theories of market share liability accepted in some states now allow an injured party who cannot identify the supplier of a given drug to sue all the firms that produced it. The

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11See, e.g., Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980). Since then even more exotic forms of liability have been adopted. See, e.g., Collins v. Eli Lilly Co., 342 Wis. N.W.2d.37 (1984), adopting what looks like a theory of "risk creation" in which any company in the market can be held liable for DES injuries because of its alleged overall responsibility in bringing the product to market, wholly with out regard to its market share. Liability between producers in the injury is again a function of an elaborate and indeterminate set of principles of apportionment. The decision reads as if administrative costs were a free good.

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9The seminal case in the line is Larsen v. General Motors, 391 F.2d 495 (8th Cir. 1968), where the defendant's Corvair was said to be defective in that head-on collision directed the steering column into the plaintiff's head. On remand at trial the defendant won the case, contending that the plaintiff would have sustained a much more serious injury had the steering column struck him in the chest. See Bowman, Defense of An Auto Design Negligence Case, 10 For the Defense No. 5 (1969).


relaxation of the rules for class actions, permissive joinder, and other procedural devices increase the likelihood that any given lawsuit will be a multi-party affair. Perhaps the best illustration of this is the current litigation over the proper construction of the insurance policy language in the asbestos coverage dispute. The relevant text of the policy is only several paragraphs long. Yet the current litigation in California has produced discovery orders against every insurance carrier in the litigation, costing millions of dollars to answer. Simultaneous depositions now take place daily in the elusive search for the original contractual intention, when every piece of past conduct by every party may lead to relevant or admissible evidence. The attractions of the parol evidence rule, and the constraints it places on extrinsic intent evidence, have never seemed greater. A close reading of the document is much cheaper and probably more accurate.

The key provision states: “[The insurer] will pay on behalf of the insured all sums which the insured shall be legally obligated to pay as damages because of bodily injury or property damage to which this policy applies, caused by an occurrence.” “Bodily injury” means bodily injury, sickness or disease, sustained by any person which occurs during the policy period, including death at any time result therefrom.”

The case, still mired at the trial level, is styled “Judicial Counsel Coordination Proceeding: Asbestos Insurance Coverage Cases no. 1072.” It involves about 100 insurers and 75 manufacturers.

It does not augur well, however, to note that to date there are five separate opinions on the proper meaning of the standard clause, each of which has adapted a different construction. The details of which are not relevant to the central point.

The result of all this seems clear. Substantive rules first allow the number of relevant parties to proliferate; thereafter they make the liability of each rest upon uncertain standards. The impact on litigation is as expected: these rules create incentives for its increase. In some of these cases added to the system, the costs in litigation may be justified by the superior social outcomes that they produce. But as the costs of litigation are in themselves deadweight social losses, the improvement they make in the human condition must be very large to justify their expense. Here the path of reform is to undo much of the needless complexity of modern litigation. Yet this can only be done by the legal profession that itself is the major beneficiary of the modern changes, each of which may have appeared commendable standing alone, but which are oppressive in combination. Good procedural rules can serve as a welcome break on complex substantive legal theories. Sound substantive rules can reduce strains on unsound procedural rules. The elimination of personal vices is quite beyond our power. But complex substance and cumbersome procedure are institutional vices for which cures are both necessary and possible.
Myth and Truth on Non-Litigiousness in Japan

Junjiro Tsubota

The widely publicized remarks Harvard President Derek C. Bok made in his 1983 report to his Board of Overseers can be summarized as follows: the U.S. economy suffers from a massive diversion of talented people into the field of law where they often add little to the growth of the economy, the pursuit of culture, or the enhancement of the human spirit; legal rules proliferate, lawsuits abound, and the costs of legal services grow faster than the cost of living; for the majority of citizens, legal rights are constrained by prohibitive costs, baffling complication of rules and procedures, and long, frustrating delays in court proceedings; and no one cares about the coherent operation of the entire legal system or worries whether the different parts fit together in a coordinated whole. President Bok reportedly called on law schools "to expand research and teaching about the system of justice, to train students less for combat and more for conciliation, and to seek ways of providing legal services to the poor and middle class."

In making his points President Bok referred to Japan, where lawyers are said to be scarce and engineers abundant, and he quoted the saying that "engineers make the pie grow larger and lawyers only decide how to carve it up." His remarks fit the prevailing myth that Japan is a society "where lawyers are unimportant, lawsuits are few, and the bureaucracy governs by developing a national consensus."

First of all, the truth is that there is in Japan a massive diversion of younger talent into the world of law. Every year more than 38,000 youngsters graduate from law faculties in Japan as compared to 36,000 who graduate from U.S. law schools. Since the population of Japan is approximately half that of the United States, there are proportionately two times more law graduates produced in Japan.

However, in Japan only about 500 of the 34,000 annual applicants can successfully pass the National Judicial Exam that makes them eligible for admission to the practice of law. Mr. Tsubota is a partner in the Tokyo Kokusai Law Offices. He received his M.C.L. from the Law School in 1967 and his J.D. from Harvard Law School in 1970.

gible to receive advanced training for two years at the Legal Research and Training Institute of the Supreme Court of Japan. This training, which is somewhat similar to that of the judicial clerkship in the United States, is compulsory in Japan. Only after passing a second exam and graduating from that Institute can one be admitted to the bar or elect to become an assistant judge or public prosecutor (the equivalent of district attorney).

It is not the deliberate government policy to allow only 1.5 percent of the applicants to pass the Exam, as alleged by Mr. Ramseyer. Nor is it the deliberate government policy to limit the number of judges and to create a large backlog of court cases. The true reason for limiting the number of successful applicants is simply that there are so few judges that 500 students is the maximum to whom they can give individual training. (When Mrs. Tsubota and I passed the exam in 1960, the number of successful applicants was only 330.) It is noteworthy that only a very few members of the law faculty in Japan have ever passed the Exam and received the advanced training.

What happens then to the unlucky 98.5 percent of applicants who failed the Exam? There are many categories of licenses for various legal professions in Japan other than attorney-at-law, such as tax attorney, patent attorney, judicial scrutinizer, and administrative scrutinizer. Those who cannot pass exams for these qualifications simply forget about law and seek employment at governmental agencies and private companies. Therefore, if legal education in the United States is a waste of social resources, it could be said to be much more of a waste in Japan, where vast numbers of law graduates eventually take jobs outside the legal profession for which they are supposed to have been educated.

Yet it is true that lawsuits are few in Japan. The most quoted explanation of this phenomenon is offered by Professor Kawashima, who attributes Japanese non-litigiousness to lack of "legal consciousness" in Japan. But as Kawashima's theory is not accompanied by any quantitative assessment of the degree of "legal consciousness," this is nothing but his subjective judgment. Another explanation attributes the relative non-litigiousness in Japan to the country's bureaucratic system. But Japanese bureaucrats do not intervene in commercial disputes except in sporadic instances. Many positive economic studies in Japan also find that the consequences of almost all government interventions in one form or another have been miserable failures; a typical example was the "industrial policy" and "administrative guidance" formulated under the Petroleum Industry Law, which resulted in deep financial difficulties for the Japanese petroleum companies and ended with the admitted bankruptcy of that governmental policy. Indeed, the national consensus in Japan today favors implementing the deregulation recommended by the Committee for Administrative Reform, a significant influence abroad of the Chicago school.

In a tightly knit society like Japan, each of the parties to a dispute has good leverage against the other so that negotiated settlement is easier because in the near future he or she may well be transacting business again with the same party. This appears to be a major reason why there are fewer litigations, not only in Japan or among overseas Chinese but in most small and closed local communities where people are constantly dealing with each other. In such societies, cooperation and mutual assistance are more cost-efficient than cut-throat struggles for legal entitlement. It was Adam Smith who pointed out that honesty is the best economic policy in a small community.

A mutual exchange of favors can also be a form of business transaction in such societies, and in those circumstances it would be insane for anyone to require his or her transacting partner to negotiate and execute precise, strict, and bulky documents. Certainly one would be better off in such a society if one forgot

This remark of Adam Smith is quoted by Edward C. Banfield, in Corruption as a Feature of Governmental Organization, 18 J. Law & Econ. 603 (1975). He notes that "mutual adherence to rules constitutes a public good."

On this subject an interesting analysis is made by Professor Posner; see, Richard Posner, A Theory of Primitive Society with Special Reference to Primitive Law, 23 J. Law & Econ. 1 (1980). In my view, however, mutual exchange of gratuities in such a society equals business transactions in the exchange economy where an individual transaction is singled out from the entire socioeconomic context and arms-length negotiation is made without material consideration to a possibility of other unrelated transactions in the future. Whether or not and to what extent people treat each transaction as an isolated and independent deal depends upon the degree of expectations as to how closely they will be transacting business with
about legal niceties and stringencies, but economic calculations in the exchange economy still prevail in a different form of bargain. A different style of "legal consciousness" is developed on the basis of social sanctions that allow fluid and vague contractual arrangements to be carried through by crediting and debiting exchange of reciprocal favors in an overall social context. This exchange is not unique to oriental communities—one can observe the same phenomena in rural parts of Europe and America, and people prefer this way of life simply because it is economical in such societies to reduce transaction costs.

If people do not sue each other, it is not because of lack of "legal consciousness" or because of legal or administrative barriers but simply because other, more cost-efficient alternatives are available. Conversely, if the lawsuit were the most cost-efficient way to settle disputes, conciliation would not prevail even if legal education were directed more at conciliation and less at combat.

If the lawsuit were the most cost-efficient way to settle disputes, conciliation would not prevail even if legal education were directed more at conciliation and less at combat. In this respect, however, a difference of legal systems affects people's election of alternatives, particularly between lawsuit and voluntary settlement, and this offers another explanation of why lawsuits are not abundant in Japan.

First, the rules on damages and the degree of the burden of proof for establishing actual damages as required by the Japanese courts in practice are comparatively severe and no punitive damages are granted, whereas under the jury system in the United States damages (both actual and punitive) are awarded more liberally in terms of the scope and burden of proof, and lawsuits have become an exciting investment. Where recoverable amounts and the chance of success are smaller, reasonable cost-benefit analysis directs that there should be fewer litigations. This assumption is proved by the fact that as the Japanese courts started awarding larger damages in automobile accident cases in the 1960's, the number of litigations on automobile accidents increased significantly. In Hong Kong, victims of automobile accidents can recover very little, and litigations are therefore still scarce.

Another interesting phenomenon is that after the court cases established clear standards as to recoverable damages in Japan the number of litigations declined. An obvious explanation for this phenomenon is that clear rules of law make litigation less speculative and the cost-benefit analysis applies more rationally, which in turn makes economic calculation in negotiated settlement easier and more rational. In tort cases, common law rules of contributory negligence (as opposed to civil law rules of comparative negligence) may make a further difference because defendants always have a chance of paying nothing by proving the victim's negligence, and they would be reluctant to settle until discovery fails to produce evidence indicating the victim's negligence.

Japanese lawyers can advise clients: "Well, you may recover by lawsuit at least $100,000, but in all likelihood not more than $180,000, and the amount will be reduced by the degree of your negligence, if any, proportionate to that of the defendant's negligence. By the way, our legal fees may exceed $50,000 if the court proceedings take 3 years.'" The client will then ponder and calculate that an immediate cash payment of $100,000 could be a very good settlement. In contrast, however, American attorneys must advise clients: "You will get nothing if found to be negligent, but if you are lucky enough to draw heavily upon the sympathy of the jurors you might be able to get $100,000,000 or $200,000,000 as punitive damages, I just don't know." Even the least self-serving of litigants could become extremely discouraged or wildly excited by this sort of advice. I might add another difference in the Japanese judicial system: Plaintiffs must pay a small percentage of stamp duties on the amount claimed in the complaint, so that a favorite American practice of adding three more zeros in alleging the amount of damages in complaints could not be followed in Japan. Also, attorneys' retainer fees are linked in Japan with the amount of payment claimed (usually five to fifteen percent depending upon the amount claimed and the complexity of the case). These charges naturally compel the parties first to explore the possibility of a settlement sincerely. However, lacking such stamp duty and given a possibility that jurors might be influenced by the amount of damages claimed in a complaint, the favorite American game of playing figures is a natural result and makes rational settlement rather difficult.

This point can be advanced more generally: In countries like Germany, France, Switzerland and Japan where laws are systematically codified, it is relatively easy for lawyers to draw legal answers. But under the common law systems fewer lawyers are needed to perform the same social function. There is smaller room for argument and, therefore, fewer lawsuits follow. Although common law rules developed by cases are efficient from the viewpoint of the economic effect in the allocation of resources,
as persuasively argued by Professor Posner, the common law system is less efficient from the viewpoint of information retrieval and clarity of legal standards. From this angle by all likelihood one can assess that the Uniform Commercial Code has reduced transaction costs and contributed to the growth of the economy, although details of the Code provisions have to be supplemented by case laws.

From the economic viewpoint, the cost of litigation is part of a transaction cost consisting of the cost of searching for information, the cost of error (losing the case), the expenses of legal proceedings, and the opportunity loss to be incurred by the lapse of time (as opposed to quick recovery by negotiated settlement). An additional cost a litigant must pay is the damage done to his reputation in a community by the filing of a lawsuit. This price is relatively higher in Japan and China, where litigation has traditionally been deemed a crazy business. The cost-benefit analysis regarding litigation should include this intangible price, and where the total cost is higher than any gain could be, amicable settlement of disputes should be encouraged.

President Bok’s most serious allegation is that lawyers often add little to the growth of the economy. If that is the case, then traditional jurisprudence and legal education should be blamed for having not fully explored what a rule of law would mean in real terms and in the context of the entire chain of causation. Economic analysis of law is a meaningful attempt to cure such defects in legal analysis. For instance, under the narrow and short-sighted logic of traditional legal analysis it has been considered that rent control should work to the betterment of poor tenants and that the minimum wage should protect unskilled workers. Now we know that this does not necessarily occur and numerous studies published by the Journal of Law and Economics and the Journal of Legal Studies teach us that many basic assumptions about causation taken for granted in the traditional legal analyses were simply wrong. The economic analysis of law is now revolutionizing traditional jurisprudence and is bringing the study of law to the level of science for the first time in our history.

This analysis should have a significant impact upon the lawyer’s way of thinking. For example, in the negotiation of sales contracts, traditional lawyers representing the seller usually try hard to narrow the scope of warranties and to minimize potential liabilities as much as possible. In doing so, lawyers feel that they have fulfilled their responsibility to their clients. But in doing so, lawyers are in effect damaging the marketability of the clients’ products because few people would willingly buy a product carrying no warranty if competitive products offer effective warranties. George Stigler has pointed out that “prices” in the real sense include all terms and conditions of the transaction. An in-depth economic analysis further indicates that a warranty provision becomes optimal when it correctly reflects the true state of the product’s quality.

However, the entire chain of causation in this instance is not yet revealed in full. Under the traditional economic analysis, trade-off is sought between the cost for improving quality and the corresponding saving in the warranty service cost. In this analysis the problem is seen only from the seller’s side, but the other side of the coin is that product failure causes an additional cost to the consumer in terms of inconvenience. Therefore, if the quality of a product is improved and the rate of product failure is reduced, the consumer is willing to pay such additional price as may equal the failure cost to be incurred. The dividends from improving quality will be threefold: the net saving in warranty service cost, a higher sales price, and a good reputation in the marketplace. Thus, in general the true price equals the total cost to be incurred by the purchaser in enjoying the utility of goods, which includes transaction cost, service cost, and the failure cost, irrespective of who legally bears them under what contractual agreement. In short, traditional legal analysis does not necessarily make clear what terms and conditions would constitute the optimal deal, and an elaborate provision declaring warranties skillfully labored by traditional lawyers illustrates that narrow legal logic results in adverse consequences.

*The necessary conclusion of this analysis is that manufacturers should spend cost in the improvement of quality in such amount as equals the total of the saving in their warranty services cost and the failure cost to the consumer.

1Traditional analysis equates high quality reputation in the marketplace with higher sales price. But high quality reputation also enhances the brand reputation and dispenses with the consumer’s search cost on quality, so that market penetration is increased accordingly. This will explain why manufacturers placing more emphasis on higher quality become the eventual winners in the marketplace, particularly where the geographic market is larger.

*In the traditional economic theories regarding cost-price equation, transactions cost, as well as failure cost to the consumer, has not been included in the definition of “cost.” But what does matter to consumers is the total cost of the utility they purchase, because
economic consequences to the winning party. It also indicates that conciliation cannot be a meaningful alternative to combat without economic analysis of the entire chain of causation. Another example is the Trust Indenture Act of New York that prohibits trustees from disclaiming liabilities for their negligence. This appears to be a reasonable measure, but it is the law of economy, as well discussed in the famous treatise Risk, Uncertainty and Profit by Frank Knight, that profitable opportunities accompany higher risks. Thus, the prudent-man rule compulsorily imposed by that legislation in effect sanctions that trustees simply invest trust funds in the safest manner, with the result that the yields go down to a marginal level, and the real parties who suffer are the beneficiaries whom the legislation was intended to protect. It also lessons competition among trust companies toward higher performance in the management of trust funds and causes a decline of the trust industry in the competition with securities firms that aggressively hold out to achieve higher performance.

In conclusion, the problem is not combat v. conciliation, but how to achieve optimal transactions. Traditional legal education in the United States trains lawyers as adversaries in the combat of procuring the largest piece of pie for their clients. The foundation of that way of thinking is the approach of trade-off, and the worst part of it lies in making trade-off in a fragmented chain of causation. Social and economic problems can be constructively solved, however, by the trade-on approach suggested by Professors Shultz and Dam. Actually, experienced business lawyers quite creatively devise contractual arrangements that enable difficult transactions to go through, and this undoubtedly helps in efficient allocation of resources and contributes to the growth in the economy. Good ideas in legal planning usually come from the trade-on approach. But the problem before us is that traditional legal education has failed to develop in an organized way the entire body of methodology for constructive problem solving through the various legal techniques that "make the pie grow larger" for the best interest of the parties concerned and that business lawyers must therefore learn it through their practices. Legal institutions and legal services in general serve, and should serve, to improve efficiency in business transactions and the resulting growth of the economy. Economic analysis of law is a useful tool for this end and helps lawyers to be problem solvers in creative ways of positive benefit to the society.

what they purchase is not goods per se but the utility thereof to be enjoyed at the place where they use them. Thus, what does matter is the total cost versus the quantity of utility to be enjoyed by them, and the competition in the marketplace lies in the total cost. When the "cost" is redefined as such total cost, neo-classical economic theories have to be restructured accordingly, as this total cost theory has many significant implications to the economic framework.

See George P. Schultz and Kenneth W. Dam, Economic Policy Beyond the Headlines (1977) 87 ff. The trade-on approach applies not only to legislation of economic policies but also to contract negotiations, and more generally to solving social problems.
As most of you know, the honor of speaking at the farewell lunch for the Visiting Committee goes to the newest faculty member. Why this is so I do not know. Maybe it is that, since by this time you obviously know more about the Law School than I do, I am here to learn from you. Or maybe it is because, since you have now met my very impressive colleagues, I can do little to damage your overall assessment of the institution.

I understand you heard a talk on law and economics from a fellow named Easterbrook, who, I think, may have discussed the theories of that noted scholar, Easterbrook. Also a talk by a fellow named Epstein, who, I am sure, discussed the theories of that other well-known thinker, Epstein.

The one thing I am sorry you missed is seeing these and other knights of the intellect jousting at our famous round table lunches. Try to imagine the different talks you heard—but speeded up, amplified, and all going at once.

Sometimes it is a little difficult to get a word in edgeways. Come to think of it, maybe that is why I was invited to give this talk. It will be the first time in more than three months that I have been able to have lunch and talk for more than 20 seconds without being interrupted.

What puzzles me is how our faculty members can debate for years and years, yet they never seem to convince each other. I listen to Epstein talk about the Eminent Domain clause, and it sounds so intelligent and persuasive that I say, “You’re right, Richard.” But then I hear Currie’s views on the same subject, which although quite different from Epstein’s seem equally convincing, and find myself saying, “You’re right, David.”

One time Epstein overheard me agree with Currie, and Epstein said to me, “You can’t possibly agree with Currie because you just said you agree with me and I disagree with Currie.” I thought about that for a while, and all I could say was, “You’re right, Richard.”

Another time we were discussing the opinions of Mr. Justice Holmes. Richard ventured the opinion—tongue in cheek, I am sure—that Holmes, although brilliant, was always wrong. I agreed—I said, “You’re right, Holmes was always wrong. What’s more, he was constantly contradicting himself.” Currie broke in. He said, “Geoff, if Holmes was constantly contradicting himself, how could he have always been wrong?” I thought about that, and all I could say was, “You’re right, David.”

For a while I was disturbed that I could agree with people who vehemently disagreed with each other. But then I had a thought that comforted me greatly: the secret to conciliating these disparate views is to abandon the law of contradiction. Let me explain. I have noticed three things about the faculty:

*first*, they are absolutely convinced they are right, no matter how wrong they may be;
*second*, no two members of the faculty agree on anything;
*third*, all members of the faculty think all other members are right about most things.

Being able to hold those three propositions in mind at the same time is, I think, a key milestone in the education of a Chicago law professor. All this, as you have probably guessed, brings me to the subject of my talk about Myths on the Midway. A myth, as Bruno Bettelheim would have told us while he was still at Chicago and therefore smart, is something that does not necessarily obey the law of contradiction. In a myth, something can be both A and

Mr. Miller is Assistant Professor of Law. He delivered this talk at the farewell luncheon for the Law School Visiting Committee on November 16, 1983.
not A at the same time. And that is true of what I call the Myths on the Midway—suppositions about the Law School commonly shared by casual observers.

What are the Myths on the Midway? There are many, but I will speak about just three.

First, Chicago is a rock-ribbed bastion of arch-conservatism.

This myth is false. There are many faculty members who believe government has a role to play beyond preventing force or theft or safeguarding the national defense. The New Deal has its adherents here. Organizations such as the ACLU have often received assistance from members of the faculty.

But this myth is also true. Taken as a whole the Law School is conservatively oriented. It is, perhaps, noteworthy that no one on the faculty represents the extreme left of the academic spectrum—the Critical Legal Studies movement that has become prominent at Harvard and elsewhere. Chicago's faculty has provided crucial intellectual justification for Reagan Administration initiatives in the areas of deregulation, antitrust, and the like. Ken Dam of this faculty is serving with distinction at the State Department. And the faculty has supplied President Reagan with two distinguished judicial appointments—Richard Posner and Antonin Scalia—and may provide more before too long.

My second Myth on the Midway is that Chicago is dominated by law and economics.

The myth is false. The Law School is a pluralist institution that engages in and values all kinds of intellectual approaches to law. Hans Zeisel, Frank Zimring, and Norval Morris have made important contributions in the application of social science to law. Geof Stone's valuable work on the First Amendment has used a more traditional doctrinal analysis. John Langbein, Dick Helmholz and Dennis Hutchinson have added to our knowledge of legal history. Cass Sunstein is working in the area of political science and political philosophy. And my mention of these scholars is not in derogation of the important non-economically oriented contributions of many others.

But the myth is true. Law and economics is very strong here. Although Richard Posner is reported to have another job, it would be hard to tell based on his continuing contribution to the school. Bill Landes and Dennis Carlton, economists both, have done outstanding research on the intersection of legal rules and economic principles. Frank Easterbrook and Dan Fischel have been extremely productive scholars in the area of corporate law and economics. Doug Baird and others have labored fruitfully in this area as well.

My final Myth on the Midway is that Chicago is a warm, intimate, personal community of students and faculty working together in perfect mutual respect and harmony.

False. That description fits a commune, not a law school. Faculty and students are certainly not colleagues, and rarely become friends. Relations are usually polite but formal; students' last names are often used, and most students would quake before calling a professor by anything other than "Mr.,” “Ms.,” or “Professor.” No one ever accused the Law School of being a particularly fun place to be in the middle of February.

But the myth is true. Where else are entering students given a delightful sit-down banquet with faculty members? Where else do students feel free to drop in, unannounced, at any faculty member's office? Where else do faculty and students mingle over drinks every Friday at wine mess? How many other schools give the same personal attention to students with special problems?

So, like all myths, these Myths on the Midway are both true and not true. The past two days have given you an intensive look at us and have enabled you to assess for yourselves what the Law School is like. So you can either agree or disagree with what I have said, based on your own experience. Or, perhaps, you will find that you both agree and disagree. That would please me, because it would mean we have really understood each other.
The Law School Record is pleased to announce that Gerhard Casper has accepted reappointment as Dean of the Law School, effective July 1, 1984. In announcing his reappointment to the faculty, President Gray wrote: "I cannot imagine better news for the Law School or the University as we start a new academic year. . . . Gerhard has provided superb leadership as Dean of the Law School and as a member of the University community. His willingness to accept another term is of great significance to all of us." Mr. Casper joined the faculty in 1966 and has served as Dean since January 1, 1979.

An Open Letter from Dean Casper

To an Alumni Chapter President:

Dear Steve:

I am writing because you should know that you have had a disastrous impact on my personal life: you, more than anybody else are responsible for my decision to accept reappointment as Dean in spite of the fact that a return to teaching and research was within my reach. The story of how you accomplished this feat I shall now recount, despite the great personal distress it has caused me.

Among my disappointments in the first five years as Dean had been our failure to arrange an early meeting with Law School alumni in your area. I finally managed to schedule one last summer, but some unexpected development forced me to relinquish my place to Phil Neal. I understand that the gathering over which you presided was a great success for you and for Phil Neal. For me, however, it was evidence of a dismal failure. It was reported to me afterwards that you introduced Phil as "the Dean of the Law School." Here I had worked so hard to fill the shoes of Edward Levi, Phil Neal and Norval Morris—to name only those who are still busily looking over my shoulder. I had even succeeded occasionally in persuading Holly Davis that it would be appropriate to include a reference to me in the Law School Record. I had worked hard to establish a rapport with our graduates and friends. On my old, decrepit, three-speed bicycle, I had traveled all over the country to meet alumni. Indeed, sometimes I felt that I had lost all the anonymity which makes it possible to live inconspicuously and therefore freely. But you disabused me of the notion that I had become a public figure. You made it clear that my impact had been small indeed, and you accomplished all that by omitting that attribute "former" in your introduction of Dean Neal. I frankly cannot get myself to believe that you did it inadvertently.

As a graduate of twenty-some years ago, you might, of course, respond by saying that the Law School should be pleased that you at least remembered the dean who succeeded Edward Levi ("under" whom—as the quaint phrase has it—you attended law school). You might also respond by telling me that there was nothing to be upset about, since mine was the fate of all deans. You might recount the story which Phil Neal told after hearing your introduction. When Phil became Dean, Phil Kurland introduced him to some alumni whom they encountered at a restaurant as "the new Dean of the Law School." This triggered the question: "Oh, what happened to Wilber Katz?"

It has always been clear to me that the lot of deans is a dismal one: while they slave in the background, all glory is reaped by faculty, students, and alumni. I suppose this is as it should be. Shortly after I became Dean on January 1, 1979, a newspaper referred to Edward Levi as "the Dean of the University of Chicago Law School." I dropped Edward a note, asking apprehensively whether he knew something I did not know. His answer was: "If I did, it would only be fair." While it may be fair to keep deans in the dark, ignoring them altogether strikes me as a bit too much.

(cont. on pg. 16)
Be this as it may, the one thing a dean must know how to do, and indeed must do, is to shoulder responsibility. Anything that goes wrong is his fault anyway. Shouldering responsibility for the fact that I remain unknown in your part of the country obviously meant that I had to accept reappointment when asked by President Gray and the faculty: it will give me another chance to redeem myself if the alumni would only read our publications and communications.

Wilbur Katz, who was Dean from 1940 until 1950, liked to tell the following story: "My last frustration as Dean was my inability to get the janitor to clean the shelves in the office to which I was moving. Finally I resorted to self-help and was proceeding through the hall with rags and a pail of water. I passed a student who stopped short, wide-eyed, and said, 'God, there has been a shake-up here!' " But for you, Steve, there might have been a shake-up this time around. Instead, at least for the time being, I am hanging on.

With many thanks and kind regards,

Sincerely,

Gerhard Casper
Incumbent Dean

Gerhard Casper showing off his new bicycle, a ten-speed Peugeot given to him by Law School faculty and staff to make it possible for him to tour the country even faster.
The Visiting Committee of the Law School discussed current issues facing faculty, students, and administration during their annual meeting November 15-16. Chairman James Rhind, a trustee of the university, opened the session by describing the committee’s goals as seeking to understand the concerns of faculty and students, and gaining sufficient knowledge to serve both as advisors to the administration and as ambassadors for the Law School to the world at large.

To this end, the program included presentations on scholarships at the Law School, with Professor Frank Easterbrook speaking on “Trends in Law and Economics,” Professor Richard Epstein on “The Integration of Public and Private Law,” Professor Richard Helmholz on “Legal History at the Law School,” and Professor Cass Sunstein on “New Directions in Administrative Law.”

Professor Walter Blum and Law Librarian Judith Wright discussed the expansion needs of the library and the Law School’s future building plans. The law library acquires 10,000 new volumes per year, and space in the present facility has become so cramped that 75,000 volumes are now in temporary storage in other parts of the university campus. The school is considering plans to expand the library facility in the next two years, and the Visiting Committee heard about the options now being explored.

An important focus of this year’s meeting was student concerns. Dean of Admissions Richard Badger explained the new Law School Admissions Test. He then illustrated the way in which the Law School admissions procedures work by showing how six actual (though anonymous) applicants were evaluated last year. The committee members were able to talk informally with students over lunch in the Burton-Judson cafeteria, and in the evening at the New Graduate Residence. In addition, representatives from twelve student organizations discussed their groups’ activities and answered questions about their membership and goals.

A panel discussion of Harvard President Derek Bok’s 1983 report to the Harvard Board of Overseers examined his criticisms of the legal system and legal education. Participating in the discussion, which closed the formal program on the first day, were Judge Susan Getzendanner, Professors John Langbein and Bernard Melzer (who served as moderator), and Mr. Lee Mitchell (J.D. ’68), President of Field Enterprises.

Phil Neal, Harry A. Bigelow Professor of Law and former Dean, was the speaker at a dinner for members of the committee and law faculty that evening. At the dinner, Dean Gerhard Casper presented James Rhind with a framed poster to commemorate the completion of Mr. Rhind’s term as chairman of the committee. The next day at lunch Geoffrey Miller gave a talk on “Myths on the Midway” that is reprinted on pages 13-14. The formal advisory program ended with committee members meeting in executive session with Dean Casper.
### Visiting Committee Members

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<tr>
<th>Chairman</th>
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<td>Bell, Boyd &amp; Lloyd</td>
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**Terms Expire September 30, 1984**

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<td>Thomas H. Alcock</td>
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<td>Frank M. Coffin</td>
<td>United States Court of Appeals</td>
<td>Portland, Maine</td>
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<td>Wulf H. Döser</td>
<td>Baker &amp; McKenzie</td>
<td>Frankfort am Main, West Germany</td>
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<td>Susan Getzendanner</td>
<td>United States District Court</td>
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<td>Harold L. Henderson</td>
<td>Firestone Tire &amp; Rubber Co.</td>
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<td>Rex E. Lee</td>
<td>Solicitor General</td>
<td>United States Department of Justice Washington, D.C.</td>
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<td>Richard L. Marcus</td>
<td>Adams, Fox, Marcus, Adelstein &amp; Gerding</td>
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<td>Lee G. Rosenthal</td>
<td>Baker &amp; Botts</td>
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<td>Mitchell S. Shapiro</td>
<td>Shapiro, Lauder, Posell &amp; Close</td>
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<td>John N. Tierney</td>
<td>President Dosci Corp.</td>
<td>Los Angeles, California</td>
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<td>William H. Webster</td>
<td>Director Federal Bureau of Investigation</td>
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<td>James A. Donohoe</td>
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<td>Skadden, Arps, Slate, Meagher &amp; Flom</td>
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<td>Mildred G. Peters</td>
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<td>Mary L. Azcuénaga</td>
<td>Federal Trade Commission</td>
<td>Washington, D.C.</td>
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<td>Stuart Bernstein</td>
<td>Mayer, Brown &amp; Plati</td>
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<td>Roland E. Brandel</td>
<td>Morrison &amp; Foerster</td>
<td>San Francisco, California</td>
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<td>Peter W. Bruce</td>
<td>General Counsel and Secretary</td>
<td>Milwaukee, Wisconsin</td>
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<td>Richard D. Cudahy</td>
<td>Judge</td>
<td>United States Court of Appeals Seventh Circuit Chicago, Illinois</td>
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<td>Joel M. Flaum</td>
<td>Judge</td>
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<td>Patrick E. Higginbotham</td>
<td>Judge</td>
<td>United States Court of Appeals Fifth Circuit Dallas, Texas</td>
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<td>Anne E. Kutak</td>
<td>Vice President, Secretary, and General Counsel</td>
<td>Guarantee Reserve Life Insurance Co. Calumet City, Illinois</td>
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<td>Joseph D. Mathewson</td>
<td>Mathewson &amp; Hamblet, Ltd.</td>
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<td>Carl McGowan</td>
<td>Judge</td>
<td>United States Court of Appeals District of Columbia Circuit Washington, D.C.</td>
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<td>Lee M. Mitchell</td>
<td>President and Chief Executive Officer Field Enterprises, Inc. Chicago, Illinois</td>
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<td>Stephen C. Neal</td>
<td>Kirkland &amp; Ellis</td>
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<td>Richard B. Ogilvie</td>
<td>Isham, Lincoln &amp; Beale</td>
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<td>Robert G. Schloerb</td>
<td>Peterson, Ross, Schloerb &amp; Seidel</td>
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<td>Kenneth S. Tollett</td>
<td>Director Institute for the Study of Educational Policy Howard University Washington, D.C.</td>
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<td>Roger D. Turner</td>
<td>Cravath, Swaine &amp; Moore</td>
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The publications described briefly below are a selection of recent writings by Law School faculty members.

**Walter J. Blum**  

Under our federal income tax there are various types of assets that cannot be depreciated or amortized by those who own them. As might be expected, the owners often seek ways to put themselves in a position to depreciate at least some of their investment in these assets. Over the years, the law has wrestled with deciding what arrangements will enable depreciation to be taken. One device that has been used by owners consists of transferring a remainder interest in the underlying property while retaining a term interest. The thought is that a term interest, which expires at a predictable date, can be depreciated. Under what circumstances should depreciation be allowed when the remainder is transferred? Mr. Blum explores this question in his article.


Over the years Mr. Blum has come to wonder about the function of analysis in dissenting opinions by justices of the Supreme Court in federal income tax controversies. Not infrequently, he is unable to discern how publication of a particular minority analysis can possibly contribute to improving the operation of our complex income tax system. Indeed, the analysis of a disserter may sometimes cause needless confusion on the part of our lower courts, tax advisors, and tax gatherers. Mr. Blum’s reflections on the analytical dissenting opinions that have been filed during the last five terms of the court lead him to suggest a few guidelines for dissenters in writing opinions in income tax cases.

**Frank H. Easterbrook**  
*Antitrust and the Economics of Federalism*, 26 J. Law & Econ. 23 (1983).

This article looks at “competition” in antitrust law from a different perspective: competition among the states. Mr. Easterbrook argues that the Supreme Court’s recent attempts to apply the antitrust laws to the actions of state and local governments are both unnecessary, because these governments rarely have the ability to affect people living beyond their borders, and likely to be counterproductive, because the foreclosure of some forms of regulation may drive state and local governments to adopt other forms with welfare effects inferior to those displaced by antitrust. Mr. Easterbrook argues that ultimately the purpose of government is to replace competition with something else, and a federal rule requiring government action to be “procompetitive” has a potential to create a new fount of federal review of state action after the fashion of the substantive due process cases from 1890-1930.

**R.H. Helmholz**  

According to most commentators, the state of mind of the adverse possessor of land should be irrelevant. What should count is the accrual of a cause of action in ejectment against him. In this article Mr. Helmholz reviews the cases decided since 1966, concluding that American courts do not follow this rule. Instead, they regularly allow adverse possession to ripen into title only when the possessor is acting in the good faith belief that he is occupying what he owns already. Knowing trespassers rarely succeed. Mr. Helmholz explores the various means judges have taken to reach this result.

**Diane Wood Hutchinson**  

Ms. Hutchinson takes a comprehensive look at the Supreme Court of the United States’ class action decisions and argues that two models of the class action emerge: a joinder model, in which the class action functions only as an elaborate joinder device, and a representational model, in which it functions as a vehicle whereby one (or more) representatives may litigate on behalf of unnamed class members who have no independent procedural right to appear before the court. After developing the history of class actions in this country and change for payment from B? In other words, why not blackmail? In his article, Mr. Epstein seeks to escape this dilemma by showing how the A and B agreement will have as a necessary consequence the commission of a fraud against C, an element which is not present when A simply discloses that same information to C. He then explains why the criminal prohibition against blackmail is important even if persons blackmailed are not willing to turn state’s evidence. The prohibition makes it impossible for Blackmail, Inc. to sell its professional services to A as a means to extract greater payments from B.

**Richard A. Epstein**  

Blackmail is a crime with a unique pedigree. On the one hand it is generally thought odious, and on the other hand there is serious debate over why it should be criminal at all. Generally speaking, if an act may be lawfully done, then the actor may lawfully threaten to do it. Thus if A may with impunity disclose embarrassing information about B to C, why cannot A and B enter into some agreement in which A agrees to withhold the information in exchange for payment from B? In other words, why not blackmail? In his article, Mr. Epstein seeks to escape this dilemma by showing how the A and B agreement will have as a necessary consequence the commission of a fraud against C, an element which is not present when A simply discloses that same information to C. He then explains why the criminal prohibition against blackmail is important even if persons blackmailed are not willing to turn state’s evidence. The prohibition makes it impossible for Blackmail, Inc. to sell its professional services to A as a means to extract greater payments from B.
the policies that class actions are designed to serve, Ms. Hutchinson describes and criticizes the two models in detail and suggests that the representative model is more consistent with both history and policy.

Gareth H. Jones

It is commonly said that the object of an award of damages for breach of contract is to compensate a plaintiff for his loss; it is not to strip the defendant of the profits gained from the breach. Mr. Jones argues that the defendant's gain has on occasions influenced judges of many common law jurisdictions in determining what is the quantum of the plaintiff's loss. But they have not always admitted this to be so. This leads Mr. Jones to consider whether it is desirable, and if so under what conditions, expressly to recognize a restitutionary claim to profits gained from a breach of contract. His conclusion is that there are precedents to support such a claim and that it is, at least in some circumstances, desirable that it should be recognized.

William M. Landes and Richard A. Posner

Regulation and tort law are alternative methods (though often used in combination) for preventing accidents. The former requires a potential injurer to take measures to prevent the accident from occurring. The latter seeks to deter the accident by making the potential injurer liable for the costs of the accident should it occur. In this paper Mr. Landes and Judge Posner examine tort law as a method of regulating safety in cases of catastrophic accident (an accident resulting in serious injury to a large number of victims). They show that the problem of limiting solvency may be overstated and is perhaps more an argument for using a negligence rather than strict liability standard. The problem of causal uncertainty and long delay between accident and full-blown injury could perhaps be solved by moving toward a system where the accident victim sues and obtains a judgment before his injury is full blown. This approach also has attractions in dealing with the serious problem of giving victims of catastrophic accidents incentives to make "life style" changes that will reduce the severity of the delayed consequences of such accidents. Of course, there are many practical problems in making such a proposal work, but the alternating regulation has its own very serious practical problems.

Bernard Meltzer and Cass Sunstein

Mr. Meltzer and Mr. Sunstein consider the circumstances leading up to the air traffic controller's strike; the considerations behind the prevailing ban on public sector strikes; the history, constitutionality, and scope of the statutes banning strikes by federal employees; the problems of selective prosecution; and the implications of that strike for labor relations in the public sector and, incidentally, in the private sector.

A.W. Brian Simpson
Editor, Biographical Dictionary of the Common Law (Butterworths, 1984).

Thirty-nine contributors, including John H. Langbein, Dennis J. Hutchinson, and Gareth H. Jones, have written entries for this concise one-volume dictionary. It contains lives of more than seven hundred individuals, selected principally for having made significant contributions to the development of the common law system. Also included are some civilians, all Roman lawyers known to have worked in Britain, and curiosities such as the patron saint of lawyers. Although the emphasis is on the English common law, numerous American lives are included, ranging from major legal thinkers such as Holmes to such exponents of the deterrent theory of punishment as Judge Isaac Charles Parker of Arkansas. There are many illustrations, and the entries refer readers to further sources to which they may turn for fuller information.

Geoffrey R. Stone

Perhaps the most intriguing feature of contemporary first amendment doctrine is the increasingly invoked distinction between content-based and content-neutral restrictions on expression. Mr. Stone explores the merits and limitations of the distinction. He examines four possible rationales for the doctrine—equality, communicative impact, improper motivation, and distortion of public debate. In the end, he concludes that the distinction is more subtle than is usually assumed, that there are several previously unexamined types of restrictions that do not fit neatly within either the content-based or the content-neutral category, but that the distinction itself, if carefully defined, nonetheless serves a legitimate and fundamental role in first amendment jurisprudence.

Cass R. Sunstein

In this article, Mr. Sunstein analyzes recent developments in administrative law, with particular attention to the problem of judicial review of deregulation. He concludes that in reviewing administrative action (and inaction), the courts have moved away from the position that their primary role is to protect private ordering by guarding against unlawful government intrusions into the marketplace. The courts' new role is to ensure that agencies have complied with the governing statute, even if compliance requires the agency to intrude on private ordering. Mr. Sunstein also argues that a number of judge-made doctrines attempt to guard against takeover of the regulatory process by narrow interest groups. He illustrates this thesis by examining the Supreme Court's recent decision to invalidate the Reagan Administration's repeal of the passive restraints requirements for new automobiles.

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Memoranda

APPOINTMENTS

Faculty Appointments

Daniel R. Fischel was appointed Professor of Law and Director of the Law and Economics Program, effective January 1, 1984. Before joining the faculty, Mr. Fischel was a professor at Northwestern University School of Law. Mr. Fischel received his B.A. in American History from Cornell University in 1972; his M.A., also in American History from Brown University in 1974; and his J.D. cum laude from the Law School in 1977. While at the Law School, he was a comment editor of the Law Review and a member of Order of the Coif. He served as law clerk to both Judge Thomas E. Fairchild, Chief Judge of the Seventh Circuit Court of Appeals, and Justice Potter Stewart of the U.S. Supreme Court. Before joining the Northwestern faculty, he practiced for a year with the Chicago law firm of Levy and Erens.

During the autumn quarter, 1984 Mary Ann Glendon will return to the Law School as Visiting Professor of Law. Ms. Glendon was a Visiting Professor at the Law School during the autumn quarter of 1983. Since 1968 she has served on the law faculty of Boston College, and she is the author of many books and articles, among them The New Family and the New Property (1981) and State, Law and Family (1977). A graduate of the University of Chicago (B.A., 1959; J.D., 1961; M.C.L., 1963), she was with the firm of Mayer, Brown and Platt in Chicago before beginning her teaching career.

Joseph Isenbergh has been promoted to Professor of Law. Mr. Isenbergh teaches courses on federal taxation, foreign and international taxation, and civil procedure. He received his A.B. in 1966 from Columbia College, his A.M. in French and comparative literature in 1967 from the University of Rochester, and his J.D. in 1976 from Yale University where he was articles editor for the Yale Law Journal. Before joining the Law School faculty in 1980, he was associate in tax practice with the Washington, D.C. firm of Caplan and Drysdale.

The Director of the Mandel Legal Aid Clinic, Gary H. Palm, was promoted to Professor of Law in September. Mr. Palm attended Wittenberg University (A.B., 1964) and the Law School (J.D., 1967) where he was elected to Order of the Coif. He came to the Law School as director of the Clinic in 1970 after being an associate at the Chicago law firm of Schiff, Hardin, Waite, Dorschel and Britton.

FACULTY NOTES

Professor Dennis Carlton gave seminars on “Insider Trading” at Columbia Law School in November and on “The Effect of Inflation on Futures Markets” at Columbia Business School in December.

By invitation of the John F. Kennedy Institute at the Free University of Berlin, Gerhard Casper, William B. Graham Professor of Law and Dean of the Law School, gave a lecture on “The United States and Germany: A Lawyer's Perspective” at a symposium that concluded the celebration of three hundred years of German emigration to the United States. The conference was held in December. Dean Casper also spoke at the Mid-year Meeting of the American Bar Association, held in Las Vegas in February, on “Too Much Law and Too Many Lawyers,” a response to Derek Bok’s remarks on the state of the legal profession. He addressed the same subject at the March meeting of the Loop Luncheon series sponsored by the Chicago chapter of the National Alumni Association.

Kenneth Dam, Harold J. and Marion F. Green Professor in International Legal Studies currently serving as Deputy Secretary of State, and Gidon Gottlieb, Leo Spitz Professor of International Law and Diplomacy, have been elected to membership in the Council on Foreign Relations in New York.

In September Professor Frank Easterbrook spoke to a forum of the American Corporate Counsel Association on the American Law Institute’s corporate governance project, discussing the evidence about the extent of managers’ discretion. In October he presented papers on the economics of criminal procedure to a meeting of the Association of American Law Schools and on insider trading to the faculty of the Boston University Law School. In November he attended a symposium at the University of Virginia on the fiftieth anniversary of the securities laws with Professor Daniel Fischel. They presented a paper on “Mandatory Disclosure and the Protection of Investors” (to be published in the May 1984 University of Virginia Law Review) that discusses the extent to which rules compelling disclosures will help investors. He also delivered a speech on the SEC’s Advisory Committee on Tender Offers to a meeting of the Association for Corporate Growth. Mr. Easterbrook participated in a panel discussion of vertical restraints under the antitrust law sponsored by the American Enterprise Institute in Washington in December and presented a paper on mandatory disclosure at the Yale Legal Theory Workshop in February. In March he was part of a panel discussing antitrust at a seminar sponsored by The Conference Board, he debated Representative Jon Seiberling on restricted distribution before a plenary session of the ABA section on antitrust law, and he participated in an antitrust symposium sponsored by the FTC.

Richard Epstein, James Parker Hall Professor of Law, attended the Hoover Institution Conference on Mass Torts and Catastrophic Injuries where he presented a paper on “Legal and Insurance Dynamics of Mass Tort Litigation” (to be published in the Journal of Legal Studies). He also presented a paper called “Toward a Revitalization of the Contract Clause” at the Univer-
sity of San Diego Conference on Economic Liberties and the Constitution and gave a talk “In Defense of the Contract at Will” at the University of Chicago Conference on Conceptual Foundations of Labor Law. Both papers will be published in future volumes of The University of Chicago Law Review. In February Mr. Epstein gave a speech entitled “A Kind Word for Lochner” at both the Yale Law School and Columbia Law School; he spoke about “Reflections on Legal Education” at the Federalist Society Convention held at Harvard Law School; and he presented a paper on the revitalization of the contract clause at a Boston University Law School workshop.

Professor R.H. Helmholz, Director of the Legal History Program, spoke on “The History of the Law of Usury” at the annual meeting of the American Society for Legal History, held in Baltimore during the month of October. In February he delivered a lecture at Princeton University on the research he did last summer in the archives of Barcelona on the comparative history of English and Spanish legal systems. During the spring Mr. Helmholz traveled to two international meetings to discuss the development of Continental and Anglo-American law. One conference at Oxford dealt with the law of contract and the other, which took place in Cologne, was on the law of libel and slander.

Baird Becomes Associate Dean

Four years after beginning his teaching career as Assistant Professor in the Law School, Douglas G. Baird has been appointed Professor of Law and Associate Dean. Mr. Baird teaches courses in commercial law, bankruptcy, and intellectual property (copyright, patents, and trademarks). His casebook on security interests in personal property, co-edited with Thomas Jackson of Stanford Law School, was published by Foundation Press in November, and he is currently working with Mr. Jackson on a new casebook that explores the effects of the 1979 Bankruptcy Code. Mr. Baird received his B.A. from Yale College in 1975 and his J.D. in 1979 from Stanford Law School, where he was managing editor of the Stanford Law Review and a member of Order of the Coif. After receiving his law degree, he served as law clerk to the Hon. Dorothy W. Nelson and to the Hon. Shirley M. Hufstedler, both Circuit Judges, United States Court of Appeals for the Ninth Circuit.

During his four years on the Law School faculty, Mr. Baird has noted several changes, both in personnel and programs. Said Baird, “The faculty has gotten a lot younger. Forty percent of the present faculty weren’t here when Gerhard Casper became dean six years ago, and these new additions have made the place more diverse and more exciting.”

One recent program change Baird thinks is especially significant is the increased sectioning of classes for first year students that was instituted during this academic year. The civil procedures class is divided into three sections, and torts, property, and contracts are each divided into two. These smaller classes have allowed first year students to get to know the professors better and have made it easier for discussion to be steered by the dynamics of the class.

Mr. Baird understands his new administrative duties to involve giving unobtrusive assistance to the Law School dean. He explained, “The associate dean is not there to set policy or change the course of the school. One of our virtues in the past has been that the Law School is underadministered, and we don’t want to add an unnecessary bureaucrat to a system that was working well without one. The day-to-day administration of the school is already handled by a very capable staff. But the Law School is going through a number of changes that will consume a lot of Dean Casper’s time, and I hope to help by taking on some of the special projects and administrative tasks that need to be handled by an academic.”

Visiting Professor of Law Gareth Jones gave the second annual Lurcy Lecture at the University of Chicago in May 1983. His topic was “The Lawyer in Public Life in Nineteenth Century England.” Mr. Jones spent July as a visiting professor at the University of Michigan Law School and in the autumn was a visiting professor at the University of Georgia, where he taught courses in restitution and contracts. He also gave two papers at the Association of American Law Schools meeting in San Francisco in January, one in the section on remedies and one in the section on legal history. Mr. Jones is the Downing Professor of the Laws of England at Cambridge University.
Phillip Kurland, Professor of Law and William R. Kenan, Jr., Distinguished Service Professor in the College.

Philip Kurland, Professor of Law and William R. Kenan, Jr., Distinguished Service Professor in the College, was co-author of "Cable-speech" The Case for First Amendment Protection, published by Harcourt, Brace, Jovanovich in January. He was co-editor, with Gerhard Casper and Dennis Hutchinson, of the 1982 Supreme Court Review, published by the University of Chicago Press in March 1983, and his article "Is the Constitution Dead, Too?" appeared in the Winter 1984 issue of the University of Chicago Magazine. In January Mr. Kurland delivered a talk entitled "Easy Cases Make Bad Law" to the faculty of Fordham University at their Faculty Day ceremony.

"Tort Law as a Regulatory Regime for Catastrophic Personal Injuries" was the subject of a paper presented by William Landes, Clifton R. Musser Professor of Economics, at a conference on Policy Options for Catastrophic Personal Injuries held in the autumn at the Hoover Institution. He also presented two lectures on "Harm to Competition" at the ABA National Institute on Antitrust and Economics held in New York in September.

In October John Langbein, Max Pam Professor of American and Foreign Law and Russell Baker Scholar, addressed a gathering of several hundred teachers of criminal law from around the country organized by the AALS and held in Chicago. He spoke on the ways of using foreign and comparative legal materials in the criminal law curriculum. In November he participated in a scholarly colloquium sponsored by the Liberty Fund of Indianapolis that drew scholars from several disciplines to a three-day session in Houston. His talk was entitled "The American Founders' Sources on the Structure of Government."


Bernard Meltzer, Distinguished Service Professor of Law, is currently working on the third edition of his casebook on labor law in cooperation with Professor Stanley Henderson of the University of Virginia Law School.

Professor A. W. Brian Simpson's current work includes Pornography and Politics: The Williams Committee in Retrospect (Waterlows 1983), an account from the inside of the working of the English Home Office's Departmental Committee on Obscenity and Film Censorship and of the fate of its report, which like that of the U.S. Presidential Commission on the same subject was not accepted by the government of the day. His book Cannibalism and the Common Law is to be published by the University of Chicago Press this spring. It contains a fuller account of the historical background to the case of Regina v. Dudley and Stephens (1884), a shortened version of which appeared in The Law School Record, volume 27, Fall 1981. The book is timed to appear during this famous case's centenary year.

Adolf Sprudzs, Foreign Law Librarian and Lecturer in Legal Bibliography, contributed the lead article, entitled "International Legal Research: An Infinite Paper Chase," to the Summer 1983 issue of the Vanderbilt Journal of Transnational Law.

During the fall, Professor Geoffrey Stone participated in a conference on Religion and the Law sponsored by DePaul University's Center for Church/State Relations, and he presented a paper on "High Theory and the First Amendment" at the Midwest Constitutional Law Professors Conference. In December he met with the Miami chapter of the National Alumni Association to discuss "The State of the Law School." He also appeared on the CBS discussion program Common Ground on December 18, speaking on the "Operation Greylord" investigation of corruption in Chicago's judicial system.

Assistant Professor Cass Sunstein spoke on the equal protection clause at the October Midwest Constitutional Law Professors Conference and on the courts' role in reviewing deregulation at the October faculty workshop at Northwestern University Law School. In November he addressed the Columbia University/National Science Foundation Conference on administrative law and political economy. His subject was the role of the courts in reviewing administrative action. Mr. Sunstein recently published two articles: "Judicial Relief and Public Tort Law," a book review, in the Yale Law Journal and "Politics and Adjudication" in Ethics.

Mark Weber, Staff Attorney and Clinical Fellow at the Mandel Legal Aid Clinic, has been named to the Lawyers Advisory Council for the Disabled Persons Advocacy Division of the Illinois Attorney General's Office.
The Fellows of the American Bar Foundation presented the 1984 Fellows Research Award to Spencer L. Kimball, Seymour Logan Professor of Law, for “outstanding research in law and government.” The award was made in recognition of Mr. Kimball’s 10-year term as executive director of the American Bar Foundation, during which he founded the American Bar Foundation Research Journal, his numerous books and articles; and his influential research on insurance legislation and regulatory practice.

Mr. Kimball is the third member of the faculty to receive the Fellows Research Award. In 1976 it was awarded to Kenneth Culp Davis, John P. Wilson Professor Emeritus of Law, and in 1981, to Norval Morris, Julius Kreeger Professor of Law and Criminology.

Tax Conference Held

The Thirty-sixth Annual Federal Tax Conference of the University of Chicago Law School took place October 26-28. Designed for lawyers, accountants, and others concerned with problems of federal taxation, the conference focused on tax issues of current interest and included both formal presentations and panel discussions. Three Law School alumni were among the speakers: Sheldon Banoff (J.D. ’74), Stephen Bowen (J.D. ’72), and Walter Carr (J.D. ’70). The proceedings of the conference were published in the December 1983 issue of Taxes magazine. Howard G. Krane (J.D. ’57) chaired the Conference Planning Committee for the second year.

Planning for next year’s conference is already well under way. The chairman of the 1984 Planning Committee is William L. Morrison, and Walter Blum (J.D. ’41), Wilson-Dickinson Professor of Law, is serving on the Planning Committee for the thirty-sixth year. In reviewing his long history with the tax conference, Mr. Blum realized that tax people probably assume that next year’s conference will be the thirty-seventh yearly presentation by the Law School when actually the association is longer and its history is somewhat more complicated. He therefore wrote the following brief account of the early years of the conference:

“In 1948 the School of Business of the University of Chicago, operating in conjunction with what was called the Downtown Center of University College, conducted the first Institute on Federal Taxation. The Law School took no part in planning the sessions; indeed the School learned of the Institute through publicity in local newspapers. Most of those on the planning group came out of an accounting background. It became apparent, however, that many of the interesting topics were legal in nature and that heavy reliance had to be placed on obtaining lawyers as speakers. The School of Business became pleased to have the Law School cooperate in putting together future programs.

This new association led to changing the name of the presentation to the University of Chicago Annual Federal Tax Conference. For six years the cooperation between the Business School and Law School continued, but the interest of the Business School gradually tapered off as it became increasingly apparent that the dominant concern of the Conference was with law and law-related problems. In 1955 the title of the operation was changed to read: “The Eighth Annual Conference of the University of Chicago Law School.” So this year’s conference will be the thirtieth sponsored by the Law School alone.

The early history might well be explained by the fact that a significant shift was taking place in the distribution of federal tax work. Prior to World War II accountants dominated the field. After the war to an increasing extent lawyers became interested in federal tax problems. It is not surprising that management of an annual federal tax conference should reflect that shift.”

Israeli Ambassador Addresses Law School

Meir Rosenne, the Israeli Ambassador to the United States, addressed alumni and students of the Law School on November 9. He discussed “The Peace Process in the Middle East,” focusing on Israel’s defense posture and policies in regard to its mid-eastern neighbors.
Russell J. Parsons Faculty Research Fund Established

A $250,000 fund to support faculty research has been established by the Borg-Warner Corporation in honor of Russell J. Parsons, who prior to his retirement in December 1983 served as Senior Vice President, General Counsel, and Secretary for the corporation. The income from the endowed fund will be used to support faculty in specialized legal research.

In announcing the establishment of the fund, Borg-Warner Corporation Chairman James F. Beré expressed the hope that it would be "a lasting reminder of the pride we have in Russell Parsons and the pride and interest he has shown in the University of Chicago Law School."

Accepting the gift for the Law School, Dean Gerhard Casper said, "I cannot stress sufficiently the importance of faculty research support at a time when it is especially difficult to maintain high quality legal education. We are very pleased that Borg-Warner Corporation has chosen this way to recognize the accomplishments of our distinguished and loyal alumnus."

Mr. Parsons graduated from the University of Chicago in 1940 and received his J.D. from the Law School in 1942. He served as a Captain in the United States Marine Corps Reserve. He later joined Borg-Warner in 1946. Professionally he was elected vice president and a director of the American Society of Corporate Secretaries, and president of the society's Chicago chapter. Mr. Parsons is also a member of the American, Illinois, and Chicago Bar Associations, the Legal Club of Chicago, and the Law Club of Chicago. He has served the University of Chicago as a Vice Chairman of the Chicago Gifts Committee for the Campaign for Chicago, a member of the Alumni Fund Committee, and a member of the Board of Directors of the Law School Alumni Association.

Coase Prize Funded

The Ronald H. Coase Prize for excellence in the study of law and economics has been created through the gifts of Junjiro Tsubota (M.C.L. '67). The award is to be made by the Dean of the Law School on the basis of recommendations from the editors of the Journal of Law and Economics, the Journal of Legal Studies, and the University of Chicago Law Review. Ronald H. Coase is the Clifton R. Musser Professor Emeritus of Economics. He joined the Law School faculty in 1964 and was editor of the Journal of Law and Economics for 19 years before stepping down in April 1983.

Mr. Tsubota is a representative partner in the Tokyo Kokusai Law Offices and is also an instructor at the Institute of International Studies and Training in Japan. He has dedicated the royalties from his book, Kokusaikōshō to Keiyakugijutsu (International Negotiation and Arts of Contract) to the fund, having long been interested in the study of law and economics being done at the Law School.

Legal History and Legal Studies Workshops Continue

The series of workshops in legal history directed by R.H. Helmholz, Professor of Law and Director of the Legal History Program, and in legal studies directed by Richard Epstein, James Parker Hall Professor of Law, continue to bring distinguished scholars to the Law School to speak on a variety of topics. The legal history speakers for this academic year have included Stephen Presser, Associate Dean and Professor at Northwestern University School of Law; Steven L. Hoch of the Drew University Department of History; Jennifer Nedelsky of the Princeton University Politics Department; William E. Nelson, Professor of Law at the New York University Law School; and Charles Donahue, Jr., Professor of Law at the Harvard University Law School. The legal studies workshops for winter and spring quarters presented Albert Alschuler speaking on "The Fourth Amendment," Vincent Blasi discussing "Pathological Perspectives and the First Amendment," Charles Fried, and Robert Prichard speaking on "The Influence of Procedural Rules on Substantive Law: A Comparative Approach."
STUDENT NOTES

Hinton Moot Court Finalists Chosen

The Honorable Susan Getzendanner of the U.S. District Court for the Northern District of Illinois, Professor Frank Easterbrook, and Assistant Professor Geoffrey Miller served on the panel that heard oral arguments in the case of United Business Forms, Inc. v. Bunker Ramo Corp. in the semi-final round of this year’s Hinton Moot Court Competition. The four finalists chosen were Sharon Epstein, Andrew Heaton, Colette Holt Irving, and Fred Schubkegel, all of the class of 1985. The final oral argument will be heard in early May by a panel consisting of the Honorable Carl McGowan, Senior Judge of the U.S. Court of Appeals for the District of Columbia Circuit; the Honorable Harry T. Edwards of the U.S. Court of Appeals for the District of Columbia Circuit; and the Honorable Arlin M. Adams of the U.S. Court of Appeals for the Third Circuit.

1984-85 Tuition Increased

Tuition for the 1984-85 academic year has been set at $10,200, an 8.5 percent increase over the present tuition level. The increase is largely due to operational costs, especially library expenses, which remain high in law schools across the country. The Law School will continue to do its best to contain costs in non-academic areas in order to help meet priorities necessary to ensure the quality of education.

In a memo to the current students, Dean Gerhard Casper wrote, "In the last few years, we have devoted special efforts to raising additional funds for student support which are beginning to pay off, and will mean that financial aid from all sources will increase more than 8.5 percent." He also assured students that his decision to continue as dean reflects his commitment to maintaining continuity in the Law School’s fundraising efforts.

Comparative Law Society Seeks Suggestions

The International and Comparative Law Society, a student group that organizes on-going programs to present and analyze a broad range of transnational legal issues, is now in its second year. The society has sponsored lunch programs, including a series focusing on "Lawyers in Business"; receptions for practicing attorneys to meet with students; and an International Roundtable discussion. Activities planned for the future include international law conferences, an international moot court team, and grant programs to enable students to study or gain work experience abroad.

The group is currently engaged in exploring the possibility of a new student-edited journal on international commercial law. Preliminary research has led members to conclude that private international law, particularly that related to international finance, commerce, tax, labor, and corporate activity, is an area in which the students and alumni of the Law School could make a significant contribution. In addition, the journal would further the professional education of a large number of students by offering them the opportunity to engage in legal research and writing. The group believes that a journal focusing on private international law could be innovative, exciting, and useful for students and practicing attorneys.

The International and Comparative Law Society would like to elicit comments and suggestions about their programs, as well as detailed comments regarding specific subjects and areas of interest for journal articles. The members would also like to invite alumni to participate in the programs. They plan to organize a Board of Advisors made up of alumni, practicing attorneys, and government and international agency representatives. Interested alumni and friends should write to James Roberts, III, 1111 East 60th Street, Chicago, IL 60637.

Law Foundation Funding Up

The Chicago Law Foundation, which was organized in 1979 to promote and support legal services in the public interest, now has a greater proportion of the student body supporting its work than any other such group in the country. More than half of the current Law School students are enrolled as members. The group’s 1983 funds were almost double what they had been in any previous year and included contributions from several Law School professors as well as from Chicago law firms.

Funds are used to run the Alternative Perspectives Speakers Program that brings to the Law School attorneys who are using their law degrees in non-traditional ways. Recent speakers have included Jonathan Rich (J.D. ’79) of the New York Legal Aid Society and Judge Abner Mikva (J.D. ’51) of the Court of Appeals for the Washington, D.C. Circuit. The foundation also funds a Public Interest Grants Program that makes regular grants to law students for summer or school year employment in public interest-related jobs. During the summer of 1983, three students received grants; Judy Brudnick ’85 worked for Greater Boston Legal Services; David Luna ’85 worked at Cabrini-Green Legal Aid handling criminal cases; and Bob Tate ’85 worked at Albany Legal Services. In previous years, students have worked with the Lake Michigan Foundation and the Legal Assistance Foundation of Chicago. The group plans to make at least three grants this summer, and competition among the students to receive the grants will be high. Although there are now more funds than ever before, there are also more applicants.

Now There are Five

Michael Lazerwitz (J.D. ’83) is the fifth Law School graduate to be chosen as Supreme Court clerk for 1984-85. He will clerk for Chief Justice Warren Burger. The other Supreme Court clerks for 1984-85 are Charles Curtis (’82), Michael Herz (’82), Richard Kapnick (’82), and Lynda Simpson (’82).
Law Women's Caucus Continues Activities

The Law Women's Caucus is a student group designed to address the concerns of women at the Law School, serving as a support group for women students and providing a forum for discussion of feminist views. This year the Caucus has sponsored a variety of events, including a seminar on resume writing and interview techniques that brought women from Chicago law firms in to talk with first-year women about the interviewing process, a wine and cheese party during orientation week, and a series of small dinners that helped to orient first-year women to the law school and provided an opportunity for them to meet second and third year students.

In November the Caucus brought Cynthia Epstein, author of *Women in Law*, to the school to talk about her book and answer questions on her research. This winter the Caucus invited all women faculty and administrative staff members to participate in a panel discussion on "Women, Law, and Academia." The group is also compiling information from a questionnaire circulated to Law School alumnae.

Later this year, Caucus members will attend a luncheon with University of Chicago Law School alumnae to discuss career planning and decision-making, and there will be a panel discussion among practicing women lawyers regarding their work in the legal field. The Caucus will also hold a debate among Law School professors concerning judicial scrutiny of discrimination in law firm partnerships. A similar debate last year on the Roe v. Wade decision sparked extensive controversy.

BALSA Brings Speakers

BALSA, the organization of black Law School students, has sponsored a lunch-time speakers series at the Law School. Recent speakers have included Ellis Reid (J.D. '59), a Chicago attorney, and Professor Richard Simpson of the University of Illinois who spoke on "Politics—Chicago Style" and Cheryl E. Gelzer (J.D. '80), an associate in the New York law firm of Guggenheimer and Untermyer, who discussed "Women in Labor Law."

Lawyers in Love, an original musical comedy on life in the first year of law school written, directed, and performed by Law School students, drew a large audience at its single showing February 17. Pictured above are Sandra Day and the Supremes, at right is Carmen Miranda explaining the Miranda rights.
Class Notes Section – REDACTED

*for issues of privacy*
The Law School

OFFICERS OF ADMINISTRATION

Gerhard Casper, Dean.

Richard I. Badger, Assistant Dean and Dean of Students in the Law School.

Douglas G. Baird, Associate Dean.

Holly C. Davis, Assistant Dean for Alumni Relations and Development.

Robert G. Evans, Assistant to the Dean.

Gladys O. Fuller, Administrative Assistant.

Frank J. Molek, Assistant Dean and Director of Capital Campaign.

Paul Woo, Director of Placement.

Judith M. Wright, Law Librarian.

OFFICERS OF INSTRUCTION


Aaron Director, Ph.B., Professor Emeritus of Economics.

Allison Dunham, A.B., LL.B., Arnold I. Shure Professor Emeritus of Urban Law.

Stanley A. Kaplan, Ph.B., J.D., LL.M., Professor Emeritus of Law.

Leon M. Liddell, A.B., J.D., L.S.B., Law Librarian and Professor of Law, Emeritus.

Phil C. Neal, Harry A. Bigelow Professor Emeritus of Law.


Hans Zeisel, Dr.Jur., Dr.Pol.Sci., Professor Emeritus of Law and Sociology.

Douglas G. Baird, A.B., J.D., Professor of Law and Associate Dean.

Mary E. Becker, S.B., J.D., Assistant Professor of Law.

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Peter Landau, Dr.iur., Visiting Professor of Law and Thyssen Fellow. (Spring Quarter.)

William M. Landes, A.B., Ph.D., Clifton R. Musser Professor of Economics.


Joan H. Langbein, A.B., LL.B., Ph.D., Max Pam Professor of American and Foreign Law and Russell Baker Scholar.

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