Then & Now: Stories of Law and Progress

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Then & Now: Stories of Law and Progress
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On the Occasion of the 125th Anniversary of IIT Chicago-Kent College of Law

Lori Andrews and Sarah Harding
Editors
Then & Now: Stories of Law and Progress
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Front cover, left to right: “Rookery Building, exterior” (p. 16); Robert S. Abbott, 1899 graduate of Kent College of Law, undated photo courtesy of the Chicago Defender, image cropped; Law Library of the Library of Congress in the U.S. Capitol (p. 88).
Background: Current photo of 10th Floor Reading Room, Library, Chicago-Kent College of Law.
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When students entered the chambers of Judge Joseph Meade Bailey in 1888 for the educational adventure that was later to become known as Chicago-Kent College of Law, the entire English and American legal opus fit in 600 volumes. Chatter inside the chambers might have centered on the infamous “Great Boodle Trial,” one of the first public corruption trials in Chicago, or the new Rookery Building being built just a block north on LaSalle Street. More serious discussion might have turned to basic questions about the Constitution and the highest court of the land. Should the Bill of Rights be applied to the States? Should everyone have the right to have their cases heard by the U.S. Supreme Court?

Outside the judge’s chambers, students were faced with a world of new technologies (the telegram, the portable camera, skyscraping architecture) and fast-evolving legal questions. Rapid industrialization and the monopolistic tendencies of major enterprises, particularly the railroads centered in the Midwest, were pushing Congress towards the passage of a path breaking “anti-trust” law. Women were permitted to enroll in the early law classes held in Judge Bailey’s chambers and they were increasingly involved in providing legal aid to the poor through the Protective Agency for Women and Children, but were denied the right to sit on juries. And while Albert Goodwill Spalding, owner of the Chicago White Stockings, and John Montgomery Ward, the nation’s most famous shortstop, were battling over player labor issues, post–Civil War tensions were still simmering in a scandalous case that pitted California against the President.

Since those early classes in the late nineteenth century, IIT Chicago-Kent graduates have mastered the law and served their clients in all 50 states and around the world. They have joined big firms, formed their own firms, created businesses, been appointed to the bench, served as legislators, argued in the Supreme Court, joined the media, and won awards for their ideas and their representation. They have changed the law and changed the world. And now, 125 years after the law school was founded, we celebrate the tenacity and success of this great Chicago institution and its alumni with tales spanning 125 years of law and change.

Lori Andrews and Sarah Harding
In late-August 1887, as some of Chicago-Kent College of Law’s first students were beginning their studies in the chambers of Judge Joseph Bailey, a bottle carrying a handwritten note bobbed across Lake Michigan. Found on the shores of Grand Haven, Michigan, the bottle and its contents were rushed to a reporter for the then-fledgling Chicago Daily Tribune newspaper. Thrilled to have scooped the competition, the Tribune published the note the next day as an exclusive:

To my friends in Chicago: A few more hours and I will be safe through the straits and in Canada. Sheriff Matson, please accept my thanks for the bath, but I have concluded it in British waters. Oh Ed, I wish you were here with me! Goodbye till we meet!

The note’s author was William J. McGarigle, and he had reason to gloat. A former Cook County Commissioner and warden of the Cook County Hospital, McGarigle had successfully fled police custody after being convicted on corruption charges and sentenced to three years in prison. McGarigle escaped by duping the Sheriff of Cook County, Canute Matson, into allowing him a visit with his wife and kids at

"The Boodle Aldermen: Each sat in his particular oven," cartoon by Art Young, 1892.

CHICAGO’S “GREAT BOODLE TRIAL”

Todd Haugh
their Lakeview home. After asking to take a bath to “freshen up,” McGarigle slipped out a window, made his way to a schooner docked along the south branch of the Chicago River, and sailed out into the lake and through the Straits of Mackinaw to Canadian waters.

Slipping past the patrol boats, knowing he was about to be a free man (Canada had no extradition treaty with the U.S. at the time), McGarigle must have chuckled as he threw the bottle overboard. When found, the note would not only put a thorn in the backside of Matson and the entire sheriff’s office, but it would surely put a smile on the face of his friend, Edward McDonald. The “Ed” from the note, McDonald was McGarigle’s co-defendant, fellow county commissioner, and now former cellmate. Keeping McDonald in good spirits hadn’t been easy as the summer humidity in their cells climbed and a transfer to the Joliet Penitentiary loomed, but McGarigle did his best. The truth was, Ed McDonald’s happiness mattered. As a long-time board member and the Cook County Hospital’s engineer, he knew every detail of the swindles that landed them and the other county commissioners in jail. But more importantly, he was brother to Michael “Big Mike” or “King Mike” McDonald, boss of the Chicago Democratic Machine and the city’s first politician gangster.

McGarigle, Ed McDonald, and Big Mike McDonald form the nucleus of a fantastic story of proudly corrupt politicians, seemingly-righteous reformers, bag men, kidnappers, and suckered citizens, revealed through the testimony of the “Great Boodle Trial” of 1887. The “most sensational corruption scandal of the late nineteenth century,” the Boodle Trial offers a glimpse into the crooked machine politics of early Chicago and the equally underhanded tactics of overzealous reformers. Called by some a “corrective antidote” to “[a]n epidemic of fraud,” the trial helped galvanize the reform movement in Chicago, proving that even well-connected Chicago politicians could be brought to justice. At the same time, it demonstrated the lengths—some say necessary; others say illegal—reformers would go in the pursuit of their goals. Finally, the trial reminds us of just how entrenched corruption is in Chicago politics. As dramatic as it was at the time, the trial may have been the beginning, not the end, of Chicago’s legacy of corruption.

Chicago’s Great Boodle Trial, which began on June 4, 1887, was actually two “prolonged and tedious trials.” The first trial pitted State’s Attorney Julius Grinnell against McGarigle and Ed McDonald; the second was against over a dozen other commissioners and private contractors in an “omnibus” pro-
ceeding. Both cases centered around the same allegations of public corruption. According to prosecutors, a ring of crooked commissioners took control of the Cook County Board sometime in the early 1880s. If a company wanted to do business with the county, it had to pay the ring a “commission” for the privilege. What we today call a “pay to play” scheme, this arrangement allowed dishonest commissioners and business owners to get rich off county contracts secured through bribes and inflated by padded invoices. Ed McDonald helped organize the ring and set up the schemes, while McGarigle, acting as the bag man, collected the bribes and kickbacks—the “boodle.” Everything led back to Big Mike McDonald, the man who controlled Chicago’s Democratic Party, all county patronage, and the county board.

A sampling of the boodlers and their schemes, recounted in vivid detail through the two trials, shows the power of early Chicago machine politics and the depth of the commissioners’ individual greed. There was Harry “Prince Hal” Varnell, a gambler and saloon owner appointed warden of the Cook County Insane Asylum. Varnell promptly set up a private office and home on the grounds of the asylum and outfitted them with “Persian rugs, Brussels carpets, and lace curtains.” He ordered expensive foods and paid for the living expenses of his nephews, cousins, and friends, all using taxpayer money. The asylum’s drug store and infirmary served as the “clubhouse” for the ring of commissioners.

James “Buck” McCarthy joined the county board in 1884. A high school dropout, former boxer, and meat packer in the Chicago stockyards, McCarthy’s main qualification for being a commissioner was his friendship with Big Mike McDonald. McCarthy’s protégé was Charles Lynn, who served as a deputy sheriff and commissioner. Lynn admitted to joining the board “solely for the money he could extort,” recounting his “scorn” for Chicago industrialists who refused to pay the ring its expected commissions. Charles Frey, another McDonald-controlled commissioner, was warden of the county poor house. He bought silk underwear costing eighty-five dollars, charging it to the county as a bale of muslin.

And then there was McGarigle. Warden of the county’s 600-bed hospital for the poor, McGarigle’s office was adorned in the finest imported damask drapes. China spittoons flanked his office door. He even had a private horse stable built on hospital grounds for his personal use. In one of the more farcical accounts, it was reported that McGarigle had 24 lightning rods mounted on a hospital tool shed—one “on every chimney, every alcove, every corner, and every crevice.” The lightning rods
were installed by Varnell, a business agent of the manufacturer.

As the boodlers siphoned off tax dollars to fund their lavish offices and private dinners, county patients suffered. In the Cook County Hospital’s contagious disease ward, “a cramped, fetid, 18- by 40-foot room,” patients fought for space on only six beds, often lying side by side on the floor. Unlike the $3.00-a-dozen strawberries and grapes Varnell ordered for his party guests at the clubhouse, patients were served spoiled meat. The nurses and orderlies often showed up to work drunk. Similar conditions were found at the asylum and the poor house. Newspapers reported that “the poor, the lunatics, and the sick have fared none too well, but those who have been hired to take care of them live in luxury.”

Not surprisingly, the boodlers’ largess eventually garnered notice. In 1886, the county budget faced a staggering one million dollar deficit (approximately 25 million in today’s dollars), which was directly tied to the reckless spending of the corrupt commissioners. This rallied the few reform-minded commissioners on the county board, including J. Frank Aldrich, who was also a member of the reform-based Union League Club of Chicago. The Union League Club joined causes with the Citizens’ Association, another reform group, whose membership included George Pullman, one of the wealthiest and most powerful industrialists in the country. Pullman and the other reformers brought suit against the county board to enjoin it from entering into more dubious
contracts—the first was to drill an unnecessary artisan well at the poor house—thereby beginning the "reform movement in county affairs."

Despite the laudable goal of ending the "epidemic of fraud" in county politics, the reformers were not exactly above reproach in their tactics. In fact, some of the reformers' methods rivaled those of the boodlers. After filing their civil suit, the reformers funded a private prosecution of the ring of commissioners. Of the $150,000 raised (over three and a half million dollars today), at least $30,000 went to the Mooney and Boland Detective Agency for the purpose of reviewing county invoices and conducting non-stop surveillance of county contractors suspected of paying bribes. When the invoices the detectives had access to didn't show evidence of bribes, the reformers had ones that did stolen from a county safe. The "confiscated" documents helped lead to a raid on the commissioners' clubhouse, which uncovered additional incriminating evidence.

Now all the reformers needed was a witness. A corrupt contractor, a plumber named Nic Schneider, gave the reformers what they were after. Drinking one night at Big Mike McDonald's four-story Clark Street gambling parlor and saloon, "The Store," Schneider loudly toasted to "county contracts," saying, "I am rich and by gracious in two years I shall be as rich as anybody." Joining him in the toast was a county commissioner. Two Mooney and Boland detectives, who had been surveilling Schneider, witnessed the toast. When Schneider left the tavern, the detectives followed. Schneider never made it home that night. Disappearing with him were his business papers, including the false invoices he wrote to pad county contracts and evidence of the commissions he paid to secure county work.

The ring of commissioners learned through their own private detectives that Schneider was being held by the reformers. Based on a bogus warrant issued for Schneider's arrest, the commissioners sent nine policemen to recapture him, but they were turned away after a struggle. Schneider, possibly bound and gagged in a second floor room, could hear the "ruckus" below as the men fought over him. He turned witness for the prosecution soon after and fled out of state, escorted (some might say restrained) by two private detectives.

The reformers may have felt justified using such tactics to secure evidence against the boodlers given their control over the jury system. At the time, the grand jury—the only body that could issue an indictment formally charging a defendant with a serious crime—was selected by the county commissioners. Each commissioner wrote two names of prospective jurors on blank cards, which were then drawn from a hat.
When a new grand jury was chosen, one of the corrupt commissioners simply picked cards that had been dog-eared by the others in the ring. This system, though rudimentary, had been used effectively to shield machine politicians from prosecution for over a decade. In fact, when asked about the possibility of indictment, Buck McCarthy commented, “There are only two powers over the [county] board, one is the Almighty, the other the grand jury, and we get to draw the grand jury.”

McCarthy’s confidence was misplaced, however. After reformist commissioner Aldrich witnessed the loaded draw, the reformers were able to convince a judge to empanel a special grand jury. The special grand jurors, “honest and true men who refused to be bribed or intimidated,” promptly indicted the ring of commissioners and private contractors on 106 counts of public corruption. The reformers had thus broken the “power of puppet master [Big Mike] McDonald and his commissioners to control the selection of grand juries that had protected them from criminal indictments.”

After unsuccessfully moving for a change of venue on the grounds that the prosecution had been improperly funded by private citizens, the Boodle Trial was underway. The evidence against McGarigle and Ed McDonald was overwhelming. “Witness after witness was placed on the stand to prove that [they] had systematically robbed the taxpayers of this county for a long time.” Plumber Nic Schneider became the prosecution’s star. Notwithstanding accusations of perjury by the defendants, Schneider’s testimony, supported by his false invoices, showed that Ed McDonald was connected with four firms that overcharged the county for goods and labor and that McGarigle collected and disbursed the bribes and stolen money. Both defendants testified in their own defense, but offered contradictory testimony “of the flimsiest character.”

On June 18, 1887, the jury found both men guilty. Later that summer, the “other dominoes fell” during the omnibus trial. When the verdicts were read, “the ball game at White Stocking Park was interrupted while the people cheered.” The penalties for most defendants were substantial, ranging from thousands of dollars in fines to three years in the penitentiary for McGarigle and Ed McDonald. However, a few received smaller fines after agreeing to help the prosecution and paying restitution. Buck McCarthy, who was fined just $1,000 amid allegations that he had influence over one of the jurors, told reporters that he was “disappointed and disgusted” with the verdict. (McCarthy went on to be elected to the Chicago City Council.)

Of course, McGarigle’s flight to Canada meant he was never fully brought to justice. After living in Banff, British Columbia for two
years where he bought into a livery business and invested in a hotel, he cut a deal and returned to Chicago. He eventually ran a tavern in the Clark Street vice district controlled by Big Mike McDonald. Ed McDonald didn’t fare as well. While awaiting transfer to the penitentiary, his nine-year-old son died after falling from a fire escape at the Cook County Hospital while playing with friends. The Assistant States Attorney John Bensley explained it this way: “In Mike McDonald’s case, an indictment could not be framed to hold. When a man lays all his plans coolly and deliberately with the express purpose, apparently, of preventing any tracing of crookedness to his door it is an extremely difficult thing to get him with legal evidence.” Big Mike explained it a little differently, though the sentiment was the same. Joking to reporters, he said, “[A]fter it’s all over I show ’em a pretty clean pair of heels and I’ll do it this time or I’m very much mistaken.” He added, “Most everybody’s a boodler nowadays, you know.”

Big Mike McDonald remained on top of the Democratic Party for more than a decade longer, controlling an empire of gambling parlors, saloons, and prostitution houses, while directing city and county patronage. The Boodle Trial did not slow his operations. The same year of the trial, he was reported to have ordered city aldermen under his control to ap-

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**THE BOODLERS CONVICTED**

**TWO PROMINENT CHICAGO POLITICIANS TO GO TO JAIL.**

**CHICAGO, June 18.—**William J. McGarigle, Warden of the Cook County Hospital, and Edward S. McDonald, engineer of the same institution, and brother of “Mike” McDonald, the notorious gambler, were convicted to-day in

fall was caused by loose boards that hospital workers had failed to secure or seal off. Afterward, Ed McDonald “lapsed into a deep depression.” He served his time in Joliet but was effectively finished in Chicago politics.

And what of Big Mike McDonald, the boss of the boodlers and the architect of their schemes? He was never charged or tried as part of the Boodle Trial; the grand jury didn't even vote on whether to indict him.

prove a $200,000 contract for applying “preserving fluid” to City Hall. The fluid, which was “guaranteed to keep the state-ly building intact for a hundred years,” washed away in the rain two days later. The World’s Fair that took place in Chicago in 1893 put more millions into Big Mike McDonald’s pockets as city contracts swelled and armies of tourists gambled and drank at The Store. It was at this time that McDonald supposedly coined the phrase, “There’s a sucker born every minute.” Big Mike retired to his Ashland Boulevard mansion in the early 1900s, content to let the next generation of boodlers and gangsters try its hand in Chicago.

The legacy of the Great Boodle Trial and the reform efforts it epitomized is decidedly mixed. In some ways, it was a significant victory for early Chicago reformers. The Boodle Trial was a very public demonstration that the city’s machine politicians—at least most of them—were not above the law. All told, nine commissioners and county contractors who faced trial were convicted and sentenced to two years or more in jail; four others were convicted and fined the maximum allowed under statute. Up to that time, no politician had received such harsh punishment for “boodling.” The commissioners’ convictions, even for those receiving only fines, also meant they would be automatically removed from the county board. By “turn[ing] the rascals out of the County Board and brand[ing] them forever as convicted public swindlers,” the trial ended most of the commissioners’ political careers, and more importantly, Big Mike McDonald’s control over county contracts. The Tribune called the trial “the most successful assault on public crooks to that date.”

More broadly, the trial and the scandal leading up to it galvanized Chicago’s reform-minded citizens, kick-starting the city’s reform movement. To successfully investigate and prosecute the ring of commissioners, two reformist groups—the Union League Club and the Citizens’ Association—joined forces. The alliance brought activist industrialists, politicians, and judges together, and allowed for great sums of money to be raised to combat corruption. The Boodle Trial was just the first success of the reformers. After the trial ended, reformers pressured the state legislature to review how jurors were selected in Cook County, leading to
a revamped jury system in which county commissioners no longer selected grand juries. This allowed prosecutors to bring public corruption cases under a fair system. With the help of a press corps intent on publishing more exposés like those leading up to the Boodle Trial, reformers went on to successfully investigate and prosecute bail-bond fraud and ghost payrolling. Some of these reform movements continue today.

Yet, to achieve their goals, the reformers became separated from the corrupt commissioners by only a matter of degree. While calling for the prosecution of Big Mike McDon ald—“the managing and directing thief whose influence has cast such a blighting shadow over public affairs in this county”—reformers kidnapped witnesses, stole documents from a county safe, and privately funded the criminal indictments of their adversaries. The reformers’ “ends justifies the means” rationalization, which they undoubtedly employed, rings as hollow as McGarigle’s defense that the prevailing system was at fault for his crimes—that he just went along with the boodling because everyone else did. While there are safeguards in place today to guard against the use of such “impure methods,” many contend the prosecutions of recent Chicago politicians have been motivated less by enacting genuine reform and more by furthering political gain. One current Cook County Commissioner, William Beavers, awaiting trial for allegedly failing to pay taxes on money he took from his campaign fund (and used to pay gambling losses, among other things), has accused prosecutors of indicting him as retribution for refusing to wear a wire against John Daley, a former commissioner who is brother to Richard Daley, Chicago’s longest-running mayor.

The best measure of the Boodle Trial’s impact is, of course, whether it changed the culture of corruption in Chicago politics. On that score, the trial has had little lasting impact. The headlines of today’s Tribune read much as they did 125 years ago. Month after month, colorful Chicago politicians fight indictment (some from their county board seats) for schemes that would get an approving nod from Big Mike McDonald. Beavers is the most recent, and possibly the most odd (after being indicted, he called the United States Attorney prosecuting him a “rooster with no nuts”), but he is by no means alone. On its way to earning the distinction of being the most corrupt city in the country, Chicago has seen five of its governors imprisoned, over 30 aldermen indicted and convicted, and countless other public officials investigated. At the top of that list is former Governor Rod Blagojevich, who is currently serving a 14-year prison term for attempting to auction off President Barack Obama’s vacant United States Senate seat for
personal gain. Wiretaps of Blagojevich recorded him saying, “I’ve got this thing and it’s f—ing golden, and ... I’m just not giving it up for f—in’ nothing.”

It could be argued that these prosecutions even taking place, some against officials at the highest levels of government, proves that the Boodle Trial has had a lasting impact—the trial showed generations of reformers that political corruption could be combated in Chicago in a meaningful way. Others will more cynically say that for every crooked politician prosecuted, another will take his place, and that the most well-connected crooks—the crafty bosses like Big Mike McDonald—always find a way to operate above the law. While the truth is likely somewhere in between, the Great Boodle Trial reminds us most of all that as long as there is boodle, there will be men trying to take it. As McGarigle remarked a few months before his conviction, “I don’t care if the same system prevailed in heaven, there would be boodlers. The temptation is too great. . . . Men are but human[.]”

Sources and Further Reading

Todd Haugh graduated with honors from Brown University and received his law degree cum laude from the University of Illinois College of Law. Before coming to Chicago-Kent, he served as a Supreme Court Fellow at the Supreme Court of the United States and practiced white collar criminal defense at Winston & Strawn LLP and Stetler, Duffy & Rotert, Ltd. Professor Haugh’s research interests include white collar crime and sentencing.
Chicago-Kent traces its origin to the incorporation of the Chicago College of Law in 1888. Chicago-Kent’s founding coincided with the opening of the Rookery Building designed by the preeminent architectural firm of Burnham and Root. There is a direct connection between the now iconic Rookery Building, located at Adams and LaSalle, and the law school building further west on Adams. There is also a more indirect but interesting connection between the first and second schools of Chicago architecture and Daniel Burnham’s vision of the modern city. Architects, but especially Daniel Burnham, helped make and sustain Chicago as a world city, thus making it an attractive and exciting place to practice law to the benefit of all law schools in Chicago including Chicago-Kent.

The Rookery is now a classic example of the first school of Chicago architecture which helped shape modern Chicago and continues to make Chicago a special place, despite decades of desecration of this rich architectural heritage. The Great Fire of 1871 destroyed the Loop and the newly developed residential areas to the north. It did, however, narrowly miss the lumber yard which occupied the site of the current law school. Architects were immediately
attracted to Chicago because of the opportunities to rebuild the city. The skyscraper was perfected here, and this technological innovation, along with the telephone and Otis Elevator, created the modern office city by separating industrial production from its administration. By 1888, Chicago, along with Buenos Aires and Sao Paulo, was emerging as a major example of a modern city unconstrained by any significant urban past. The city had grown from about 100,000 persons when Lincoln was nominated for President, a few blocks from the current law school, to one million inhabitants and counting.

Chicago had surpassed Philadelphia and became America’s second city. Chicago’s location as a rail and water hub enabled it to become the processing center for the agricultural bounty of the Midwest and Great Plains as well as the distribution center for this region. For a brief period of time, wealthy Chicagoans used their new wealth and power to patronize a progressive group of architects to build modern, forward-looking cathedrals of commerce.

A group of Chicago architects, led by Dankmar Adler, Louis Sullivan, John Root, Daniel Burnham and later Frank Lloyd Wright, developed a distinctive style of architecture geared to the technological innovations that were changing the nature of business. The Rookery is a perfect example. The walls were partially load-bearing, but the interior used the state-of-the-art steel frame, developed by William Jenny, to permit it to become the tallest building in Chicago. The building is a mix of early modernist and retrospective styles. The walls of large windows allowed maximum use of light because of the dimness of the 20 watt bulbs powered by Commonwealth Edison’s first loop generating station across the street. The exterior building is also an example of Chicago Romanesque. This style, whose distinctive feature was the arch, was based on pre-Gothic Romanesque architecture in southern France. Initially adopted by Frank Richardson in Boston, the great Louis Sullivan brought it to Chicago. The Auditorium Theater, which opened in 1889, is the best surviving example.

After the elite lost interest in “modern architecture,” innovation languished in Chicago until the post–World War II modernist school emerged. Until the 1980s, Post-War Chicago architecture was a monument to Mies van der Rohe. Fleeing Nazi Germany, he ultimately settled in Chicago, headed IIT’s then Department of Architecture, designed its landmark campus, and more generally helped make the German Bauhaus the dominant form of post–World War II Chicago architecture.

The law school’s current building, which opened in 1992, is a synthesis of the two great schools of Chicago architecture. Its scale and facade
recall the post-fire Prairie School, especially the Rookery Building. However, the incorporation of an arch into early designs was rejected as disproportionate to the building. Not only is it about the same height, it was designed by Holabird and Root, the successor firm to Burnham and Root. The relatively austere stone facade, rather than a pure steel and glass frame characteristic of Mies’s main campus buildings, echoes the Rookery in both style and underlying philosophy. And, like the law, it both respects the past and looks to the future. Burnham rejected the argument of Louis Sullivan and Frank Lloyd Wright that America needed a distinctive style of architecture. Rather, “Burnham and his allies,” as the Encyclopedia of Chicago explains, “believed that the sometimes frantic quest for ‘American-ness’—the obsession with New World originality and horror of all things European—was itself a kind of insecurity, and that maturity would consist in an acknowledgment that America was not culturally isolated from the rest of the world. Burnham and his associates saw the United States as a rightful heir to the traditions of Western culture.”

Daniel Burnham’s larger legacy for Chicago and its vibrant legal community is twofold. First, Prairie School architecture both symbolized Chicago’s emergence as a world city in the late nineteenth and early twentieth century by allowing it to drain
the surrounding region of both re-
sources and talent, legal and other-
wise. This legacy along with Burn-
ham's partially realized 1909 plan
also helped Chicago to evolve into a
major financial center, after its origi-
nal industrial base of Chicago eroded
after World War II. The concentra-
tion of law firms to serve Chicago’s
economy provided employment for
thousands of lawyers.

The second legacy of Burnham’s
plan is much darker but also benefi-
ted Chicago lawyers. The much hailed
plan envisioned Chicago as a great
city in the mold of Paris or Imperial
Vienna. But the plan primarily con-
centrated on a magnificent core and
lakefront for the wealthy. The un-
ruly, poor, polluted, and dangerous
rest of the city, home to the waves of
immigrants from around the world
and migrants from other parts of the
country, was depicted only by end-
less low rise, uniform blocks. In other
words, the city that actually existed
was largely ignored. It was left to
others to deal with what was in fact
happening on the streets of Chica-
go. In the twentieth century, Chi-
cago’s continuing attempts to deal
with urban problems such as racial
segregation, urban poverty, substan-
dard housing, rampant corruption,
and juvenile and gang violence have
provided endless opportunities for
lawyers and future lawyers trying to
obtain justice for individuals caught
in the net of poverty, corruption,
brutality, and discrimination equally
characteristic of Chicago, including
a young Columbia University grad-
uate (and Chicago-Kent commence-
ment speaker), Barack Obama.◆

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and water law and has published widely
in these fields.
When we think of extraordinary nineteenth-century legal institutions and innovations, we generally do not think of women. In fact, in 1875, the United States Supreme Court ruled that Illinois’ refusal to admit women to the bar did not violate the newly passed Fourteenth Amendment of the U.S. Constitution. Yet remarkably, in 1885, women in Chicago created the Protective Agency for Women and Children (PAWC), which was one of the very first organizations in the country to provide free legal aid to the poor.

The PAWC began inauspiciously and indirectly. In 1876, Caroline M. Brown, a wealthy woman and mother of two children, founded the Chicago Women’s Club (CWC) by inviting 21 women to meet in her living room to learn about and discuss the day’s pressing social, political, and cultural issues. Brown was acutely aware of the limited sphere in which elite women could maneuver respectably and worried that some might take a dim view of the club. Yet, in the aftermath of the disastrous 1871 fire, Chicago was a particularly hospitable place for such a group, as women had created organizations to provide charity.
and relief to victims of the fire. Thus a tradition of middle-class and elite women's organizing already was beginning to develop in Chicago.

One of the first projects of the CWC was to place a woman night matron in each police station and the club hired and raised funds for the matron's salary. The issue of having women police matrons was one embraced by numerous women's organizations across the country. It was an appropriate women's issue because it involved the supervision of working-class and poor women under the rationale of protecting such women's virtue from male prisoners and from policemen (often immigrant men). Responsibility for the matron gave CWC members cause to visit the jails as well as to follow jailed women's cases through court proceedings. They observed firsthand the treatment of poor women and girls in Chicago courts as defendants, witnesses, and victims.

These experiences underlay the CWC's decision to create the Protective Agency for Women and Children in 1885. The PAWC announced as its objective: “To secure justice for women and children, to give legal counsel free of charge, and to extend moral support to the wronged and helpless.” Significant to notice here is that the PAWC limited its clientele to women. In fact, gender was fundamental to how members of the PAWC viewed themselves, constructed their roles and duties, and defined the problems that they sought to solve. According to the PAWC, elite and middle-class women had a unique responsibility to protect poor and working-class women from a host of dangers and injustices. Central to the PAWC's ideology was the argument that men as a whole had failed to create a moral and just society. Instead, men had constructed a world that was rife with injustices to women and governed by a corrupt political system in which men put self-interest before the public good.

Charlotte Holt was hired by the PAWC as the organization's superintendent. She ran the office and interviewed women who sought aid. She and her assistants, board members, and volunteers then would investigate cases and attempt to settle them. A male attorney would become involved only if a lawsuit was filed, which was a rare event. Each year, the number of clients to whom the PAWC ministered grew exponentially. In its first year, the PAWC handled 156 cases, in its third year 1,145, and by 1905 over four thousand. There were few rules regarding the types of cases that the PAWC would take. Rather it functioned flexibly and often improvised, meeting needs as they arose. Thus unlike the practice of most later legal aid societies, the PAWC did not have eligibility requirements, did not require that a client be worthy, and was entirely unconcerned that it might take cases
away from attorneys. As the PAWC’s superintendent stated, “We do not make any rules, but judge of each case as it comes to us.”

The two largest categories of cases were wage claims involving women whose employers had failed to pay them and domestic relations claims. In wage cases, Holt and other board members, using their influence and persuasion through letters and personal visits, pressured employers to pay such wages. This form of conciliation was used so often that the PAWC dubbed it “White Mailing.” The “white” was intended to imply that it was done in the name of justice, morality, and the public good, as opposed to blackmail which was done for self-interest.

The bulk of the PAWC’s domestic relations cases raised issues of abandonment and/or non-support of wives by husbands. These cases went to the heart of the PAWC’s belief in the absolute obligation of a husband to support his wife and children. In a typical case, a woman would appear at the PAWC’s office claiming that her husband disappeared weeks ago, leaving her penniless. Now the landlord was demanding rent, and the furniture was being repossessed. At times, the husband was close by living with relatives and at other times he had traveled far away. Often the wife would have some sense of where the husband was staying and where he worked. The PAWC would take the case, search for the husband, threaten him with a lawsuit for failure to support, and collect support payments for the wife. If the husband did not agree to pay, the PAWC often would convince his employer to pay wages directly to the PAWC for the benefit of the wife. Actions such as these combined the threat of litigation with public humiliation by making visible a man’s failure as a breadwinner. In the small number of cases where these methods failed, the PAWC might file a lawsuit against the husband for non-support. Meanwhile the PAWC also would negotiate with the landlord and furniture dealer for lower or postponed payments. The PAWC rarely initiated lawsuits and this was for good reason. A lawsuit would require that the PAWC’s male lawyer become involved. Even more important, the PAWC had little faith in the courts and did not believe that courts could actually deliver justice.

The PAWC’s vision of legal aid went well beyond representing plaintiffs in claims for monetary damages. Rather the PAWC devised for itself the mission of overseeing the court system’s treatment of poor and working-class women’s cases involving sexual assault. The PAWC declared that they intended to protect such women from a legal system that too often failed to take seriously cases in which women made claims of rape or sexual abuse. Rather, courts and the state dis-
missed charges, charged defendants with minor offenses, or even found defendants innocent in cases where significant proof of abuse existed. The PAWC argued that defendants’ lawyers endlessly delayed cases and inappropriately influenced judges. If a trial occurred, the defendant’s lawyer humiliated the victim by attacking her character and chastity. Likewise the state’s attorney, who was at best overworked and apathetic, could not be relied upon to prosecute cases fully.

Leaders of the Agency also believed that the court system was filled with justices of the peace and police magistrates who had obtained their appointment through political connections and were often corrupt. By contrast with corrupt non-elite justices of the peace, police magistrates, and lawyers, PAWC members considered themselves more competent and certainly more virtuous. In 1887, the PAWC confidently wrote a letter to state appellate judges regarding the deplorable state of the lower courts. The letter declared, “We have had cases in which we believe political influences have governed the Justices. We have had cases in which sympathy with vice seemingly decided the question. We have had cases in which the attorney for the accused controlled the Justice, and it was deemed impossible to secure a fair hearing.” They further complained of intentional delays, mind-numbing technicalities, discourteous treatment by court personnel, crowded courtrooms, and magistrates’ and court officers’ lack of sympathy with or concern for poor women. The letter urged the appellate justices to appoint only the most qualified attorneys to judicial positions. Regarding the issue of qualifications, the PAWC’s complaints were laden with contradictions. Even its most powerful and active members did not have formal legal training, and the PAWC’s mission was to exert their own influence over judges.

Part of what the PAWC found so objectionable was that police magistrates and other lower court judges were not only deeply ensconced in politics but were also non-elite, often immigrant men. The PAWC’s attack on court officials reflected their larger fear of the power that immigrants and non-elite men, through political connections and the system of Chicago’s ward bosses, had obtained. By contrast with the supposedly illegitimate power exercised by court officials, the members of the PAWC saw themselves and the power that they exercised to be earned, natural, and above reproach.

When the PAWC learned about a case of sexual violence, it became involved in multiple ways, including conducting its own investigation, gathering evidence, and speaking with judges and attorneys. At times, PAWC members would pressure the state’s attorney into allowing the
PAWC’s own attorney to prosecute cases. In their own words, they would act “the sister’s part.” One of the PAWC’s best-publicized and most visible tactics was to appear *en masse* in courtroom proceedings involving cases of sexual assault. In doing so, they functioned as judicial watchdogs whose presence was intended to shame court officials and lawyers into proper behavior. PAWC members walked a fine line in assuming this role, as truly respectable women rarely appeared in court, which all recognized as a masculine space.

Chicago’s police courts were rough-and-tumble places—crowded, noisy, filled with smoke, and teeming with defendants of all sorts. These were hardly places where ladies appeared. Responding to the PAWC’s actions, some court officials declared that the courts, especially police courts, were not an appropriate place for respectable women. Such judicial opprobrium only increased the PAWC’s tenacity and paradoxically augmented the impact had by the public nature of their protests. As the PAWC explained, “The presence of a delegation of reputable women, women of social position and influence, changes the moral tone of Police court, and imparts courage to a timid girl, whose very innocence confuses her, in the presence of so many strange men.”

As PAWC members invaded the courtroom, they also began to question substantive and evidentiary laws regarding sex crimes. Particularly infuriating was how defense lawyers raised issues of a victim’s consent and used past sexual conduct to demonstrate consent, even when crimes involved girls. The PAWC strongly condemned as hypocritical the double standard that permitted men to have sex outside marriage while condemning women who did so. Connecting this understanding to the legal arena, they sought to make a woman’s chastity and morality irrelevant to the question whether she was the victim of a sex crime. As members continued to attend court, they began to assert that the courts’ unfair treatment of women in cases regarding sexual violence was not caused only by individual men’s behavior. Rather, the PAWC insisted, this unfair treatment was engrained into law and required the enactment of new laws that would exclude evidence of a women’s chastity or previous conduct. It explained, “[I]mmorality should be no hindrance to legal rights in one sex more than the other.” It also campaigned to raise the legal age of consent, which in Illinois was ten for a girl. Laws raising the age of consent went hand-in-hand with reforming evidentiary rules and burden of proof standards, as statutory rape made questions of consent and a girl’s character and past sexual conduct moot. As the PAWC understood, such reformed laws removed a judge’s discretion and further controlled defense attorneys’ behavior.
Significantly, the PAWC did not conceptualize its legal work as distinct from its other work, which included providing non-legal advice, giving financial aid, locating lodgings, finding employment, and seeking medical services for its clients. It would have made little sense to the women of the PAWC to believe that the purpose of legal aid was simply to provide their clients the ability to go to court separated from a concern with substantive justice or material well-being. Moreover, they claimed, the PAWC provided its clients with “self-respect” and “self-dependence.”

The women of the PAWC also tended to accept the stories told by those women seeking their help. In other words, they presumptively believed their clients rather than finding their stories suspect. Moreover, they appreciated the importance of allowing clients to tell their stories slowly, which they asserted “busy lawyers would not bear.” As they recognized, many women who sought help did not have legally cognizable claims. But they believed that client narratives had value in and of themselves. “Many a tale of woe is told in our office, the mere listening to which by sympathetic and intelligent women is all the help possible. It is astonishing how grateful some of these women are for the opportunity of telling their trials to such listeners.” For a poor woman to tell her story to a middle-class or wealthy woman and to have her listen to and acknowledge her story must have given the poor women a sense of empowerment and agency.

Like attorneys, volunteers and employees of the PAWC treated all conversations with clients as confidential, often refusing to write or speak about individual cases. As Holt wrote, “Much of our work is of a confidential nature, and as our aim has always been to encourage women to come to us for advice and counsel, it has been one of the essential stimulants to them to be assured of the strictly private nature of all work that could be kept private.” Thus the Agency never publicly discussed its cases in any detail, even in its fund-
raising materials. By contrast with a variety of reform organization, especially those related to women, the PAWC eschewed melodramatic narratives of seduction and betrayal of young women. In their view, such stories and issues were so serious that they needed to stand outside popular discourse. They were not to be traded upon and instead were to be treated as precious.

Early in its history, the PAWC’s members correctly understood their power as coming from their class and social position. As time passed, they began to base their claims to expertise and authority on their growing legal knowledge and experience. They proudly proclaimed that the bench and the bar recognized and appreciated their expertise. The PAWC’s relationship to judges and attorneys was complicated, because they simultaneously looked down on many lawyers and judges while still longing for their acceptance and basking in their compliments. When long-time officer and board member Mary Potter Crane died, the PAWC boasted that “she had a judicial mind, and was always welcome at the State’s Attorney’s office, and her advice and counsel in difficult cases . . . were frequently sought by attorneys.” Likewise, one board member wrote that Charlotte Holt “has so won the respect and confidence of the courts that whatever case she presents is sure of respectful hearing.” The PAWC was also particularly proud when, in the late 1890s, they received requests from judges to have the PAWC station a representative in every police court to handle cases involving women, an affirmation of the PAWC’s importance and its members’ legal and practical expertise.

The work of the PAWC had lasting influence not only in shaping the idea and practice of providing organized legal aid to the poor, but also in building Chicago’s specialized courts, including its juvenile and domestic relations courts. A number of women who were officers of the PAWC played significant roles in the creation of these courts and the PAWC may have functioned as a model for such courts. Both of these courts were intended to move away from an adversary model of law and sought to minimize the role of lawyers. Likewise, tremendous discretion was vested in social workers, often women, whose job was to understand holistically those who appeared before the court. They were to use such knowledge to fashion individual solutions and such courts were intended to be flexible institutions not bound by strict understandings of the rule of law.

The PAWC was an extraordinary institution. At a time when only a miniscule number of women were lawyers, it created a space in which women provided legal advice to
other women. Situated within a thick network of women’s clubs, the PAWC expanded its activities to provide a wide range of legal services to women, and it refused to make hard distinctions either between the types of cases that it would handle or between legal versus non-legal cases. In 1905, the PAWC became the Chicago Legal Aid Society and its vision of legal aid as part of a continuum of care became the hallmark of a Chicago-style of legal aid which is still with us today.

Felice Batlan earned her J.D. from Harvard and spent a decade working in New York in the financial services industry. She then earned her Ph.D. in history from NYU. She specializes in both the regulation of financial markets and in nineteenth and twentieth century U.S. legal history with a focus on women and gender. She has published widely in law reviews, history journals, and anthologies. This is an excerpt from her forthcoming book Inventing Legal Aid: Lawyers, Social Workers, and the Poor, 1863–1960.

Sources and Further Reading
- Protective Agency for Women and Children, Annual Reports of the PAWC, 1886–1905.
When Chicago-Kent’s predecessors were founded in 1888 there were no e-commerce, wireless access to media, e-mail, Facebook friends, or airline delays. That does not mean, however, that people did not shop remotely, enjoy entertainment, communicate with friends, or travel. They just did them in other ways, all of which sometimes spawned disputes, some of which found their way into the courts. What follows is a story of the dreams of 125 years ago. The characters are fictional. What they talk about is not.

* * *

Annie Morton, 22, had just finished playing “Now Where Did You Get That Hat?” on the piano in the parlor of the rooming house at 2210 South Prairie Street in Chicago.

“I should like to have one just the same as that!

“Where’er I go, they shout ‘Hello! Where did you get that hat?’” she sang.

Patrick Boland, still dressed in his telegraph messenger’s blue uniform with red trim, sat on the couch by the piano and applauded. His cap with a prominent brass number “79” sat on the table beside him.
Annie giggled and then looked at Luther Wardell, who was sitting in a plush chair beside the couch. “What’s the matter, Luther?” she asked. “You don’t like it? It’s one of the most popular songs this year.”

“Oh, I’m sorry!” Luther said. He plucked at his blue denim trousers. “I enjoyed it. I was just thinking while I listened.”

“About the strike?” Patrick asked.

“Yeah. I think I’m just going to go home and help work the farm. I didn’t think they’d fire all of us. Who knew that they’d be able to get hundreds of strike breakers to work as switchmen and brakemen within a week.”

“That’s the CB&Q Railroad for you,” Patrick said. “They’re even nastier to their passengers than to the brakemen. They’re tough.”

“Everyone is tough,” Luther responded. “I’m sick of it. You come to Chicago to make your fortune, and everyone holds you down. There are no decent jobs.”

“Sure there are,” Patrick said. “I’ve got one, with American District Telegraph Company. When I was started, at age twelve, the pay was $17 per month. Now, I’m one of about one-hundred boys employed, most in the La Salle Street central office, but I’m up to $20.”

“Oh, we know, we know,” Luther said. “Seven long years you’ve been telling us your boring stories about it.”

“It’s not boring at all. It’s exciting,” Patrick said, glancing at his cap proudly and determined to gain the upper hand against Luther. “We’re allowed to take on special errands for our customers. One guy who owns the livery stable up by the river paid me two dollars to follow his wife and report to him that she had spent a good part of her day with one of the stable boys.” He was disappointed by Annie’s lack of reaction.

“I’ve heard that Western Union pays better,” Annie said. “They have about 140 boys, about half of them working out of the main office at La Salle and Washington Streets.” Annie liked to tease Patrick almost as much as she liked playing music.

“It’s not so bad,” Patrick said. He liked for Annie to think well of him. “We wait on benches at the office and get called in turn, according to when we went out last. Almost everyone rides a safety bicycle now. When a customer rings his call box, we ride out and pick up a handwritten message and bring it back for transmission.”

“What’s a safety bicycle?” Luther asked.
“You are a farm boy,” Patrick laughed. “You ought to get one. They’ve been out for three years. They’re much better than the old kind with a large front wheel and a smaller rear one. These new ones have pneumatic tires.”

“I can’t afford one now,” Luther said glumly.

“I don’t like it that we have to pay for our own uniforms,” Patrick admitted. “They cost $12, and they take it out of our pay.”

“I bet you have to buy your own bicycle, too,” Luther said. “That’s not for me. I’ve got loans to pay back now.”

“You had to borrow money only because you lived so high during the strike. You should have saved up beforehand,” Annie said.

She shifted her attention back to Patrick. “You’re a thing of the past,” Annie said. “What do people need with telegraph boys when they can just use the telephone?”

“Don’t be ridiculous,” Patrick said. “Telephones will never replace the telegraph. Everyone knows that. Did you see the article in the January 1, 1888, Chicago Daily Tribune?”

“It was headlined, ‘Telephones a Nuisance.’ It quoted the Reedy Elevator Manufacturing Company as saying, ‘The service we receive is not at all satisfactory, and if all instruments could be removed we would have ours fired at once. Would much prefer the old system of messengers, letters, or dispatches, as frequent costly errors are made by telephone, which you cannot trace to any reliable party. We don’t think the telephone company has sufficient assistance in their offices to wait on calls promptly. Frequently we ring three or four times before we hear the lazy “hello?” and more frequently they reply, “Busy now—call again,” or “Busy; will ring you up when through.” But they nev-
er ring. We consider it very poor service. But as our neighbors and customers have the phone we must keep up with the procession.”

“That’s not fair,” Annie said. “I work very hard. So does everyone else.”

“We’re all getting screwed,” Luther said. “And now, that robber baron, Benjamin Harrison, stole the election from Grover Cleveland.”

“He’s not a robber baron,” Annie said. “I wouldn’t think you would favor Cleveland. He vetoed pensions for veterans. He’s not for the common man. And he’s a sympathizer for the South. He would have never supported the women’s suffrage movement. We’re poised to get something done, now, on the amendment. The two main organizations merged last year.”

“Women’s suffrage—pshaw!” Luther said. “Next thing they’ll want is to shut down the saloons.”

“It would help you save money for a bicycle, if they were shut down,” Annie said. “Anyway, I’m going to do my part. I’m going to become a lawyer.”

“A lawyer!” Patrick said. “You can’t be a lawyer.”

“Yes I can. Did you see the story in the September 7, 1888, edition of the Chicago Daily Tribune? Miss Emma Baumann and Miss Ada Dalter applied for admission to the Chicago Evening Law School. Several of the seventy young men already enrolled objected and went to Judge Moran, one of the founders, who rebuked them and said that the precedent was well established that women could be admitted to the bar. I’m going to apply.”

“Even if they let you in,” Patrick said, “and even if you get admitted to the bar, no one will give a girl lawyer any work.”

“I hope you won’t borrow any money for that,” Luther said, laughing. “You’d be better off borrowing it to go to saloons.”

“I’ve already got a promise of some work,” Annie said. “One of the mechanics at the telephone company wants me to help him get a patent for his idea for a new switchboard apparatus. It’s a good idea. The days of making a telephone call by signaling a switchboard operator and giving her the name of the person to be called are over. They have just introduced five-digit numbers to accommodate the rapid growth in subscribers. Now automatic dialing is being introduced in Chicago—”

“Because of the rude and lazy operators,” Luther said.
“What does this guy look like?” Patrick asked.

“Jealous?” Annie teased.

“Well, you ought to think about it,” Patrick said. “You’re on the verge of becoming an old maid.”

“And all the inventiveness is already producing lots of lawsuits—more work for lawyers,” Annie argued. “Alexander Graham Bell and Western Union are suing each other. Morse’s patent for the telegraph is always being challenged.”

“Keep your job, but organize,” Luther said. “Launch a strike against all this mechanical foolishness, taking away jobs. It was bad enough on the railroad.”

“Oh, right,” Annie said. “It’s a wonder you still have all your fingers. They need to make the Janney automatic coupler mandatory.”

“I guess I don’t have to worry about that anymore,” Luther said, flexing the fingers on both hands and looking at them. “That’s another thing a union could do for us. The most basic goal, though, is to insist on what the Congress just did for mail carriers: making eight hours a full day of work, with overtime pay for hours worked over eight.”

“That’ll never happen,” Patrick declared. “And they shouldn’t have done it for the post office workers. They don’t work as hard as we do, and we damn sure don’t have a deal like that.”

“They deliver mail twice a day to residential customers and four times a day to businesses,” Luther said.

“It would be quicker if they rode bicycles, like we do,” Patrick said.

“Just wait,” Annie said. “Bicycles aren’t the future. Self-propelled carriages are. The Wisconsin legislature just awarded a prize for a steam-propelled carriage that completed a race from Green Bay to Madison, a distance of 201 miles at an average speed of six miles per hour.”

“That was nine years ago,” Luther said. “And nothing has come of it. There’ll be flying machines before horses and railroads need to be afraid.”

“Better try to get a union for the horses,” Annie said. “There will be flying machines. Four years ago, a man named John Joseph Montgomery made a glider flight near San Diego.”

“Yeah, but you can’t put a steam engine in a glider,” Patrick said. He laughed. “If they could, Luther, you can make sure they hook them together with automatic couplers. A
flying train!”

“I’m telling you,” Annie said. “People are inventing things all over the place. Pretty soon, I won’t have to learn the new songs to play them on the piano. Thomas Edison just got a patent for a machine that plays music from grooves etched on a wax cylinder.”

“Well, I guess they can stop work on the Auditorium Theatre,” Patrick said, “even though it’s scheduled to open next year. President Harrison and Vice-President Levi Morton are supposed to come to the grand opening. They’ll be disappointed to hear that all the operas and plays are going to have to find somewhere else to perform in Chicago. Oh—I forgot—there won’t be any operas and plays. They’ll be a thing of the past. Everyone will stay at home, sit on the couch and listen to ‘phonographs.’ They’ll all get fat, and no one will learn how to play the piano anymore.”

Annie ignored him. “And he just applied for another one: an ‘Optical Phonograph,’ capable of showing pictures in full-motion. Already, people are excited about the Kodak, the first roll-film camera just patented. And a man named Herman Hollerith received a patent for an automatic tabulating machine. You punch numbers into paper cards and his machine sorts them.”

“You must have gotten into your mother’s laudanum,” Patrick said. “Next thing you’ll predict is sending telegraph signals through the air, without wires.”
“It’s possible,” Annie said. “An English scientist, James Clark Maxwell, has already proven mathematically that electricity can be transferred through free space, and a German, Heinrich Hertz, has demonstrated it in his laboratory.”

“Things are changing pretty fast,” Luther said, showing a spark of enthusiasm for the first time. “There sure is a lot of stuff being invented on the railroads,” Luther said. “The Janney automatic coupler is one; airbrakes before that. Now, people are working on automatic signaling systems and even on ways to replace the steam locomotive with some kind of engine that burns fuel inside the cylinders. I’ve been coming up with some ideas of my own before I got caught up in the strike.” A hint of sadness returned to his face. “One thing I’ll miss is all the machinery.”

He thought for a moment and then rushed on: “Think about what Old Man Sears and his partner Roe-buck have already done. Their new ‘Sears & Roebuck’ catalog was just published from their new office on Homan Street. It advertises watches and jewelry, which can be purchased by mail. ‘Book of Bargains: A Money Saver for Everyone,’ ‘Cheapest Supply House on Earth,’ and ‘Our trade reaches around the World,’ he brags. People are ordering them like crazy. There’s no reason they can’t include other stuff, like sewing machines, sporting goods, musical instruments, saddles, firearms, buggies, bicycles, baby carriages, eyeglasses, clothing . . .” He looked at Patrick. “Or safety bicycles,” he said.

“She must have given you some of the laudanum,” Patrick said. “Steam powered gliders linked with automatic couplers, card sorting machines linked with vapor telegraph signals. Just imagine!” Patrick chuckled. “For that matter you could order from the catalog with a vapor telegram. Old Man Sears would track the orders by sorting the cards, and deliver the stuff by steam powered gliders and steam carriages.”

“I tell you what, Luther,” Annie said. “Don’t go back to the farm. Stay here, with us. I’ll become a lawyer and help you get patents on all the stuff you’ll invent—if you keep all your fingers. Go talk to Reverend Frank Wakeley Gunsaulus, the minister at Plymouth Congregational Church. He’s already trying to persuade Philip Armour to extend his grant for the Sunday School that Julia Beveridge is running to establish a new kind of school where students of all backgrounds can prepare for meaningful roles in a changing industrial society, to study mechanics, chemistry, architecture, and library science. They already have something like that in Boston. It’s named the Massachusetts Institute of Technology—‘Boston Tech,’ most people
Henry H. Perritt, Jr.

Henry H. Perritt, Jr. has been a law professor for 32 years and served as Dean of Chicago-Kent from 1997 to 2002. He has worked on the White House Staff and was the Democratic candidate for the U.S. House of Representatives in the Tenth District of Illinois in 2002. He has written 15 books, 80 law review articles, four plays including a musical, and five novels. He is a sailor and a helicopter pilot.

“Who knows?” Luther added. “Maybe we’ll get married.” He leered at Patrick.

“Maybe,” Annie said, “Even though Patrick is cuter in that uniform. Put on the hat, handsome.”

“Ha!” Luther said. “I can just see it. He’ll still be riding his safety bicycle around the streets of Chicago asking people if they want to send a telegram, and they’ll say, ’What’s a telegram?’” Annie laughed. Patrick tried to smile, the hat halfway to his head.

“And then,” Luther said, looking at the hat and laughing harder. “They’ll say, ‘now where did you get that hat.’”

Luther looked at her.

“We’d make a good team,” she urged, with a quick glance at Patrick.

“Who knows?” Luther added. “Maybe we’ll get married.” He leered at Patrick.

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Advertisement for the Kodak camera, c. 1890.

PRIVACY & TECHNOLOGY:
A 125-YEAR REVIEW

Lori Andrews

The year the Chicago-Kent College of Law was founded, a new consumer product arrived on the scene: the portable camera. Before then, taking someone’s photo was a big deal. A person would get dressed up and go to a studio. Photos were not taken without a person’s permission. But the portable camera changed all that—and in the process led to the development of legal rights of privacy that endure today.

An 1890 newspaper article warned:

Have you seen the Kodak fiend?
Well, he has seen you. He caught your expression yesterday while you were innocently talking at the Post Office. He has taken you at a disadvantage and transfixed your uncouth position and passed it on to be laughed at by friend and foe alike. His click is heard on every hand. He is merciless and omnipresent and has as little conscience and respect for proprieties as the verist hoodlum. What with Kodak fiends and phonographs and electric search lights, modern inventive genius is certainly doing its level best to lay us all out bare to the gaze of our fellow-men.

Like Facebook, Twitter, Instagram,
Snapchat and YouTube today, the portable camera fundamentally changed the way other people and institutions could peer into people’s lives. But the issues raised by today’s cutting-edge technologies are similar to those raised by the Kodak fiend.

In the late 1800s a lawyer, Samuel Warren, married the daughter of a Senator. He was unprepared for the incessant media attention to their union, fueled by the newly-developed portable camera. After his children were born, paparazzi would snap photos of the babies when the family took walks down the street. Annoyed, he thought about what legal recourse he might have. Were there any legal precedents for a “right to be let alone”? He pondered the issue with a friend from law school, Louis Brandeis. They could have suggested that people no longer had a right to be left alone because technologies could now track and record what they did. Instead they noted that the intrusiveness of technologies like the portable camera made it even more important for people to have control over information about themselves. “The intensity and complexity of life attendant upon advancing civilization has rendered necessary some retreat from the world,” they wrote, “so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasion upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.”

Their article, “The Right to Privacy,” was published in 1890 in the Harvard Law Review. They demonstrated that a privacy right had a basis in fundamental Constitutional values, such as the right to refuse to testify against oneself, and common law principles, such as the “right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.”

“The protection afforded to thoughts, sentiments, and emotions . . . is merely an instance of the enforcement of the most general right of the individual to be let alone,” they said. “It is like the right not to be assaulted or beaten, the right not to be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed.”

Their ideas were incorporated into law through the creation of four distinct legal actions for invasion of privacy: for intruding on someone’s seclusion, for publicly disclosing private information, for putting a person in a “false light” in the public eye, and for appropriating someone’s name or likeness for commercial use. They advocated that information about and photos of people could be disseminated if they had consented or if the matter was of legitimate public interest. Since then, the fundamental Constitutional right to privacy has additionally been in-
interpreted to include a right to make important personal decisions, such as whether to use contraception or whether to homeschool your child.

The mode of analysis of the two Boston lawyers from a century ago has been used to analyze each new technology that has reached the courts. How does it affect the individual and society? How do fundamental legal values help to protect the individual when the technology is used? As each new technology has been adopted—including forensic technologies, medical technologies, and computer technologies—the application of fundamental values has been used to protect, and often expand, people’s privacy rights. Sometimes courts, lacking the comprehensive analysis of technology like the one undertaken by Warren and Brandeis, took missteps when they first encountered a technology. But ultimately, privacy prevailed.

When Charles Katz entered a public phone booth in 1965, he never imagined that cops would tap the phone line. The cops charged him with placing illegal bets—and he protested that they had infringed the Fourth Amendment limits on governmental intrusion into a person’s private life. The trial judge said that wiretapping didn’t violate the Fourth Amendment because the Founding Fathers drafted the Constitutional provision to honor people’s privacy in their homes. In this case, the police hadn’t trespassed into his home. In fact, there had even been a Supreme Court decision on the matter, back in 1928, when cops had used earlier wiretap technology to learn that someone was violating Prohibition.

In that earlier case, Olmstead v. United States, 277 U.S. 438 (1928), the five-justice majority of the U.S. Supreme Court had held that a

“The Kodak Fiend,” Hawaiian Gazette, December 9, 1890, Chronicling America Collection, Library of Congress.
bootlegger’s privacy hadn’t been invaded and he hadn’t been forced to incriminate himself because, although police had recorded the calls he was making from his home, the wiretap equipment had been placed on phone lines outside his home. Writing for the dissent was none other than Louis Brandeis, who was then a Supreme Court justice. He argued that fundamental values had to be applied to new technologies. He noted that when the Constitution was adopted, “force and violence”—torture and breaking into people’s houses—were the only ways that the government had to obtain private information about people. The Constitution protected against force and violence. But, said Brandeis, “discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet. . . . The progress of science in furnishing the government with means of espionage is not likely to stop with wiretapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home.” According to Brandeis, the Constitution’s fundamental value of privacy and the right not to incriminate yourself needed to be applied not only to “what has been, but of what may be.”

Forty years after the Olmstead decision, when Charles Katz’s case was appealed to the U.S. Supreme Court, the majority of the justices applied Brandeis’s logic. Even though Charles Katz was using a public phone booth, the Court said that the Constitutional right of privacy “protects people, not places.” What a person seeks to preserve as private, even in a public place, may be Constitutionally protected.

The Supreme Court protected Katz’s privacy by enunciating a legal test that is still used today: Did the person have an “expectation of privacy” and was that an expectation that society was willing to protect? As a result, police need to get a warrant, based on probable cause, before they tap someone’s phone.

The march of law enforcement technology continued, and in 2001, a new forensic technology reached the court. A federal agent suspected Danny Kyllo of growing marijuana. Since growing pot indoors requires high-intensity lamps, the agent sat in a car across from the home and used an Agema Thermovision 210 thermal imager to scan Kyllo’s home. The scan showed that the roof over the garage and a side wall of the home were relatively hot compared to the rest of the home and substantially warmer than neighboring homes in the triplex. The agent concluded that Kyllo was growing pot and convinced a judge to allow him to search Kyllo’s home. The agent found pot,
and Kyllo was convicted on a drug charge. Because the thermal scanner did not physically intrude on the house and did not show any private human activities, the trial court said that it hadn’t infringed Kyllo’s Constitutional rights.

The appellate court, too, held that Kyllo had shown no subjective expectation of privacy because he had made no attempt to conceal the heat escaping from his home, and “even if he had, there was no objectively reasonable expectation of privacy because the imager ‘did not expose any intimate details of Kyllo’s life,’ only ‘amorphous “hot spots” on the roof and exterior wall.’”

When the U.S. Supreme Court took the case, it reversed Kyllo’s conviction. “It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology,” wrote Justice Antonin Scalia. “Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.”

In 2012, the U.S. Supreme Court in United States v. Jones, 132 S. Ct. 945 (2012), assessed the use of a GPS tracking device installed on a car driven by Antoine Jones, a D.C. nightclub owner. Jones was the target of a narcotics investigation by police and the FBI. The Court held 9 to 0 that the twenty-eight-day warrantless use of the GPS violated the Fourth Amendment. In her concurrence, Justice Sotomayor pointed out how the fundamental right to privacy was salient even in today’s world. “GPS monitoring generates a precise, comprehensive record of a person’s public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations,” wrote Sotomayor, adding, “People disclose the phone numbers they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries and medication they purchase to online retailers. . . . I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year.” Justice Sotomayor also was concerned that “[a]wareness that the government may be watching chills associational and expressive freedoms.”

Contemporary medical technologies, such as genetic testing, have also raised disputes about the reach of privacy principles. When genetic testing became possible, people were tested without their knowledge or consent. Doctors and researchers would use blood that people had
given to labs for routine cholesterol or pregnancy tests and perform additional testing, without the person’s consent, for everything from breast cancer to Alzheimer’s disease. The argument was, what’s the harm? The person had already been pricked; the additional tests involved no additional intervention. And even if the blood was collected anew—as in a forensic DNA test—blood tests were safe and noninvasive.

But then employers and insurers started discriminating against healthy people based on their genetic predisposition to future disease. With certain genetic mutations, for example, some women had a higher risk of developing breast cancer than other women. Even with those mutations, half the women would not develop breast cancer. Some women didn’t want to know whether they had the mutations or not. They said they would feel like they had a time bomb ticking away inside them. But employers and insurers wanted that information to make their decisions. There were no legal limits on what could be done with that information.

During routine physicals, an employer in California asked the company doctor to surreptitiously test the female employees to see if they were pregnant and the African-American employees to see if they carried the sickle cell anemia gene mutation. The results were not disclosed to the employees, but they were put in to their personnel files.

When the existence of the files leaked, the employees sued. The trial court dismissed the case, saying that the test was a modest intrusion, no more than what people usually undergo in a physical. But the appellate court held that genes contain personal information that is protected by the fundamental right to privacy. “One can think of few subject areas more personal and more likely to implicate privacy interests than that of one’s . . . genetic make-up,” wrote the Court of Appeals for the Ninth Circuit in Norman-Bloodsaw v. Lawrence Berkeley Laboratory, 135 F.3d 1260, 1269 (9th Cir. 1998). Since then, Congress has passed a law, the Genetic Information Nondiscrimination Act, specifically prohibiting employers and insurers from discriminating against people based on the results of genetic tests. People’s privacy rights include the right not to have genetic information generated about them or used against them.

Even computer technologies that collect data about people have been subject to a fundamental rights analysis. When Judge Robert Bork was nominated for the U.S. Supreme Court in 1987, Michael Dolan, a Washington, D.C. newspaper reporter, attempted to discredit him by publishing his video store rental records. In today’s world, Judge Bork’s choices seem tame: British movies, Bond movies, costume dramas. The reporter was disappointed not to see legal movies such as 12 Angry Men
or To Kill a Mockingbird. Instead, Judge Bork had rented “only one truly court-related tape”: The Star Chamber.

Bork did not get the Supreme Court nomination. But the publication of his video rentals did get the attention of Congress. “It is nobody’s business what Oliver North or Robert Bork or Griffin Bell or Pat Leahy watch on television or read or think about when they get home,” said Senator Pat Leahy. “In an era of interactive television cables, the growth of computer checking and check-out counters, of security systems and telephones, all lodged together in computers, it would be relatively easy at some point to give a profile of a person and tell what they buy in a store, what kind of food they like, what sort of television programs they watch, who are some of the people they telephone. . . . I think that is wrong. I think that really is Big Brother, and I think it is something that we have to guard against.”

Senator Paul Simon agreed. “There is no denying that the computer age has revolutionized our world. Over the past twenty years we have seen remarkable changes in the way each one of us goes about our lives. Our children learn through computers. We bank by machine. We watch movies in our living rooms. These technological innovations are exciting and as a nation we should be proud of the accomplishments we have made. Yet, as we continue to move ahead, we must protect time honored values that are so central to this society, particularly our right to privacy. The advent of the computer means not only that we can be more efficient than ever before, but that we have the ability to be more intrusive than ever before. Every day Americans are forced to provide businesses and others personal information without having any control over where that information goes. . . . These records are a window into our loves, likes, and dislikes.”

The legislators applied the fundamental Constitutional right to privacy and passed a law in 1988 forbidding disclosure of people’s video rental records (or, in this day and age, what they watch on Netflix). The bill prohibits video stores from disclosing “personally identifiable information”—information that links the customer or patron to particular materials or services. In the event of an unauthorized disclosure, an individual may bring a civil action for damages.

The concerns raised by the disclosure of Bork’s video records are mild when compared to today’s digital invasion of privacy. A billion people have joined Facebook, a population only slightly smaller than either of the two largest countries, India and China. Marketing companies, political candidates, law enforcement agencies, employers, and other social institutions peer through
the keyholes of people’s lives by assessing the information and photos that individuals post and that third parties post about them. Even more troubling, data aggregators use surreptitious tracking mechanisms to follow people across the web and use that information to make judgments about them. If a woman does a Google search for old guitars and then seeks a credit card, she will be offered a credit card with less advantageous terms—not because her credit is bad, but because garage rock bands in general are less likely to pay off their credit cards. If she has a photo of herself with a wineglass in her hand, she may be denied a job. Seventy-five percent of employers look at people’s social network presence; one-third reject people who have alcohol in a Facebook photo. And, as with past technologies, courts and legislatures have been slow to protect privacy, initially holding that privacy rights are lost “on affirmative keystroke.”

In just the past two years, however, courts and lawmakers have begun to protect freedom of expression and privacy on social networks. In Layshock v. Hermitage School District, 650 F.3d 205 (3d. Cir. 2011), and J.S. v. Blue Mountain School District, 650 F.3d 915 (3d. Cir. 2011), the Third Circuit Court of Appeals held that public high school students had a First Amendment right that covered their posts on social networks even if those posts were critical of school administrators. And a few state legislatures—including that of Illinois—passed laws prohibiting employers from asking for the social network passwords of an employee or a job applicant. That Illinois law went into effect 125 years after Chicago-Kent College of Law opened its doors. The Illinois governor came to the campus to sign the bill into law.
and was introduced by a Chicago-Kent student who was working on internet privacy issues.

The Warren and Brandeis article not only created a legal framework that still applies today to safeguard people's privacy, it also established a method for judging new technologies. The authors analyzed how fundamental values inherent in the U.S. Constitution and common law provide a basis to make judgments about new technologies. They also assessed how new technologies affected individuals, institutions, and the larger society. Warren and Brandeis did not suggest that individuals adapt to each new technology, but instead advocated that society assure that each technology was employed in a way that was consistent with fundamental societal values.

When Brandeis was appointed to the U.S. Supreme Court 26 years after his privacy article appeared, he continued to champion the application of Constitutional values to modern technologies. He also wrote about the nature of a Constitution. "Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of Constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.’ The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a Constitution, therefore, our contemplation cannot be only of what has been but of what may be.”

When the law school opened its doors 125 years ago, it would have been difficult to imagine the high-tech world of today. But by learning about cutting edge technologies as well as fundamental legal principles, the students at IIT Chicago-Kent College of Law have been well educated, in every era, to face their generation's legal challenges.

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As 1888 drew to a close, John Montgomery Ward stood atop the world of professional baseball. The star shortstop had just led the New York Giants to the National League pennant, followed by a triumph over the St. Louis Browns of the rival American Association in what even then went by the inflated title of baseball’s “World Series.” A dominating pitcher early in his career (he threw the second perfect game in major league history), an arm injury forced Ward to recreate himself as an infielder, where he became one of the best fielders and hitters of his era. He was lauded in the press as a ballplayer with “few equals and no superiors,” and “by long odds the most popular player in the profession.” These accomplishments would eventually earn Ward a place in the Baseball Hall of Fame.

Ward’s skills on the ball field were only a part of what made him such a remarkable figure. Contemporaries and historians alike have struggled to describe him. One adjective-happy biographer took the saturation approach: he was a “jug-eared, willowy, peach-fuzzed, overreaching punk” as well as “honorable, smart, and tenacious.” More admired than liked seems to have been the consensus view of Ward contemporaries. In a
profession not known for intellectualism, he stood out. Although Ward left school at the age of thirteen in order to pursue his baseball career, he eventually earned, in his spare time, degrees in political science and law from Columbia. He was said to speak five languages. A regular contributor to newspapers and periodicals, in 1888 he published *Baseball: How to Become a Player*, which he described as a “handbook of the game, a picture of the play as seen by a player.”

Ward was also a pioneering labor leader. In 1885, he established America’s first sports union, the Brotherhood of Professional Base Ball Players. Initially designed to help sick, injured, or hard-up ballplayers and promote professional standards, the Brotherhood quickly evolved into something approaching a craft union for ballplayers. Ward had forward-looking attitudes on race as well. At a time when the color line was hardening in American society, and organized baseball had become a whites-only affair, Ward urged the Giants to sign an African-American pitcher.

If all this wasn’t enough, Ward’s social life was also noteworthy. In 1887 he married a New York actress and socialite, Helen Dauvray, who also happened to be a passionate baseball fan. “Her tiny hands beat each other rapturously at every victory of the Giants and her dark eyes were bedewed at every defeat,” reported the *New York Times*. “But the thousands of spectators who observed Miss Dauvray’s emotions little suspected that one of the Giants had any precedence over the others so far as her affections were concerned.” She had donated the Tiffany trophy that went to the World Series champion; it was the “Dauvray Cup” that her husband brought home at the end of the 1888 season. In *How to Become a Player*, the ever gallant Ward included a chapter explaining the basics of the game “for the benefit of those ladies whose escorts either cannot, or will not, answer their questions.” He also offered advice for his gentleman readers: “Whoever has not experienced the pleasure of taking a young lady to her first game of ball should seize the first opportunity to do so.”

Life was not all three-hit games and celebrity life for the great Monte Ward, however. His relationship with Helen Dauvray was strained almost from the start. He was carrying on an affair, and she knew it; she wanted to return to the stage, and he didn’t want her to. They lived together for only a year and soon divorced.

His baseball career too was about to veer off in some unexpected directions. Following his World Series triumph, Ward captained a team of National League all-stars that traveled around the globe between October 1888 and April 1889 in an effort to promote the game overseas. It was a grand gesture, fitting for an emerg-
ing era of American nationalism and confidence on the international scene. But the world tour also helped set in motion one of the most significant upheavals in baseball’s history. The man who organized and led the tour around the globe was Albert Goodwill Spalding. Soon after they returned home, he and Ward would face off in an epic struggle for the future of the game.

Spalding, a star pitcher in his younger years, now owned the Chicago White Stockings of the National League in addition to a burgeoning sporting goods empire. The game never had a more effective and more passionate salesman. Baseball, he once wrote, captured the nation because “it is the exponent of American Courage, Confidence, Combative-ness; American Dash, Discipline, Determination; American Energy, Eagerness, Enthusiasm; American Pluck, Persistency, Performance; American Spirit, Sagacity, Success; American Vim, Vigor, Virility.” (Spalding also basically created baseball’s all-American birth myth, which conveniently featured a future Civil War hero, Abner Doubleday, in 1839 dreaming up the game in bucolic Cooperstown, New York. In fact, baseball had largely evolved from various children’s games; if it ever had a proper birth moment, it was among young professionals in 1840s New York City.) Spalding envisioned the world tour as an opportunity to sell two things he loved above all: the game of baseball and the equipment that bore his name. Despite his background as a player, and despite his overwrought romanticism about the national pastime, Spalding approached his role as a team owner from the perspective of the captain of industry that he had become: the players were employees, and comfortably paid ones at that; and it was the owner’s job to control costs and ensure a compliant workforce. Needless to say, he didn’t think much of Ward’s efforts with the Brotherhood.
The world tour had just reached Cairo, Egypt, in February 1889 when the players received news that, at their winter meetings in New York, the National League owners had adopted a major reform designed to reign in player salaries. They created a player classification system under which “Class A” players earned $2,500, “Class B” players $2,250, and so on, down to “Class E” players who earned $1,500. The classifications scheme took into account not only player ability, but also “conduct, both on and off the field.”

Ward, who had already established himself as his generation’s most outspoken critic of baseball’s distinctive labor practices, saw the plan as an affront to the players. What made working as a professional ballplayer different from any other occupation was the “reserve clause,” a provision in player contracts under which an owner could “reserve” a number of players when the term of their contracts ended. The clause prohibited the player from negotiating with another team unless his team released him. As professional baseball was controlled by an agreement between the teams under which each team agreed to respect the player contracts of other teams, the reserved player faced three options: sign a new contract at the terms dictated by the owner; hold out and hope for better terms; or stop playing baseball. Owners defended the reserve clause as essential to ensuring the stability of the game. It did indeed further this goal. But there was another reason, one they didn’t trumpet so proudly: it kept down player salaries. And here too it was effective. In the late 1880s, as club profits tripled, player salaries grew by only 30 percent, a fact at least partly attributable to the reserve system.

In 1887, Ward had a scathing attack on the reserve clause, titled “Is the Base-Ball Player a Chattel?” He compared the reserve clause to “a fugitive-slave law”: it “denies [the player] a harbor or a livelihood, and carries him back, bound and shackled, to the club from which he attempted to escape.” The remedy, according to Ward, was simple: get rid of “base-ball law” and allow “the business of base-ball to be made to rest on the ordinary business basis.”
When he learned of the owners’ classification plan, Ward was so incensed he threatened to abandon the world tour to come home and confront the owners. (The news that the Giants were trying to trade him only added to his frustration.) He suspected that Spalding had planned the entire trip just to get him and some of his allies out of the country in order to go forward with their plans. If this was indeed Spalding’s plan (and there is no evidence it was), it backfired, as the tour ended up giving some of the game’s top players long hours to share their grievances. The plan for the baseball revolution that would upend the game in 1890 might very well have been hatched in quiet conversation among the players while on Spalding’s world tour. Nearly all the players on the tour would join Ward’s revolt against the National League.

During the 1889 season, Ward began preparations for the creation of a rival major league, the Players League. Working in secret (he was, after all, still on the enemy’s payroll), he found financial backing and convinced many of his fellow players to commit to the new league. Some aspects of the Players League looked familiar. The players were familiar—the new league lured many of the best National League players to its rosters. And the cities in which they played were familiar—the seven cities in which their eight teams played were all cities that already had National League teams. But the business model behind the Players League was radically different from anything that had come before. Each club was run by an eight-man board, consisting of four players and four investors. The league was governed by a senate-like organization, with two representatives from each team (one elected by players, one by owners). Players had three-year contracts, and no reserve clause. Investors were promised the first $10,000 of each club’s net profit, with the rest to be divided among the players.

Spalding and the National League attacked the Players League. First, they turned to the courts: the Giants sued Ward for breach of contract. Ward had violated the terms of his reserve clause, they claimed, and they asked a New York state court to issue an injunction prohibiting Ward from playing for anyone else. The court denied the injunction. As the reserve clause failed to specify such essentials as Ward’s salary and the terms of the renewed contract, the judge concluded that it was too indefinite to be treated as a binding contract for the 1890 season. The court also raised the disturbing question of whether, assuming the reserve clause were read to constitute a binding contract for the following season, the renewed contract would also include a reserve clause. If so, the player would be tied to his current team for as long as the team desired, while the team could release
a player with only 10 days’ notice. This was rather absurd, according to the judge. “We have the spectacle presented of a contract which binds one party for a series of years and the other party for 10 days, and of the party who is itself bound for ten days coming into a court of equity to enforce its claims against the party bound for years.” The judge concluded that the reserve clause was unenforceable for “want of fairness and of mutuality.”

With the courts refusing to help, Spalding turned to public opinion. He pulled out all the rhetorical stops. What the players were doing was “secession,” a “revolt,” a “war”; the National League was confronting “hot headed anarchists” who were leading a “revolutionary movement.”

But the fall of the Players League after just one season came not from Spalding’s attacks in the press, nor from legal challenges. It came from the marketplace. The new league had the best players, but this was not enough. With three major leagues competing for a limited fan base, everyone suffered at the gate. At season’s end, when Spalding opened negotiations with Players League investors, he pointedly excluded Ward and any other players. “[T]he monied men met with the monied men,” as Spalding put it. The National League owners simply bought out their competition; several Players League clubs were integrated into a reconfigured National League. Ward’s revolution was over.

Ward returned to the National League, where he played four more seasons. He was still one of the best players in the league when he retired in 1894. He went on to be a successful lawyer, a gentleman farmer, and a top amateur golfer. Although he mended fences with organized baseball, his passion for the cause he had led never left him. In 1925, shortly before his death, he gave a speech—at an event to celebrate the National League, of all places—recounting the events of 1888–1890 in which he made clear that the war against the National League, while doomed, was justified.

For a brief moment, the Players League presented a radical alternative business model for professional sports, one in which the players and owners shared control of the game as well as its profits. With the failure of Ward’s baseball revolution, the owner-dominated system lived on. In the following decades, various teams would go to court to have the reserve clause enforced against players who had jumped their contracts (a relatively common occurrence any time there was a rival league that refused to abide by the agreement that controlled the baseball monopoly). Judges, with only the rarest of exceptions, sided with the players, often citing Ward’s case as authority on the matter. The reserve clause lived on, however, and it did so be-
cause the baseball monopoly, while periodically challenged, remained in place. As long as owners respected the contracts of their on-the-field competitors, they did not need the courts. For this reason, the most significant legal challenges to baseball’s unique labor practices came in the realm of antitrust, not contract law. But baseball law survived this challenge too, as the United States Supreme Court granted, and then twice reaffirmed, that federal antitrust law did not apply to professional baseball.

When change eventually came in the 1970s, it was at the hands of another organized players movement, but this time it was achieved not through a rival league but through labor negotiations (with a critical assist from a sympathetic arbiter). Today, major league baseball operates in a way that has some similarities to the core premise of the alternative model Ward had offered. The game is governed, in large part, through collective bargaining agreements between players and owners. With the skyrocketing of player salaries after the fall of the reserve clause, the game’s profits are far more evenly distributed between players and owners. It took almost a century, but John Montgomery Ward’s vision for major league baseball has, in some part, been realized.

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When the United States Congress enacted the first “antitrust” law in 1890 it was taking a shot in the dark. At the time there was no concept of “antitrust law”—i.e., a general legal regime intended to combat restraints on competition. Today more than 100 countries have such laws, including all significant participants in the global economy. Competition law has become a major factor in economic life throughout much of the world. U.S. antitrust law has played a central role in this remarkable evolution, and it is generally acknowledged to be the most important of these laws. It is the touchstone and frame of reference for international discussions, and it is often used as a model or at least a major source of guidance by other countries in developing their own competition laws. The story is extraordinary, intertwined with the roles of power and ideas and intertwined with the evolution of the U.S. and its role in the world. This brief essay sketches its trajectory. Chicago-Kent’s role as an educational institution tracks that trajectory.
I. A Shot in the Dark

This new type of legislation was a “shot in the dark” in the sense that few, if any, of the legislators had any way of knowing what consequences the legislation would have. They were “shooting” at something, but they didn’t know what they might actually hit. So what were they trying to do and why?

Antitrust law was, above all, a response to social turbulence and tensions. The United States in the 1880s presented a complex mixture of hope, fear and resentments. The terrible Civil War was a memory, but not a distant one. Rapid industrialization was creating great wealth for a few and jobs for many. Immigration was bringing millions from Europe to take those jobs and to find land to farm in the Midwest and the West. Yet the rapid changes also generated sectional conflicts and social tensions, and political and legal institutions strained to respond effectively to them.

This mixture of pressures, conflicts and resentments led Congress to enact what came to be known as antitrust law. One key background factor was the resentment that many felt towards the new super rich and their lavish and ostentatious lifestyles. Located primarily in New York and other cities on the East Coast, these groups had achieved great wealth quickly, often through control of large manufacturing businesses. These firms often dominated specific industries, and this dominance allowed them to exclude new entrants from those industries. It also allowed them to extract what many viewed as unfair prices and conditions on their suppliers as well as their employees. This led to anger at the power of these so-called “trusts” and often combined with anger at the power of their owners to control the destinies and stifle the possibilities of others, especially those in other parts of the country.

A specific catalyst for antitrust law was rising anger among Midwestern farming communities at what they saw as rapacious and monopolistic conduct by railroad companies and others whom they believed were manipulating prices paid to farmers for their grain and livestock. Groups representing these interests pressured their representatives in Congress to do something about the “trusts” that were amassing fortunes for a few, but exploiting vast numbers of hard-working farmers and tradesmen.

Congress responded to this pressure by enacting the Sherman Antitrust Act in 1890. The name that soon attached to the legislation—“anti-trust”—reflected its goals. It was a tool to be used to combat the monopolistic abuses of very large enterprises. There was, however, no model for Congress to use in doing what it wanted to do—or wanted to appear to be doing. So Congress
“punted”—it simply federalized two barely used legal principles. It took two concepts from the common law that had been used for quite different purposes, first in England and then to a limited extent in the U.S., and it made them enforceable under federal law. The statute was very short, and its basics have not changed since 1890. The first concept was “restraint of trade.” This concept had been used primarily in civil cases to combat overly restrictive provisions in contracts. The second basic idea was “monopolization.” It had also been part of the English common law, but for centuries it had been little used in either England or the U.S. The legislation contained virtually no guidance as to the substantive content of the provisions, leaving issues of content to the federal courts.

The Sherman Act transformed the role of these private law concepts by providing that the federal government could enforce them. Congress appears to have given little thought to how this was to take place. It did not create specific procedure for the enforcement of the antitrust provisions. It merely authorized the U.S. Justice Department to file claims in the regular courts, using the normal rules for civil proceedings. Given that the federal government was still very small in 1890, the legislators could hardly have envisioned extensive federal administrative application of the provisions. Some assumed that private actions could be brought on the basis of the legislation, and this was confirmed a few years later.

This was the “shot in the dark!” The U.S. Congress was responding to specific domestic pressures. The legislators just took common law concepts and gave the federal government authority to use them in the federal courts. The legislators paid little, if any, attention to how others in the world had dealt with similar issues or what, if anything, they might think about the U.S. experiment. They just experimented, basically relying on judges to sort out the issues and develop the law.

II. An Antitrust System Develops

Prior to the Second World War the system evolved slowly and fitfully according to a pragmatic, court-based process—typical of U.S. legal development generally. The judges were solving the conflicts before them, and there is little evidence that they thought about their decisions as creating a “system” of antitrust law. They relied on accumulated practical experience, domestic conceptions of the judicial role, and often on ideologies about the role of markets as they shaped the content and roles of antitrust in the U.S. There were relatively few cases, and other than in a few large companies there was relatively little interest in this area of the law.

After the war the roles and importance of antitrust law expanded
greatly. One factor was transnational. Antitrust came to be seen in the U.S. as a part of a global “mission” to provide an antidote to fascism and to support freedom. Many believed that the concentrations of economic power in Germany and Japan were at least in part responsible for the horrors of the Second World War, and they saw antitrust as a means of preventing such concentrations or at least curbing the resulting abuses. This led U.S. government officials and others actively to promote antitrust in Europe. A European version of antitrust law had begun to develop in the 1920s, but it had not gained much status in most European countries, and thus U.S. antitrust became a symbol of restructuring in Europe, both in individual countries and in connection with the process of European integration. At the same time, the economic and political dominance of the U.S. in the so-called “free world” allowed the U.S. to apply its antitrust law to conduct outside its own territory and thus further support the antitrust mission.

This heightened political, symbolic and economic importance of antitrust on the international plane combined with the de facto protection of the U.S. market encouraged rapid growth in the perceived importance of antitrust within the U.S. and the expansion of antitrust principles. By the early 1970s antitrust had become a very important part of the legal environment of business and as such it attracted strong interest from lawyers. The growing importance of antitrust meant that law schools increased their offerings in the area. According to Ralph Brill, antitrust was first taught at Chicago-Kent College of Law in 1973. This also meant, however, that antitrust represented a major cost for many U.S. businesses. These costs were tolerated as long as economic factors (especially currency and regulatory obstacles) buffered U.S. firms from international competition.

In the 1970s the international economic picture changed markedly, and these changes in global economic conditions generated a fundamental change in U.S. antitrust law. The “oil shocks” of the early 1970s and the concomitant international currency restructuring led to increased awareness in the U.S. business community of the need for U.S. businesses to compete internationally. Antitrust now began to appear as a burden on the U.S. economy, and this led scholars to examine ever more carefully the intellectual justification for such burdens. Economists and law professors increasingly argued that the courts had expanded antitrust law too far and that the entire edifice of antitrust law should be viewed from the perspective of its economic impact. This perspective quickly won favor in the courts and law faculties, and within a few years it led to a radical revision of standards for antitrust law in the U.S. The central substantive
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law questions were now to be judged by economists according to economic criteria.

III. Global Competition Law Leadership

The “shot in the dark” that was the U.S. antitrust law system is today no longer solely a domestic field of law. It is now also a critically important component of global economic policy! The system that U.S. judges had evolved to deal with purely domestic problems and that relied on little more than confidence in the capacity of courts to develop reasonable responses to conflicts has been transformed into the central player in efforts to respond effectively to economic and other forms of globalization. It is now a U.S. export product, and the stakes are enormous. What directions and forms will the rules of competition take? Treatment of these issues will be a factor in the future of many countries, including the U.S., and for more than two decades Chicago-Kent has brought transnational competition law to our students, and Chicago-Kent faculty have contributed to the international discussion of these issues.

A. Foreign Interactions and Perceptions

U.S. antitrust now plays on a global stage, and much will depend on how foreign experts, lawyers, government officials and business leaders see U.S. antitrust. They will make decisions about what to do in their own countries and on the international level. This means that their perspectives on the U.S. system are critical to its roles both at home and abroad, and foreign images of U.S. antitrust have changed radically. Prior to the Second World War, those in Europe who knew anything about U.S. antitrust law (and they were few) generally considered it a mistake. They tended to see it as a failure that actually created more harm than good by forcing companies to merge rather than cooperate. This view predominated in large measure until after the Second World War. The Europeans were developing a different concept of competition law that emphasized administrative control of dominant firms. This conception of competition was spreading rapidly in Europe in the 1920s, but depression and war led to its virtual abandonment.

After that war ended, however, U.S. antitrust law became associated with U.S. economic dominance in the “free world.” The real and imagined connections between economic concentration and military expansion in both Germany and Japan convinced many that U.S.-style antitrust law should be used to combat such concentrations. U.S. occupation forces in Germany and Japan imposed U.S. antitrust ideas during
the occupation period, and the U.S. insisted that both countries either enact or maintain competition law after the occupation. This increased awareness of these ideas abroad. Perhaps more important, however, was the perception that antitrust was a source of strength for the U.S. economy and thus a potential spur to growth that other countries could employ.

U.S.-style antitrust did not, however, always fit well with European legal traditions and institutions, and in most European countries skepticism toward the U.S. model limited progress in protecting competition. In Germany, however, a separate set of ideas about how to protect competition developed in the 1930s and 1940s in the underground, and after the war it became the basis for German antitrust law. From here it spread to the European level and became part of the process of European integration. The basic idea of U.S. antitrust law—i.e., protecting the competitive process from restraints—was part of this model of competition law, but the model itself was conceptually and institutionally quite distinct. European scholars and officials in these areas often looked to U.S. antitrust for comparisons and insights into problems, but there was relatively little interaction between U.S. and European forms of competition law until the 1990s.

In the 1990s these relationships became far closer and more important for both the U.S. and Europeans. Moreover, the fall of the Soviet Union precipitated widespread interest in market-based approaches around the world and revived the messianic tenor of the U.S. antitrust law community. Many countries that had socialist or other command-based approaches to the organization of economic activity now introduced antitrust laws or significantly increased their investment in
the enforcement of such laws. Often they looked to U.S. antitrust officials, lawyers and scholars for help in implementing or evaluating their new activities.

B. Policy Issues and Obstacles

This has raised a critically important issue: How will/should competition law on global markets be implemented? Globalization has shown the limitations and distortions of the traditional jurisdictional system—e.g., differing rules and procedures for different parts of the same economic market. Many in the U.S. and elsewhere believe that the best response to these problems is to encourage all countries to follow at least the basic substantive law approach of the U.S. antitrust law system. This would generate convergence among competition law systems around the world and reduce the harms caused by current jurisdictional arrangements. Many others are, however, skeptical that the U.S. model should be the focus of convergence. They often see some form of coordination (perhaps at the World Trade Organization level) as the best response.

How these foreign decision makers and decision shapers understand and evaluate U.S. antitrust law is critical to this set of decisions. It is important, therefore, that they understand as clearly as possible how U.S. antitrust law works and what the guiding ideas are behind the law. Only then will they be in a position adequately to evaluate it, compare it with their own systems and make informed choices in relation to it. There are many obstacles—linguistic, comparative, political and economic—to achieving an adequate understanding of the U.S. system and of the implications of various policy choices for the global system and for individual components of it. Moreover, it is critical that U.S. lawyers, officials and scholars acquire a better understanding of the competition law elsewhere and thus of the potential bases for convergence and coordination on the global level.

IV. Concluding Comments

A former U.S. antitrust official not long ago wrote that U.S. antitrust is (or could be) the “light of the world.” That might be a bit strong, but U.S. antitrust certainly does play a key role in the development of the global economy and its many components. Now the big question is whether U.S. legal thinking and the creative and pragmatic impulses that have been so much a part of U.S. antitrust law will continue to provide the leadership that can make the most of these opportunities.

These changes have important implications for U.S. legal education. At Chicago-Kent College of Law, we are doing our part. Here, and at some other leading law schools, these issues have generated increas-
ing attention. Since the 1980s, and even more so since the early 1990s, I and others have included transnational issues in the domestic antitrust course and included an antitrust focus in courses such as international business transactions. I have also long offered a seminar in international and comparative antitrust law that tackles these issues directly. These efforts have two central objectives. One is to educate U.S. lawyers to perform more effectively in this new global context. The other is to educate foreign lawyers about U.S. antitrust law and provide them with tools for understanding and evaluating it and its global roles.

One fact stands out in 2013 at the celebration of Chicago-Kent’s 125 years of teaching law. The U.S. will have to earn its leading role in antitrust law on the global level. Effective legal education in this area will be a key element in whether it will be successful in achieving that goal.

Sources and Further Reading

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For generations, commentators have decried the fact that we live in an era of an imperial presidency. The second President Bush famously (or infamously) ignored Congress in subjecting suspected terrorists around the world to military commissions at Guantanamo Bay and citizens and suspected terrorists alike to warrantless surveillance of their phone calls. President Barack Obama, like his predecessor, has used executive power to shape rules and regulations that Congress had delegated to subordinates in agencies as opposed to the President directly. Both Presidents claimed broad power to circumvent the Senate’s power to consent to treaties and appointments. Congress and the courts have fought back to limit the scope of presidential power, at least in discrete contexts.

Somewhat lost in history, a comparable battle over executive power brewed one hundred and twenty-five years ago, culminating in the U.S. Supreme Court’s 1890 decision in In re Neagle, 135 U.S. 1 (1890). The case questioned the President’s inherent authority to assign a U.S. Marshal to protect the life of Stephen Field, a sitting United States Supreme Court Justice. Marshal Neagle confronted the potential assailant, David Terry, and killed him when he thought Justice Field’s life was in danger. California authorities were none too

**THE LEGACY OF IN RE NEAGLE**

*Harold J. Krent*
pleased given that Terry had been so prominent in California political life and that Terry likely was unarmed. Local officials indicted and then imprisoned Neagle for killing the Californian.

Events leading up to the Supreme Court decision read like a soap opera, perhaps revealing more about the interplay of society and politics than does the decision itself. The history of the case starts with David Terry, who before the Civil War served on California’s Supreme Court with Justice Stephen Field. Terry gained notoriety by challenging Senator Broderick from California, a former friend who was also a friend of Field’s, to a duel, which left Broderick dead. The dispute centered over political rivalries, in part due to Terry’s sympathy with the Confederacy. Terry was acquitted and then left California to support the South in the Civil War. After the War, Terry returned to law practice and politics in California and, of relevance here, within twenty years fell within the orbit of an apparently glamorous but unstable woman named Sarah Althea Hill.

In the late 1870s, Hill became the companion of Senator William Sharon of Nevada, who had amassed great sums from real estate and mining investments. Sharon, who was much older than Hill, evidently sundered relations when he suspected Hill’s designs on his money. Hill continued to plot how to separate Sharon from some of his enormous wealth. She made a demand on Sharon for alimony, asserting that Sharon had married her some three years earlier when they had started their “companionship.” In so doing, she presented what likely were forged documents attesting to the marriage relationship. Sharon sued in federal court in California (due to diversity of citizenship) in 1883 for a declaration that no marriage had ever taken place. Hill then filed her own suit in state court in 1884 to demonstrate that the marriage was valid and requested a share of Sharon’s property. She hired Terry as one of her attorneys.

The state court bizarrely decided the case in Hill’s favor even though the judge labeled Hill a liar. Sharon immediately appealed to the California Supreme Court but died before the case was heard. His executor pursued the appeal.

In the meantime, the federal suit proceeded slowly, prompting more aberrant behavior from Hill. She sported a pistol at many of the proceedings, and waved it at witnesses. She threatened to have adverse witnesses and their counsel killed. Although Justice Field, by then serving on the U.S. Supreme Court, was not assigned to preside over the case, he was assigned as a Justice riding on circuit to hear several motions arising out of the case. During one proceeding, Justice Field in an effort to maintain decorum ordered that
Ms. Hill be disarmed, and he found her in contempt of court. At the end of the proceedings in 1886, the federal court determined that the marriage was a sham and the documents forged.

Terry then married Hill, manifesting an intriguing view of the attorney-client relationship. More importantly, the marriage placed pressure on his successors on the California Supreme Court to uphold the state court finding that Hill had been married to Sharon. A divided California Supreme Court acquiesced, affirming the trial court’s decision that a valid marriage had indeed taken place.

In a complicated procedural move, the estate then moved to revive the federal court decree and enjoin both Hill and Terry from maintaining the validity of the prior marriage, despite the state court ruling. At this point, the case was assigned to U.S. Supreme Court Justice Stephen Field, sitting by designation. Field in 1888 determined that Hill had obtained the marriage documents through fraud. As he orally delivered the decision, Hill caused a commotion in the courtroom protesting the ruling and had to be escorted out. Terry in a display of chivalry thereupon attacked the marshal for carrying out Field’s order. Field ordered both Terry, his former associate on the California Supreme Court, and Hill imprisoned for contempt of court. Hill threatened Field’s life and Terry claimed that Field’s decision had been bought with Sharon’s money. Terry then sought a pardon from President Grover Cleveland, asserting in part that Field was retaliating against him for refusing to throw his support to Field in a prior presidential primary. Cleveland declined, and Terry served out his short term.

Upon release, Terry apparently became even more consumed by revenge, broadcasting widely his intent to harm Justice Field. When Justice Field traveled back west from Washington, newspapers speculated on when the confrontation would occur. Accordingly, President Benjamin Harrison through his Attorney General assigned Marshal Neagle to protect Justice Field.

The confrontation arose in the summer of 1889 when Field traveled by train from San Francisco to Los Angeles. Terry and his wife boarded the train at a stop along the way and entered a dining room in which Justice Field was eating breakfast. Hill left the room—presumably to gather her pistol from her chamber—but her husband did not wait and circled behind Justice Field and delivered two blows to his head. Neagle, the marshal, announced his presence and called on Terry to stop. Terry made a move as if to draw a knife that he customarily carried, and Neagle responded with two shots from his pistol, killing the assailant.
A local constable arrested Neagle on the spot. Ms. Terry, upon her return to San Francisco, swore out a complaint for murder against both Field and Neagle. California authorities then arrested Field who was released under a bond. An eastern newspaper reported the following imaginary dialogue:

*Newsboy: “Man tried to kill a judge in California!”*

*Customer: “What was done about it?”*

*Newsboy: “Oh! They arrested the judge.”*

Field immediately filed for a writ of habeas corpus, and the federal court within a matter of days granted Justice Field’s writ, ending Justice Field’s stay at the other end of the courtroom.

Marshal Neagle was not as fortunate—he unquestionably fired the shots that killed Terry. He filed a similar writ of habeas corpus from a California prison, asserting that he acted within the line of duty in protecting Justice Field’s life. He was moved to San Francisco, but remained behind bars. He argued that, to the extent his actions were undertaken pursuant to federal authority, his conduct could only be challenged in federal court. The federal court eventually scheduled a hearing, and upheld the writ, reasoning in part that “upon general, immutable principles, the power must be necessarily inherent in the executive department of any government worthy of the name of government, to protect itself in all matters to which its authority extends; and this necessarily involves

the power to protect all the agency and instrumentalities necessary to accomplish the objects and purposes of government.” The Supreme Court accepted the case for review at California’s request.

On one level, In re Neagle reflects the generation-old conflict inherent in our system of federalism. Some Californians were resentful that the federal courts did not respect the state courts’ determination that a valid marriage had been entered into between Hill and Sharon. Moreover, authorities in California were more than willing to imprison and indict a U.S. Marshal, even when the Marshal was following presidential orders. Others in California believed that California courts should be trusted to determine whether Neagle’s defense was valid without interference from the federal courts.

Whatever one thinks of the resurgent importance of federalism in our generation—including petitions for secession filed in the wake of President Obama’s 2012 victory—few proponents today would be so bold as to approve of California’s imprisonment of a U.S. Marshal who unquestionably was acting pursuant to the President’s orders, not to mention local authorities’ decision to arrest Justice Field himself. The story reminds us that, no matter how intense regional divides may be today, they pale before the tensions between states and the federal government over a century ago.

But, the facts underlying the case reveal more—a sordid tale of love gone awry, reminiscent of politicians’ struggles more recently, from Senator Gary Hart’s famed ride on the aptly named boat “Monkey Business” to President Bill Clinton’s fling with an intern, and from Wilbur Mills’ dalliance with the Argentinian stripper Fanne Foxe to Representa-
tive Anthony Weiner’s more recent debacle of sexting. Politicians’ affairs impact not only political races, but Supreme Court decisions as well. *Clinton v. Jones*, 520 U.S. 681 (1997), was not the first Supreme Court case on presidential power sparked by politicians’ sexual misconduct.

The doctrinal legacy of *In re Neagle* endures. A divided U.S. Supreme Court, with Justice Field recusing himself, held that the President enjoys a residuum of authority under Article II of the Constitution to take steps to protect the nation even if those steps are not spelled out by Congress. In presaging presidential power debates of the last decade, the Court concluded that the President could rely on powers not directly rooted in the text of the Constitution in safeguarding the country. The Court explained, “In the view we take of the Constitution of the United States, any obligation fairly and properly inferrible from that instrument” is appropriate, including the duty to protect a Supreme Court Justice, even in the absence of explicit congressional authorization. The Court continued that “it would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably.” Presidents can “infer” powers from the Constitution—including the duty to protect Justices from harm. In the case, those non-statutory or “inferrible” powers displaced California’s authority to try Neagle for murder and provided Neagle a complete defense to the charge. Although the accumulation of powers and responsibilities over the last 125 years has radically transformed the presidency, the debate over the scope of presidential powers under Article II is not new. There is a residuum of authority under Article II—even if the extent remains in bitter dispute—permitting presidents leeway to ensure protection of the government and the nation itself.

Sources and Further Reading


Harold J. Krent graduated from Princeton University and received his law degree from New York University School of Law. He has been teaching full-time since 1987 and has focused his scholarship on legal aspects of individuals’ interaction with the government. Dean Krent joined the IIT Chicago-Kent faculty in 1994. He was appointed Associate Dean in 1997 and Interim Dean in 2002 before assuming the deanship on January 1, 2003.
When IIT Chicago-Kent College of Law was founded 125 years ago, many of our key legal institutions, such as the jury, were well established. By 1888, the year of our school’s founding, the jury was seen as an institution that provided justice in a nation created by a revolution of “we the people.” Although it no longer seems remarkable to us today, the jury system gave ordinary citizens, untutored in the law, the power to decide cases and to dispense justice.

Today, reinforced by movies, television shows, and constant media coverage, the American people have two deeply-held views about the jury. The first is that the jury is meant to represent all of us—“we the people”—by reflecting our diversity as much as is practical. In every high-profile jury case, much attention is paid to the diversity of the jury. In particular, we care about race and gender more than almost any other characteristics. Although the diversity of the venire is enshrined in several Supreme Court cases, the diversity of the petit jury is reinforced by the portrayal of the jury in popular culture.

The second widely-held view is that the jury has one job, and that is to determine the facts. Although a
The role of the jury, so that it decided only the facts, happened gradually from about 1850 to the 1930s. Some researchers believe that as the practice of law became more professional, the distinction widened between judges and lawyers who knew the law and ordinary citizens who did not, until it made little sense for jurors to decide the law.

I offer a more radical theory in which I see a connection between the growing diversity of the jury and the declining power of the jury. My theory is that the white, male legal establishment began to curtail the power of the jury as African-American men and women had the right to serve on juries. Although African-American men and women lost that right by the late 1800s, they regained it, albeit after much struggle, many decades later. For both groups, however, even when official barriers were eliminated, other practices kept them from actually being seated on juries. Some of these practices, such as the peremptory challenge, are still used today in a discriminatory manner, in spite of Supreme Court cases to the contrary, in an effort to keep African-American men and women from being seated on juries.

The Exclusion of African-American Men from the Jury

Albert Alschuler and Andrew Deiss, in an article entitled A Brief History of the Criminal Jury in
the United States, identified 1860 as the year in which African-American men first served on a jury. In that year, two African-American men sat on a jury in Worcester, Massachusetts. In 1864, Congress passed legislation that allowed African-American men to testify in federal courts, and this was followed by legislation that allowed them to testify in state courts. Jury service was soon to follow.

During Reconstruction (1863–1877), African-American men served on juries in some states. For example, in South Carolina in 1869, the legislature mandated not only the integration of grand and petit juries, but also that the racial composition of the jury should approximate that of the community. Similarly, in New Orleans between 1872 and 1878, one-third of the citizens summoned for jury duty were African-Americans, and this percentage matched their representation in Orleans Parish. Between 1870 and 1884 in Washington County, Texas, where African-Americans were approximately 50 percent of the population, they constituted about 30 percent of those who served on juries. During the 1870s, in Warren County, Mississippi, African-Americans were about 35 percent of the grand jurors, and even though that percentage did not approximate their percentage in the community (where they were 70 percent of the community), it was a significant improvement over their total exclusion in the past.

Newspapers, in their reporting of jury trials during this period, noted when an African-American man (and they were only men) served as a juror. On January 15, 1884, in the Chicago Daily Tribune, one story questioned whether South Carolina jurors in a particular case had voted to convict based on their political parties; it included the following observation: “Three of the jurors, one a negro and two white men, refused to find a verdict of guilty.” On February 16, 1885, in the Chicago Daily Tribune, a story described a murder trial in New Orleans and mentioned the sole African-American juror on this jury: “The only juror who stood out from the very beginning in favor of conviction was one Edwards, a negro, and the only negro on the jury, and he maintained his manly and honest position to the end, notwithstanding that [the defendant’s] friends went to his house while he was serving and threatened his family with violence.”

The newspaper accounts also noted when the African-American juror was the first African-American to serve in that locale. A brief story on May 6, 1891, in the New York Times announced that a man named Nelson Stark, described as “colored,” had been selected as the eleventh juror in the Garrison murder trial. The story noted that “[it] is the first time in the history of that county [in West Virginia] that a col-
ored man has sat on an important case in the State court.” Similarly, on September 7, 1880, the Chicago Daily Tribune noted that “[f]or the first time in the history of Kentucky the panel of jurymen for the duty in a criminal court included in the list of the Louisville Circuit Court to-day three colored men.” Two of those men were selected to serve on a grand jury and the third man was selected for a petit jury. The article noted that there were a number of African-Americans at court that day and “they evidently took great satisfaction in seeing representatives of their race assume privileges heretofore denied them.”

The inclusion of African-American men on the jury was not limited to Southern states. A notice in the New York Times on November 19, 1890, announced that “[a]mong the jurors in a case in the Circuit Court this morning was Abe Peterson, a Grafton blacksmith, who is the first colored man to sit on a jury in Rensselaer County[, New York].” On July 9, 1893, a lengthy story in the Chicago Daily Tribune reported that for the first time in Madison, Wisconsin, an all-African-American jury (six jurors) heard a civil case involving an assault and battery; the article noted that this jury marked “an inauguration of a new judicial era.”

Newspaper accounts of jury trials also reported on perceived differences between white jurors and African-American jurors. According to one story in the Chicago Daily Tribune on July 10, 1880, “[t]he first negro juror in Atlanta, the other day, promptly joined in convicting a negro who was put on trial.” As a result of African-Americans’ seeming proclivity to convict, “[t]he next prisoner, also a negro, objected to having one of his own race on the jury.” Another story, published in the New York Times on November 3, 1885, also observed that African-American jurors had been “decidedly in favor of the Commonwealth as against colored offenders.” The article suggested that African-American jurors wanted to show that they were committed to law and order—so much so that older lawyers who had African-American clients would not
select African-American jurors because “they claim[ed] that colored jurors are more severe in meting out punishment to offenders of their race.”

In spite of constitutional protections provided by the Fourteenth Amendment (1868) and the Fifteenth Amendment (1870), statutory protections provided by the Ku Klux Klan Act of 1871, the Federal Civil Rights Act of 1875, and the Federal Jury Selection Act of 1879, and a U.S. Supreme Court case, Strauder v. West Virginia, 100 U.S. 303 (1880), which held that a state statute disqualifying African-American men from jury service was unconstitutional, African-American men lost their place on juries in the South in the 1890s. Booker T. Washington observed at the end of the nineteenth century: “In the whole of Georgia & Alabama, and other Southern states not a negro juror is allowed to sit in the jury box in state courts.” According to a 1910 study, African-Americans rarely served on juries in Florida, Louisiana, Mississippi, Missouri, South Carolina, and Virginia, and they never served on juries in Alabama and Georgia. In sum, according to another commentator, Douglas Colbert, “[a]lthough it was common for blacks to have served as jurors during Reconstruction, they virtually disappeared from the southern jury box by 1900, even in counties where they constituted an overwhelming majority of the local population.”

Even though statutes could no longer prohibit African-American men from serving on the jury after Strauder, other practices kept them from the jury box. James Forman, in Juries and Race in the Nineteenth Century, described the violence directed toward African-Americans and white Republicans that kept African-American men in the South from serving as jurors or witnesses, or seeking or being afforded the protection of the legal system. All-white Southern juries failed to convict the white perpetrators of these crimes.

Non-violent and more subtle practices also kept African-Americans from actually being seated on a jury, even if they had been summoned to serve. These practices ranged from color-coding by race the names placed in the wheel from which jurors were selected to the discretion exercised by white jury commissioners in selecting only

white men whom they knew to serve as jurors. Mississippi’s 1892 law, which allowed three state officials to select jurors based on their “good intelligence, sound judgment, and fair character,” was another way to keep African-Americans off the jury; other Southern states followed suit.

The practice of discriminatory peremptory challenges, which continues to this day, was another way to keep African-Americans from being selected for petit juries. Each party could exercise a certain number of peremptories and use them to remove prospective jurors without giving any reason at all. Parties used their peremptory challenges to remove African-Americans from the jury. Prosecutors, in particular, exercised race-based peremptories to remove African-Americans from the jury in criminal cases in which the defendant was African-American. Even after a number of cases, from the mid-1960s to the mid-1990s, in which the Supreme Court developed an elaborate framework to attempt to counter the exercise of race-based peremptory challenges, the practice continues today. Lawyers have simply learned ways to avoid discovery. In some courts in the South, defense lawyers in capital cases will not even challenge the prosecutor’s use of a race-based peremptory because they know the judge will never find a peremptory to be discriminatory. The practice of exercising discriminatory peremptory challenges persists, even though it is undertaken in more subtle ways than it once was.

The Exclusion of Women from the Jury

Women’s experience in serving as jurors tracked African-American men’s experience in some ways, but lagged behind by many years. Before 1888, women in at least two Western territories were permitted to serve as jurors, and in 1898 women in Utah were permitted to serve as jurors. Wyoming Territory gave women the right to vote and to sit on juries in 1869, with the first woman sitting on a jury in Laramie, Wyoming in 1871. However, there is some dispute as to when Wyoming women lost their right to sit on juries. Albert Alschuler and Andrew Deiss point to 1872 as the year that “Wyoming’s experiment in equality in the courtroom” came to an end, and a *New York Times* article on November 19, 1883, claimed that “no woman [in Wyoming] is ever seen nowadays in the jury box.” However, in an article in the *Chicago Daily Tribune* on October 26, 1891, the first Governor of the State of Wyoming was interviewed and said that there had been “several women jurors in the courts of Cheyenne, the Capital of Wyoming.” The *Wyoming Almanac of Politics* included an article from the *Cheyenne Daily Leader*, dated September 17, 1891, describing a trial in which the defendant was female as were two of the jurors.
In 1884, women in Washington Territory had the right to vote and to serve on juries. However, in 1887, after a change in personnel on the Supreme Court of Washington Territory, women lost their right to sit on juries. In 1898, Utah allowed women to serve as jurors, and has traditionally been credited as the first state to do so, though women rarely served as jurors until the 1930s.

Although there were few women serving as jurors in the 1880s, there were occasional ruminations about what women jurors would be like and what difference they would make on juries. In a brief note in the *Chicago Daily Tribune* on April 21, 1888, entitled *Call for Feminine Jurors*, the writer suggested that it is difficult to convict a female defendant on the West Coast, and perhaps if women were permitted to serve as jurors this situation would change. The writer offered the following recommendation: “It would be a good thing if the rights of women could be so extended that in cases where a woman is accused of crime she might be tried by a jury of her own sex.” On June 28, 1893, there was a brief article in the *Chicago Daily Tribune* entitled *Women as Jurors*, which raised the question whether Lizzie Borden should have been tried by a jury that included women because “a woman on trial for her life should have the right to demand an equal representation of women on the jury.” However, the same article also suggested that whenever the defendant is a woman, “there are few men not predisposed to regard the opposite sex with tender consideration.” In 1893, the Senate Judiciary Committee held a hearing to consider a bill that would allow women to serve as jurors if they “are wives of men who are duly qualified so to act,” according to an article in the *New York Times* on February 1, 1893. The article reported that Dr. Mary Walker spoke in support of the bill, but the bill did not go forward.

Women thought the passage of the Nineteenth Amendment in 1920, which gave them the right to vote, would also give them the right to serve on juries, but this proved not to be the case in most states. According to Professor Gretchen Ritter, around the time of the Nineteenth Amendment, 14 states granted women the right to serve on the jury. In seven of these states, new laws were passed that gave women the right to serve. In the other seven states, jury-qualification statutes described jurors as “electors,” so once women became electors under the Nineteenth Amendment, they automatically became eligible to serve as jurors. However, other states, like Illinois, rejected this idea. The Illinois Supreme Court reasoned that at the time when the Illinois General Assembly used the term “electors” only men could be electors. If women were to be included as “electors,” then it was up to the Illinois General
Assembly to say so, which it did, though not until 1939.

States decided whether to allow women to serve on juries in their own courts, and the federal courts followed the practice of the state in which the federal court was located. It was not until the Civil Rights Act of 1957 that federal courts allowed women to serve as jurors in federal courts regardless of the practice of that state's courts. State courts, even when they ostensibly permitted women to serve as jurors, followed practices that kept many women from actually serving. In some states, women had automatic exemptions from jury duty. In other states, such as Florida and Louisiana, women could serve as jurors, but only if they went down to the courthouse and affirmatively registered for service, which was an extra step that men did not have to take. States that adhered to this practice claimed that it respected women's role in the home and that most women would be unable to serve because of their duties at home. The effect of affirmative registration was that very few women registered for jury service. As late as 1961, this practice was upheld in Hoyt v. Florida, 368 U.S. 57 (1961), and was not found to be unconstitutional until Taylor v. Louisiana, 419 U.S. 522, 533 (1975).

Even after the demise of affirmative registration, the exercise of peremptory challenges was another way to keep women from serving as jurors. Although women were summoned to serve, they could be struck from the petit jury by lawyers exercising gender-based peremptory challenges. Whereas race-based peremptory challenges were addressed by the Supreme Court in a series of cases spanning from the mid-1960s to the mid-1990s, this line of cases did not become applicable to gender until J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994). Although there are many reasons that lawyers defend the peremptory challenge—from giving defendants control over jury selection to ridding the jury of an outlier who could not be dismissed for cause—the peremptory challenge also should be seen as a practice that has been, and continues to be, used to keep women and African-Americans from serving on juries.

A Decline in Jury Power

Back in 1888, when African-American men had for all intents and purposes lost their right to serve on juries and the few women in Western territories still had their short-lived right to serve on juries, the jury had begun to experience a decline in power. Whereas the jury—from colonial times until the 1850s—had always had the power to decide the law and the facts, the jury started to lose its power to decide the law and was reduced to deciding only the facts. This loss came about
through state court interpretations of state statutes and constitutions. This loss could be seen in a number of states, including Massachusetts in 1855 and Louisiana in 1871, and soon spread to other states, including Georgia in 1879 and Vermont in 1892. Today, only two states, Indiana and Maryland, still instruct jurors that they have the right to determine the law as well as the facts. Although these two states’ constitutions provide for this right, the judiciary in both states has narrowed this right through case law.

My own theory is that as African-American men and women sought to serve on juries, there was a move on the part of judges to limit the power of juries. Some commentators suggest that this move came about because of the growing professionalization of judges. As judges received legal training and saw themselves as professionals, they began to see the functions of judges and juries as distinct, and attempted to limit juries to the fact-finding function only. Another possibility is that as the law grew more complex, it seemed appropriate for professionals with training and knowledge to decide it, rather than citizens who had only common sense and experience to guide them. My own theory is that the move to limit the function of the jury to fact-finding came about at a time when outsiders—women and African-Americans—were trying to claim a right to serve as jurors. Although African-American men and women had not yet been able to secure their right to serve, the writing was on the wall.

Thus, the late 1880s were a time of transformation for the jury. Juries in many states had lost their power to decide the law, and were officially limited to finding the facts. It is no coincidence that this occurred at a time when African-American men and women had experienced the right to serve as jurors, albeit briefly, and sought to recover that right, even though it would take them many years to do so.◆

Sources and Further Reading

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After examining the United States Reports containing the cases decided by the Supreme Court during its 1887–88 term, one might conclude that the United States in the late 1880s was a law-abiding country with little crime. Of the approximately 270 cases decided by the Court during that term, only seven (2.6 percent) raised issues of criminal law or procedure. In contrast, in its most recently completed term, 2011–12, the Supreme Court decided 76 cases, 22 (29 percent) of which involved issues of criminal law or procedure.

What accounts for this dramatic rise in the number (and percentage) of criminal law or procedure cases decided by the Supreme Court? No one would deny that crime in the United States has increased since 1888. But the true explanation for the increased number of criminal law and procedure cases decided by the Supreme Court is the “constitutionalization” of criminal procedure. When originally adopted in 1791, the Bill of Rights (the first eight amendments to the U.S. Constitution) placed limitations only upon the Federal Government, not upon the individual States. Consequently, none of the rights provided in those amendments—such as the protection against unreasonable searches...
and seizures (Fourth Amendment), the guarantee against double jeopardy (Fifth Amendment), the privilege against self-incrimination (Fifth Amendment), the right to counsel (Sixth Amendment), the right to a jury trial (Sixth Amendment), and the right to confront hostile witnesses (Sixth Amendment)—applied in criminal prosecutions brought in state courts. Hence, an individual convicted of a crime in a state court could not challenge his or her conviction in the U.S. Supreme Court on the ground that he or she had been denied a right guaranteed in the Bill of Rights. Many states did of course have their own constitutional provisions guaranteeing various rights to those accused of crime in their own courts, but each state could interpret its own constitutional provisions, and many of these provisions turned out to be less protective of individual rights than their federal counterparts. Moreover, since these were rights guaranteed by state law, rather than federal law, their alleged violation did not raise a federal issue that could be adjudicated by the U.S. Supreme Court.

Even in 1888, after the adoption of the Fourteenth Amendment—which, among other things, prohibits a State from abridging the “privileges and immunities” of United States citizens (“Privileges and Immunities Clause”) and from “depriving any person of life, liberty, or property, without due process of law” (“Due Process Clause”)—the Bill of Rights still provided no protection to state criminal defendants.

Shortly after the turn of the twentieth century, the Supreme Court recognized that the Due Process Clause of the Fourteenth Amendment protected some individual rights from state infringement, including, perhaps, some safeguarded by the Bill of Rights against National action. Nevertheless, the Court expressly stated that if the Due Process Clause protected such latter rights, it was not because they were enumerated in the first eight amendments. It explained that the Due Process Clause protected only those rights that are “the very essence of a scheme of ordered liberty” and essential to “a fair and enlightened system of justice.” In determining whether a particular safeguard met this standard, the Court asked whether “a civilized system could be imagined that would not accord the particular protection.” Applying this test, the Supreme Court held that several of the protections contained in the Bill of Rights, including the privilege against self-incrimination and the right to a grand jury indictment, did not apply to the States. Even when the Court held that a particular right enumerated in the Bill of Rights fell within the concept of due process, it frequently concluded that the protection afforded against state infringement was less than that afforded against infringement by the Federal Government—a
“watered-down” version of the right.

To illustrate, although the Fifth Amendment guarantee against double jeopardy precluded the Government in a federal criminal prosecution from appealing a jury verdict—whether a conviction or an acquittal—that protection did not apply in state court proceedings. Consequently, in the mid-1930s, after a Connecticut jury considering a charge of first-degree murder against Frank Palko convicted him of second-degree murder (thereby implicitly acquitting him of the original charge of first-degree murder), the State, acting pursuant to a state statute, sought review of the conviction. The Connecticut Supreme Court agreed; it reversed the conviction (and life sentence) and, despite Palko's implicit acquittal for that offense, ordered a new trial for first-degree murder. At the second trial, a jury convicted Palko of first-degree murder, and he was sentenced to death—a conviction and sentence that the Supreme Court ultimately upheld against a claim that Palko's second trial had placed him twice in jeopardy for first-degree murder.

Throughout the 1940s and 1950s, the Supreme Court consistently rejected the view, persuasively argued by Justice Hugo L. Black, that the Fourteenth Amendment had "incorporated" the entire Bill of Rights and made its provisions applicable to the States to the same extent as they applied to the Federal Government. Even as late as 1961, despite the Sixth Amendment's guarantee that an accused in a criminal prosecution "shall enjoy the right . . . to have the Assistance of Counsel for his defense," an indigent being tried in a state court for a non-capital felony had no federal constitutional right to have counsel appointed to represent him or her. Thus, when Clarence Earl Gideon, an indigent drifter being tried in a Florida state court for breaking and entering a poolroom, requested the trial court to appoint counsel to represent him, the judge could respond:
Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case.

During the 1960s, however, under the leadership of Chief Justice Earl Warren, the Supreme Court adopted the position that the Due Process Clause of the Fourteenth Amendment “selectively incorporated” various provisions of the Bill of Rights and made them applicable to the States. Using this approach, the Court held that the Fifth Amendment privilege against self-incrimination, the Fifth Amendment guarantee against double jeopardy, the Sixth Amendment right to a jury trial, and, in overturning Clarence Earl Gideon’s conviction, the Sixth Amendment right to counsel were among the rights safeguarded from infringement by the states. In 1968, the Court explained that it had reformulated its test for determining whether a particular provision of the Bill of Rights was incorporated by the Fourteenth Amendment. It stated:

The recent cases . . . have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing virtually contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty. [Emphasis added.]

Today, virtually all of the provisions of the Bill of Rights safeguarding the rights of a criminal defendant apply to the States (the lone exception being the right to an indictment). As a result, the Supreme Court each term receives hundreds of petitions requesting it to review a state-court conviction alleged to have been obtained in violation of the defendant’s federal constitutional rights, and each year the Court decides 20 or so cases involving such issues, a large percentage of the number of cases it decides each term with written opinions. ◆

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The Supreme Court in 1888 was in crisis. Its structure and responsibilities, created a century earlier by the Judiciary Act of 1789, were no longer adequate or appropriate. The Court was overwhelmed by its docket, and the justices' responsibilities, which included circuit riding, were impossible to meet. Shaped as it was by a law almost as old as the country itself, the Supreme Court in 1888—and the federal judicial system as a whole—would be barely recognizable to many today.

The Judiciary Act of 1789 established not only the Supreme Court, but also the entire federal court system. The Act divided the country initially into thirteen districts, which were in turn combined into three circuits. Unlike today's circuit courts, however, the circuit courts created in 1789 had original jurisdiction over certain types of cases and provided appellate review of only a few cases heard originally in the district courts. In addition, the Judiciary Act provided for district court judges and Supreme Court justices, but no circuit court judges. Instead, twice a year, two Supreme Court justices would visit each district and, along with one district court judge, would sit as the circuit court. There were six Supreme Court justices, so
that two could be assigned to each circuit. Even after 1793, when subsequent laws provided that only one Supreme Court justice at a time would sit on a circuit courts, meaning that each justice had to make the trip only once a year rather than twice, an enormous portion of Supreme Court justices’ time, was spent riding circuit—at a time when travel was slow and difficult. And as the country grew, more circuits were created.

Not only did Supreme Court justices ride circuit, but the Supreme Court itself had no discretion over its docket. Cases were appealed to the Supreme Court as of right, unlike today. This lack of control turned out to be extremely problematic. During the first century of its existence, not only did the United States become geographically larger and more populous, but industry grew, the country’s economy became increasingly sophisticated, and new laws and sources of litigation abounded, especially after the Civil War. As a result, the Supreme Court’s docket grew dramatically. At the beginning of the 1888 Term, there were 1,563 cases on the docket. The Court simply could not keep up. As Felix Frankfurter and James M. Landis described the situation: “The Supreme Court docket became a record of arrears.” Less poetically, it took three years for a case to be heard. The situation was untenable.

Faced with overwhelming case-loads, by 1888 the Supreme Court had already attempted to adjust its standard of review in order to dissuade lawyers and litigants from appealing fact-intensive cases with few implications beyond the particular parties. In Newell v. Norton and Ship, an 1865 admiralty case involving a steamboat collision, for example, the Court summarily affirmed the verdict for the plaintiff, holding that there was “ample testimony to support the decision.” The Court explained that it would not engage in a searching review of the lengthy record, which included more than 100 depositions:

Parties ought not to expect this court to revise their decrees merely on a doubt raised in our minds as to the correctness of their judgment, on the credibility of witnesses, or the weight of conflicting testimony.

The Court’s reluctance to engage in error correction, even at a time when it had no formal control of its docket, continues to this day. Today, Supreme Court Rule 10, Considerations Governing Review on Writ of Certiorari, explains that a “petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”
Despite the Court’s effort to define a very narrow scope of review, it was unable to halt the flood of cases coming to it. Facing both its own swelling docket and the geographic expansion of the country, the justices found circuit riding to be increasingly difficult and they often simply did not do it. As Frankfurter and Landis explain, “[B]y 1890 the statutory duty of the Justices to attend circuit was practically a dead letter.”

And it was not the Supreme Court alone that was unable to function properly. Despite some earlier attempts to expand and reform the lower courts, there were still not nearly enough judges. Circuit courts, which were supposed to sit with two judges, often had to function with only one. Even more problematic, that single judge was often a district court judge who was hearing appeals of his own decisions. In 1889, a paper presented at the Annual Meeting of the American Bar Association put it this way:

Such an appeal is not from Philip drunk to Philip sober, but from Philip sober to Philip intoxicated with the vanity of a matured opinion and doubtless also a published decision.

This arrangement could not possibly inspire confidence in an impartial and fair justice system.

Congress finally acted in 1891, after many years of considering and rejecting proposals for major reform, and the federal judicial system we know today began to emerge. Most significantly, Congress established intermediate appellate courts for the first time. If litigants were required to appeal first to those intermediate courts, the hope was, many fewer of them would subsequently take their cases to the Supreme Court. The law indeed appeared to lessen the tide of cases, at least at first. During 1890, before passage, 623 new cases were docketed at the Supreme Court. In 1892, the number dropped by more than half, to 275.

The 1891 law, known as the Evarts Act, also contained the seeds of today’s Court’s largely discretionary jurisdiction. For the first time, Congress created a category of cases that the Supreme Court would review only upon certification, or certiorari, although most cases continued to flow to the Court as a matter of right.

The Supreme Court embraced the opportunity to limit the number of cases coming before it. During the first two years after passage of the 1891 act, it granted certiorari in only two cases. While careful to maintain its power to grant certiorari in any case pending in the courts of appeals, the Court was, quite deliberately, “chary of action in respect to certiorari,” as it explained in Forsyth v. City of Hammond, decided in 1897. In Forsyth, the Court announced narrow criteria for when
certiorari would be appropriate:

[The certiorari] power will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise.

These criteria remain, largely unchanged, the stated criteria for certiorari today as set forth in Supreme Court Rule 10.

The Evarts Act, however, was not successful in its goal of cutting the Court’s workload to a manageable size. It did not eliminate most of the Court’s mandatory appellate jurisdiction. The hope that the creation of the intermediate appellate courts would satisfy litigants’ need for appellate review, thereby making an appeal to the Supreme Court less attractive, proved largely illusory. (Lawyers and litigants often apparently used the right of an appeal to the Supreme Court simply as a delaying tactic, a possibility that seems entirely obvious to a modern legal audience.) In the years following the enactment of the Evarts Act, the Supreme Court’s caseloads increased again to unmanageable proportions, as the nation, its economy, and its judicial business continued to grow. Moreover, even after 1891 and despite the concern for the Supreme Court’s caseload that inspired the Evarts Act, Congress continued to create even more categories of man-
mandatory appeals to the Court. In 1903, for example, it passed the Expediting Act, which created the three-judge district court to hear certain antitrust cases. Appeals from this type of district court went directly to the Supreme Court as of right. And over the following 10 to 15 years, Congress provided that more and more types of cases follow this procedure. (A handful of cases, such as constitutional challenges to congressional districts, are subject to this procedure even today.)

Although it expanded the Court’s mandatory jurisdiction in some areas, Congress did cut back on it in others. In 1916, for example, Congress eliminated mandatory jurisdiction over Federal Employers’ Liability Act cases, as well as certain cases arising out of state courts, cases from the Philippines, and cases arising under certain other federal statutes. The most significant overhaul of the Supreme Court’s jurisdiction, however, was the 1925 Judges’ Bill—so called because it was drafted by members of the Supreme Court itself. The Act dramatically expanded the Court’s certiorari jurisdiction, leaving only a few, relatively small categories of cases for mandatory appeals.

The goal of the Judges’ Bill, like the Evarts Act, was to free the Court from having to decide cases that were not important to anyone beyond the immediate parties involved and to allow it to focus on more nationally significant matters. The House Committee report on the Judges’ Bill explained:

The problem is whether the time and attention and energy of the court shall be devoted to matters of large public concern, or whether they shall be consumed by matters of less concern, without especial general interest, and only because the litigant wants to have the court of last resort pass upon his right.

In a 1925 *Yale Law Review* article, Chief Justice William Howard Taft provided more detail about what sorts of cases he believed the Court should take on certiorari after passage of the Judges’ Bill, reiterating the criteria the Court first articulated in the 1890s—and that today are embodied in Rule 10:

The function of the Supreme Court is conceived to be . . . the consideration of cases whose decision involves principles, the application of which are of wide public or governmental interest, and which should be authoritatively declared by the final court. Such cases should include issues of the Federal constitutional validity of statutes, Federal and State, genuine issues of constitutional rights of individuals, the interpretation of Federal statutes when it will affect large classes of people, questions of Federal jurisdiction, and some-
times doubtful questions of general law of such wide application that the Supreme Court may help remove the doubt. Where there is a conflict of opinion between intermediate appellate courts in the different Circuits or between the Federal intermediate appellate courts and the Supreme Courts of the States, the public interest certainly requires that the Supreme Court hear the cases, if its decision will remove the conflict.

The Judges’ Bill did not completely eliminate caseload pressures, of course. Petitions for certiorari alone topped 5,000 a year by the early 1980s. In October Term 2011, the Court considered more than 7,500 petitions, although this number represents a modest decrease from prior years. Despite these massive numbers, however, the Court has not fallen behind in dealing with these filings. Instead, it has adopted a variety of ways of dealing with them efficiently—from eliminating the need to discuss a petition in the justices’ conference unless at least one justice wants to consider it, to relying on law clerks to read the petitions and summarize them in brief memos. This latter mechanism relies heavily on the “cert pool”—a cooperative agreement among most of the justices (currently, all but Justice Alito) in which the petitions are divided among the chambers and each petition is assigned to a single law clerk. The cert pool was introduced in the 1970s.

For cases decided on the merits, however, the Court continued to feel greatly burdened by its workload in the mid- to late twentieth century, even as the number of merits cases shrank. In the 1980s, the Court heard argument and issued written opinions in approximately 150 cases a year. Many observers, and some of the justices themselves, believed that 150 cases were simply too many for the Court to handle well. Moreover, these people argued, the Court was unable to give truly important cases the time and attention they needed in part because of the need to manage the mandatory appeals, which were often not of interest beyond the parties themselves. There was much discussion of some kind of national court of appeals or other panel to assist the Supreme Court with the more mundane cases. Then-Justice William H. Rehnquist explained at his 1986 confirmation hearings to be Chief Justice:

I think if Congress could be persuaded, not ultimately but very presently, there ought to be a new national court, frankly recognized as such, with judges appointed by the President and confirmed by the Senate, who would act as something of a junior chamber of the Supreme Court, to hear primarily statutory cases about which there are presently conflicts in the circuit[s].
As we all know, no such dramatic change occurred. During the 1970s, Congress eliminated mandatory jurisdiction in a number of types of cases and in 1988, once again at the justices’ urging, it eliminated almost all of the remaining direct appeals to the Supreme Court. The Court, freed from mandatory appeals and aggressively applying its certiorari criteria, has been hearing argument in fewer and fewer cases a year. In October Term 2011, for example, the number of cases decided after briefing and oral argument reached the historic low of 65 cases.

Not only do these numbers place the Supreme Court caseload at historic lows, but, as Judge Richard A. Posner has pointed out, when measured as a proportion of all cases in the federal judicial system, the case-load is vanishingly small. He “compare[s] the percentage just of federal court cases in which the Court granted certiorari in 2004—0.11% (64 divided by 56,396)—with the corresponding percentage in 1960—1.6% (60 divided by 3753)” to find that “the Court reviewed, in relative terms, almost 15 times as many federal court cases in 1960 as in 2004.”

Put another way, what Frankfurter and Landis said in 1928 remains just as true today:

Perhaps the decisive factor in the history of the Supreme Court is its progressive contraction of jurisdiction. . . . In contrast with the vast expansion of the bounds of the inferior federal courts, the scope of review by the Supreme Court has been steadily narrowed.
This “progressive contraction,” both of mandatory jurisdiction and of the Court’s exercise of its own discretion to hear cases, has reached a point where the concerns expressed today about the Supreme Court’s workload are unprecedented. Commentators and observers today complain that the Court is not taking enough cases and that the justices do not work hard enough. In stark contrast to Chief Justice Rehnquist’s statements at his confirmation hearings, then-Judge John G. Roberts indicated at his hearings in 2005 that he thought there was “room for the Court to take more cases.” Nonetheless, since his confirmation, the Court has not in fact done so. As already noted, the Court decided only 65 cases after briefing and argument in October Term 2011. Whether and how Congress—or the Court itself—will ultimately respond to such complaints and observations, and what the next 125 years will bring, remains to be seen. ◆

Sources and Further Reading

Carolyn Shapiro earned both her B.A. and J.D at the University of Chicago. After law school, she went on to clerk for then-Chief Judge Richard A. Posner of the Seventh Circuit Court of Appeals and Justice Stephen G. Breyer of the United States Supreme Court. Following two years as a Skadden Fellow and four years as a civil rights lawyer in private practice, she joined the faculty of Chicago-Kent as a visitor in 2003 and as a tenure-track faculty member in 2004. Her research focuses on federal courts, especially the Supreme Court, and she is the director of Chicago-Kent’s Institute on the Supreme Court of the United States.
James Kent wrote those words in 1826, decrying the fact that more than 600 volumes of English and American case reports and treatises had been published, but not many of them were helpful to the student seeking an understanding of the common law. “Steady perseverance,” to Chancellor Kent, meant setting aside more books than were consulted, to take control of the “indigestible heap of . . . legal authorities.”

The early classes at Chicago-Kent College of Law were taught in judges’ chambers or in law offices, where the library usually belonged to the instructor. Students were often free to use the books, and sometimes could borrow them for short periods of time. The trouble was, everyone needed the same books. The problem was underscored when Dean Langdell’s case method became the dominant means of instruction. Many volumes of case reports had to

125 YEARS OF LAW BOOKS, 1888–2013

Keith Ann Stiverson

To attain a competent knowledge of the common law . . . requires steady perseverance, in consequence of the number of books which beset and encumber the path of the student.

—James Kent
be replaced year after year, because the pages where the assigned cases appeared were simply thumbed to death by students: the casebook was born of necessity as much as convenience.

The nineteenth century law schools that merged to become Chicago-Kent College of Law had very small collections of books, but students had access to both the city’s public library (founded in 1872) and the Newberry Library, a humanities research collection open to the public that was established in 1887. The only Chicago law library of any size was the Chicago Law Institute Library, which was incorporated by a small group of lawyers in 1857 to serve the needs of the city’s growing legal community. The collection consisted of approximately 7,000 volumes and was housed in the Cook County Courthouse, where judges, government employees, and law students were permitted to use the collection at no charge, while local practitioners paid an annual fee of $100. The Law Institute collection eventually served as the basis for the Cook County Law Library, which is now estimated to have more than 300,000 volumes.

Law book publishing in the nineteenth century was initially based in Albany, New York City, Philadelphia, and Boston, but Chicago also had a share of the industry, including E.B. Myers & Co., a book store/office for Lawyers Co-operative Publishing Company of New York, and the Illinois Book Exchange, which provided student textbooks. The most famous law book store of all was “Callaghan’s Three Miles of Law Books” at 68 West Washington Street, which eventually became “Miles and Miles of Law Books” in later advertisements when its stock was replaced after the Great Chicago Fire of 1871. Law books were often distributed through the publishers’ own book stores, but Callaghan sold books from many publishers.

It was in the 1880s that American law publishers began to create order out of the “indigestible heap” of law books that was growing very fast as the nation and commerce developed. By then, case reports had been published in the United States for approximately 100 years, but not in a systematic way until West’s National Reporter System began in 1879 with the Northwestern Reporter. West was the company that established a real system for publishing cases, and then followed that innovation with the American Digest System. Soon after the Northwestern Reporter began, West took over and improved the U.S. Digest, which was previously published by Little, Brown. West’s digests and Key Number System enabled lawyers to find what they needed in the rapidly-growing sets of West reporters. The company then answered the needs of lawyers who could not afford (and did not want) the entire national system when it
began publishing state digests and reporters.

As West was inventing a system to grapple with the burgeoning case law, Frank Shepard was inventing the case citator. Shepard’s Citations began in 1873 as a service in which adhesive labels were sent to subscribers who affixed them to the pages of published case reports so that the lawyer reading the case could determine whether the court’s decision in the case was still “good law” or had been overturned on appeal. Eventually Shepard developed a complicated system of abbreviations to indicate the importance and validity of the case so that a reader knew if the case could be cited as authority for the statement he wanted to make. The awkward method of updating (the gummed labels often dried up and fell off the pages) didn’t work very well, so Shepard began publishing his updating system in bound volumes keyed to the various reporters and updated by paperback supplements. The lawyer who needed to determine the history or current status of a case he was reading could simply check by citation. Finally, in the 1980s, the Shepard’s Citations system became the extremely current online citator that lawyers use today.

One response to the proliferation of cases was the birth of selective case reporters with so-called annotations, i.e., an explanation that put the case(s) in context and provided a narrative to explain the development of a particular area of law. It was simply impossible for most lawyers to keep up with the massive number of court opinions being published, so the idea of highlighting and explaining only the leading cases had real merit. The earliest of the annotated cases, in the 1880s, were accompanied by short notes; later on, editors wrote hundreds of pages to explain the development and current state of an area of law in multiple jurisdictions.

Another innovation that came from the law book publishers soon after the turn of the century was the specialized loose-leaf service. The first successful one was published by Commerce Clearing House in 1913 after ratification of the Sixteenth Amendment created the income tax. Soon there were other services covering such subjects as trade regulation and banking, then additional areas of law as more publishers entered the field. The most useful of the loose-leaf services brought together in one publication all of the things that a practitioner needed: court opinions, rulings, statutes and regulations, as well as secondary commentary. Many of the services were updated weekly, so the lawyer had less reason to worry that the information he had was out of date. In the 1980s, many lawyers who specialized in a particular area of law welcomed the new CD-ROM format, which made it easy for them to carry around their entire law library.
Judges were not the only busy writers; legislatures, both state and federal, began to pass more laws to deal with the demands of an increasingly complex industrial society. Session laws were often published only at the end of a session of the legislature; these, along with the occasional statutory digest and the various indexes, were not sufficient to make the material available in a timely manner. It was increasingly difficult to piece together the original statute with all of the amendments of later years. The Revised Statutes of 1873 was a temporary solution to the problem, but it was 1926 before the first publication of the United States Code. The Code finally gave lawyers access to federal law in a topical arrangement that was updated. The official Code is republished every six years; the most recent edition consists of more than 200,000 pages. West began publishing an unofficial version of the Code right away, in 1927, called the United States Code Annotated. As everyone knows who has done research in federal statutes, West did a faster, better job than the government of publishing the supplementation necessary to keep the Code up to date. Many states also began to compile their statutes into a topical arrangement with an extensive index. Some of these compilations provided citations to cases or short annotations of the court decisions that had construed each section of the statute.

No law library could afford to collect all of the official statutes and court opinions of Federal and state governments, let alone the commercial versions of primary material. The huge wave of secondary legal publications that appeared in response to the New Deal and the eventual specialization of the legal profession made it impossible to build a truly comprehensive collection. The 600 volumes of case reports that once annoyed Chancellor Kent continued to multiply until it eventually became the behemoth that also included thousands of law reviews and legal newspapers. Luckily, the technology we needed and the uniform system of legal citation made it possible to control this enormous mass of material, and to simplify the many elaborate systems that had been created to help the practitioner find the law by subject.

The 1970s and 1980s were decades of real achievement in making the whole body of law and the many secondary sources more readily available in convenient form. The Lexis database was followed eventually by Westlaw, and the two systems have dominated the market for online legal research ever since, despite weak challenges from smaller publishers and from the open access movement. The recent entry of Bloomberg Law/BNA into the online market is the first real challenge to the supremacy of Lexis and Westlaw.

A collection of historical books
named *The Making of Modern Law* (MOML) was an important contribution to law collections several years ago that helped to level the field for new academic law libraries that had few of the older books. MOML is a digital collection of more than twenty thousand nineteenth and early twentieth century treatises and other legal documents that are accessible through Chicago-Kent Library’s online catalog. As one flips through the pages of this electronic book collection, it is somewhat surprising to realize that quite often one is looking at images of a print work that was once prized by our nineteenth century faculty and students. An example is Thayer’s *A Preliminary Treatise on Evidence at the Common Law*, published at the turn of the last century and later added to our library’s print collection as the 10,510th volume, a work that is still available on a shelf in the library, but also accessible as a full-text e-book that can be read 24/7 by clicking a hyperlink.

Now that our huge collections of print volumes are disappearing from shelves, what will happen next to the academic law book collections that took more than a century to acquire? One can probably predict more offsite storage, more e-books, and more use of print-on-demand options. What was once known as “collection development” in the library has undergone radical change. Acquisition is often temporary, and research materials are not automatically added to the library’s permanent collection.
Many law libraries are returning to their roots to make the historical materials of their law schools available. For instance, Chicago-Kent Library is starting a project to preserve the law school’s unique historical collections by placing them in a digital repository. The images will reside in the cloud, rather than moldering away, page by page, in a dark room. The institutional repository will be the permanent home for (among other things) the early publications and videos of and about the law school. We will be able to tell the descendant of a 1915 graduate where to find the online class photograph that includes his great-grandfather. The nephew of a woman who was the class poet many years ago can now read her work online, because we saved on old student yearbook before it disintegrated.

Today’s law student may finish her legal education and then go into the practice of law without ever using a print volume, given the twenty-first century reality that online databases usually contain everything she needs for research, and client files are often in an electronic knowledge management system rather than in a print file. But if she returns for a law school class reunion in a few years, hoping to re-live her triumph at a law student talent show, we hope we’ll have a link to the video.

Sources and Further Reading
- Chicago-Kent College of Law, The Transcript (student yearbook), 1917–.

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I. The First 100 Years

A. The Early Years

At the end of the nineteenth century, the major method by which one became a lawyer was through self-study under the supervision of a practicing lawyer—an apprenticeship. Few law schools or even university law departments existed. In 1774, Judge Tapping Reeve of Connecticut established the first law school, Litchfield. Over the next 58 years, Reeve and his partner James Gould lectured on all areas of the law to over one thousand student-apprentices. Graduates included two Vice Presidents of the United States, 101 members of the United States House of Representatives, 28 United States senators, three justices of the United States Supreme Court, 14 state governors and 13 state Supreme Court chief justices. In 1779, Thomas Jefferson established a “chair in law” at William and Mary. George Wythe was appointed to the position, and gave lectures on various law subjects as part of the university’s multifarious curriculum. Harvard, Pennsylvania, Maryland and other schools later added actual law departments;
their graduates were awarded bachelor degrees. Most schools offered a curriculum similar to Litchfield’s: lectures on Domestic Relations, Executors and Administrators, Sheriffs and Gaolers, Contracts and Actions, Torts, Evidence, Pleading and Practice, The Law Merchant, Equity, Criminal Law, and Real Property. Apprenticeship remained the major means to becoming a lawyer.

As interest in law training increased, lawyer/mentors tended to overwork their apprentices with work growing out of their practices, leaving little time for the would-be lawyers to study on their own. Also, the significant increase in immigrants furnished a large audience eager to enter a profession in their new country. Thus, a number of evening law programs began, enabling those interested in keeping their jobs while preparing for careers in law. In Chicago, the first of these was Union College of Law, begun in 1859. It was founded and maintained through a loose association of Northwestern University and Chicago University. The Chicago University was not The University of Chicago, which was founded years later in 1890. Chicago University went defunct about 1871, at which time Northwestern completely took over the Union College of Law.

In 1887, four young clerks at the law firm of Burke, Hollett and Tinsman—Kickham Scanlon, Louis Henry, Rudolph Frankenstein, and Joseph Grannick—asked Mr. Burke for advice on how they could obtain mentoring after work as they studied for possible admission to the bar. Mr. Burke recommended they talk with Justice Thomas A. Moran of the Illinois Appellate Court. Moran was intrigued with the idea but at that time believed he was too busy. He in turn recommended they speak with Justice Joseph Meade Bailey, then of the Appellate Court and soon to be elevated to the Illinois Supreme Court. Justice Bailey agreed to meet with the group from 7 p.m. to 9 p.m. three nights a week in what they informally called “The Evening Law Class.” The group met in Justice Bailey’s chambers at the Court, located in the Grand Pacific Hotel, at LaSalle and Jackson. As word of the class spread, other apprentices throughout the city requested to be allowed to sit in on the class. In 1888, the class was formalized and Justice Bailey incorporated it as Chicago College of Law, with himself as dean and president. Bailey induced Justice Moran and Appellate Court Judge Shepard to join him as teachers, enabling them to split the evenings and have classes Monday through Saturday.

Classes were spread over two years, and labeled the Junior and Senior Classes. The Junior classes were held on Monday, Wednesday and Friday, from 7 p.m. to 10 p.m., and the Senior classes were held on Tuesday, Thursday and Saturday. Tuition was set at $5 per month, pay-
able three months in advance. The judges’ lectures were supplemented for the Junior Class by readings from law books, including Blackstone’s Commentaries, Kent’s Commentaries, Bishop on Contracts, Walker’s American Law, and Morey’s Elements of Roman Law. The Senior Class was assigned readings from more advanced legal texts including, Bishop’s Principles of Equity, Gould on Pleading, Taylor on Corporations, and Langdell on Equity Pleadings. Completion of the two-year program enabled graduates to be eligible for admission to the bar, upon proper motion by an existing member of the bar.

Students could be admitted without having attended college or finishing high school. Students who lacked a high school diploma could be admitted by showing that they had a “good common school education” and could pass a test on the branches of learning commonly taught in high school. Many other schools in the country did not admit women or persons of color. In contrast, the Chicago College of Law catalogue emphasized that “no distinction will be made in the admission of students on account of sex or color.” Thus, among the students in the early classes were several women and students of color. Ms. Emma Bauman was in the very first class and was admitted to practice in 1890. Ms. Ida Platt, Class of 1894, was the first African-American woman admitted to practice in Illinois. Twenty of the first one hundred women admitted to practice in Illinois were graduates of the school.

Things moved quite quickly in the first few years. The rapid increase in enrollment led Justice Bailey to move the classes to the Appellate Court rooms at the Chicago Opera House Building, on Clark near Washington. In 1889, the Chicago College of Law merged with Lake Forest University, which was seeking to become a full-fledged university with affiliated medical, dental and seminary schools. In addition, because so many lawyers had already been admitted to practice, based only on their home-study, the Chicago College of Law established a post-graduate program to help them measure up to the demands of the profession. The graduate program consisted of one year of practice-oriented courses, two nights per week for eight months, with tuition of $40 per year. Further help was offered through a summer school, with classes on drafting pleadings and contracts, for a fee of $12. Completion of the full three-year program earned graduates a Bachelor of Laws degree and automatic admission to the bar.

The success of the College is shown by the fact that over the first six years of its existence, 766 students graduated from the two-year undergraduate program, and 290 lawyers from the graduate program. In 1892,
the ever increasing size of the classes caused the College to move once again, this time to the Atheneaum Building, located on Van Buren near Michigan.

Justice Bailey passed away in 1896. Judge Moran took over as dean and president. Judged by modern standards, the law school was literally an undergraduate college, with very young students. It was thus natural that the typical college organizations formed, including fraternities and sororities, clubs of all kinds, a school newspaper, and a combination catalog/yearbook/law review, *The Athenaeum Journal*.

Meanwhile, in 1891, Northwestern took full control of the Union College of Law, and renamed it Northwestern Law School. Marshall Ewell, one of Union College’s leading professors, was unhappy with the shift in teaching philosophy and pedagogy that was put into effect at Northwestern. He believed that by eliminating many practical courses from its curriculum, Northwestern had lost sight of the fact that the law school was supposed to be training students for the practice of law. In 1892, he and several other faculty members resigned and formed a new school, Kent School of Law. Forty-two Northwestern students followed Ewell to Kent. The initial classes were held at the Briggs and Stratton Business School Building. Kent’s first catalog opined that it would be the first law school in the country emphasizing the “practical method,” requiring each student, after learning the basics of the law, to “engage in the practical work such as usually engages the attention of a regular practitioner.” Such training would enable graduates “at once to fill important and responsible positions . . . which, under the old method, they could not . . . fill without from six months to a year’s further training in an office.” The curriculum featured an upper class School of Practice, in which each student would have to draft all of the typical documents for cases that would arise in every area of practice.

Kent College was very successful, enrolling well over 500 students during the first three years of its existence. Within a year, the law school

*Painting of Justice Joseph Meade Bailey, Dean, Chicago College of Law, 1888–1896.*
moved to the sixth floor of the Ashland Block Building at Clark and Randolph. Two years later, it moved again, this time to the Association Building, next to the Chicago Bar Association’s quarters on LaSalle Street.

In 1902, Ewell’s advancing age apparently led him to negotiate a merger with Chicago College of Law of Lake Forest University. The law school name was changed to Chicago-Kent College of Law. Ewell and some Kent faculty made the move as well. Two years later, Lake Forest decided to leave the professional school business, rescinded the merger, and Chicago-Kent became a freestanding independent law school, which it remained for 65 years. In subsequent years, Chicago-Kent absorbed other law schools that had tried to establish themselves in the Chicago law school market, including colleges named YMCA, Webster, Western and Chicago Business Law. The Chicago-Kent curriculum was expanded to three years, and a bachelor of laws awarded to graduates, which made them eligible for admission to the bar. The law faculty adopted the Case Method of teaching, pioneered by Langdell of Harvard, but also retained the senior School of Practice inherited from Ewell and Kent College.

In 1904, Judge Thomas Moran passed away. He was succeeded by Justice Edmund W. Burke, also of the Appellate Court. The law school now employed, part-time, about 20 lawyers and judges to teach the solid array of courses in its three-year curriculum. They were paid $5 per class hour for their teaching. Courses were divided by the number of weeks they would meet. Thus, during their first
year, students took Contracts for five hours a week for 14 weeks, Torts for two and one-half hours per week for 18 weeks, Personal Property for two and one-half hours for 11 weeks, etc.

The law school moved again in 1913. It occupied three floors in the new 116 N. Michigan Avenue Building, which also housed the Chicago Municipal Courts. This arrangement made it easier to draw on the judges and lawyers who served as faculty, and reach out to the employers of many of the students. Among the faculty was one distinguished alumnus of the school, Hon. Henry Horner, Judge of the Probate Court. Horner continued to teach until 1924, during which time he wrote the leading treatise on Illinois Probate Law. In 1933, he was elected Governor of Illinois, serving till his death in 1940.

The make-up of the student body was incredibly diverse. A survey of one class showed that the students held jobs as disparate as accountants, court reporters, dentists, engineers, law clerks, letter carriers, merchants, secretaries, teachers, etc. They were primarily young people on the rise. Thus, the school had a debating society, which placed teams in competitions against teams from other colleges. These debates were carried on radio, and the listeners sent in their ballots to choose the winners. The school also had a swimming team, a wrestling team, and a highly successful basketball team, all competing against teams sponsored by other local colleges, churches, or clubs. One of the six fraternities, Phi Alpha Delta, was established at Chicago-Kent, and in fact had its own fraternity house on south Michigan Avenue. The first legal sorority, KappaBeta Pi, likewise began at Chicago-Kent and soon had chapters throughout the country. A band, the Kent Syncopators, was hired out for weddings and bar mitzvahs. When World War I broke out, many students enlisted or were drafted. Some, unfortunately, did not return from the war.

B. World Wars I and II

In 1918, upon the death of Dean Edmund W. Burke, his son, Webster Burke, became dean and president of the Board of Trustees. He continued to run the school for over 30 years, at a salary of $400 per year. He waived all salary during and after World War II. Tuition in 1918, which had been $60 per year in 1888, had slowly risen to $90 per year. The early period of Webster Burke's tenure as dean saw the law school grow to one of the largest in the country. Thus, from 1909 to 1912, Chicago-Kent had the sixth largest student population; from 1913 to 1916, it had climbed to second largest.

Webster Burke was a frugal administrator and somehow raised enough money so that by 1923 the law school was able to finally buy its own building, a small four-story structure at 10 N. Franklin Street.
That year coincided with the inauguration of the Chicago-Kent Law Review.

Over the next 15 years, the law school increased its requirements for admission. The first change was to require applicants to have completed at least 30 hours of college credit. Within a few years, the requirement grew to 60 hours. The school also gradually moved towards adding a day division. A major step was taken in 1937 when the law school received ABA accreditation, enabling graduates to be eligible to seek admission to practice in any other state. In addition, part-time teachers were no longer the entire law school faculty. By 1940, six full-time teachers made up the nucleus of the faculty: Donald Campbell, James Hemmingway, Charles Pickett, Roger Severns, Ernest Tupes and William F. Zacharias. Tuition now was charged by the credit hour—$7 per hour, with 75 hours required to graduate.

World War II had a serious impact on the law school. Unlike many other law schools, it remained open, though with very small classes. The student-body was roughly a third of its normal size. Warren Heindl, born with cerebral palsy and thus ineligible for the draft, took one class in which he was the only student. The professor held every class and required Warren to “recite” on every assigned case.

In 1949, Dean Burke resigned so that the school could apply for AALS accreditation. The rules required a full-time dean and he still was working and drawing a salary at his old law firm. Donald Campbell was promoted from the full-time faculty to take on the job. AALS accreditation was received in 1951, making Chicago-Kent one of only three non-university affiliated schools to be accredited by the AALS. The year 1951 also saw over 500 alumni attend the 65th annual homecoming luncheon in the Grand Ballroom of the Sherman Hotel. At that event, a Chicago-Kent student team was honored for reaching the finals of the National Moot Court Competition, a first for the law school.

In 1956, Dean Campbell retired and William F. Zacharias was chosen to succeed him. Zacharias at first declined the offer because of what he asserted was the deplorable physical condition of the law school. The 10 N. Franklin building had no library. Students had to use the library of the Cook County Bar Association at the Civic Center. It had only three classrooms and not enough offices for the full-time faculty. In fact, Zacharias’ first faculty “office” was located in the boiler room!

Zacharias agreed to accept the job after President Douglas Schwantes of the Board of Trustees announced a fund-raising campaign, seeking to acquire for the law school the adjoining wine warehouse at 12 N. Franklin, and to blend the two buildings into one. A $500,000 campaign was
successfully launched, the building was acquired, and classes continued to be held at 10 N. Franklin while the blending construction took place at 12 N. Franklin. When it was complete, the law school now contained space for a library reading room, a reserve library stack area for 25,000 books, a 200-seat auditorium, six classrooms, a student lounge, a small faculty library, seven faculty offices, a separate faculty washroom, a large entry area, offices for the dean, registrar, and two assistants, as well as space for a switchboard operator.

Dean Zacharias prided himself on “running a tight ship.” However, he often ran it too tightly. He was dean, policeman, security guard, registrar, admissions officer, and secretary all-in-one. He made all admissions decisions, some of them controversial. He cut off the locks from student lockers at the end of the year. He physically removed students from classes if they were behind in paying tuition. He also personally threw out the occasional Skid Row bum who wandered into the building. At the time of registration for a new semester, he wrote out the class schedule for each student, including selecting their “electives” for them. When grades were turned in, he computed each student’s grade point average by pencil, and then personally typed the warning letters to those who were to be put on probation and the dismissal letters to those who would be dismissed.
Faculty who taught for most of the Zacharias years included the brilliant Fred Herzog, a judge in Austria who fled the Nazi invasion to come to America, James K. Marshall, Theodore Bayer, John Drac, Marty Hausman, Warren Heindl, Shelvin Singer, Jerry Bepko, Dean Sodaro, and a very young Ralph Brill. Faculty salaries were very low, and teaching loads were very high.

In 1968, both Dean Zacharias and President Doug Schwantes announced that they would be retiring within a year. While the school was maintaining steady enrollment and income, it had a very small endowment to fall back on should leaner times appear. The Trustees continued to insist on quality education at an affordable tuition—$18 per credit hour with 75 hours required for graduation. Some felt that the reputation and the future of the law school were jeopardized by the fact that it was not connected with a university. Thus an agreement was reached to merge the school with the Illinois Institute of Technology, effective in 1969. A controversial provision in the agreement indicated that the law school would be moved to the IIT campus in the future, away from the downtown law firms and not convenient for evening students. The agreement also specified that the Chicago-Kent name would not be changed.

For the first time in its history, the law school performed a nation-wide search for Zacharias' successor; however in the end, the faculty and administration chose Fred Herzog to be its new leader. Simultaneously with his taking office in September 1970, an unexpected rise in applications for admission occurred. The number of women taking the LSAT rose dramatically. Within the three years of his deanship, the total enrollment of the school rose from 450 to 750, with most of the increase being traceable to the high percentage of women entering law school. The boom necessitated a dramatic increase in full-time faculty, and pushed the limits of the existing physical plant to a nearly unmanageable level.

Dean Herzog made history by the faculty he recruited and hired. Among the many new faculty hired during Dean Herzog's short term were Mary Lee Leahy, the first woman professor at Chicago-Kent, and Emerson Blue, the first African-American professor. Dr. Walter Jaeger, a nationally famous professor at Georgetown and the author of the revised edition of the famous treatise, Williston on Contracts, was induced to join the Chicago-Kent faculty. He also hired Lew Collens, who later would become dean of the law school and then president of the university. Two wonderful colleagues, Howard Chapman and Phil Hablutzel, were also hired at that time and are still active and productive professors at the law school.
When Professor Leahy left for a government appointment, Dean Herzog hired another well-known female lawyer, Jill McNulty, who later would be elected as Justice of the Appellate Court.

In December 1973, Dean Herzog was recruited by the Illinois Attorney General to become First Assistant Attorney General of Illinois. Professor Ralph Brill, then the associate dean, was elevated to interim dean, and served for two years.

Much was accomplished in those two years. The law school space was doubled by annexing space at 33 W. Madison. Five new professors were hired, including David Rudstein and Richard Conviser. A new clinical program was started in which third year law students earned credit by working on Cook County Legal Assistance Foundation cases, under the supervision of three clinical professors hired by the law school. Warren Wolfson, a well-known Chicago lawyer and judge, was hired to start the Trial Practice program.

C. The Lew Collens Era

In 1974, the IIT administration selected Professor Lew Collens to become the dean of the law school. Lew went on to serve as dean for 17 years, at which time he was selected to be the president of the university. During Lew’s long reign as dean, the law school made tremendous progress as an innovative and exciting law school.

One of the first steps taken by Dean Collens and IIT’s new president, Tom Martin, was to resolve the physical plant issues that had mushroomed as the school had grown. The 10-12 N. Franklin building was much too small for the many stu-
Students and faculty now at the school, and the 33 W. Madison annex was only a temporary solution. While the merger agreement with IIT had specified that the law school would relocate to a building on campus at 31st and Federal, the law school faculty, Chicago-Kent Board of Overseers, and the alumni agreed that this would be a significant mistake. President Martin agreed, and instead raised funds to acquire a six-story building at 77 S. Wacker Drive. The more than 120,000 square feet was at least five times the total space of the old building and annex. The space was refurbished with modern furniture and fixtures, several floors of classrooms, two floors of open library stacks and reading rooms, over 50 faculty, administrative and student organization offices, a cafeteria, one separate floor for the clinic, and a multi-use auditorium. The library grew to house 450,000 volumes. The school moved into the new space in mid-1976.

Dean Collens was a very pragmatic dean, willing to take chances with new ideas and back them fully. Thus, in 1977, he approved the creation and implementation of the first three-year Legal Writing program in the country, headed by Professor Brill. As it developed, students were required to take 11 credit hours of the total of 90 now required for graduation, in five separate courses, spread over three years of law school. The program received superlative reviews and the positive publicity was used successfully as a recruiting tool by the admissions office. Full-time Legal Writing teachers taught the first-year classes and expert practitioners taught spe-
cialized advanced courses. In later years, a Visiting Assistant Professor component was added to help cover the first-year component. The VAP program, basically an apprenticeship for new teachers, still receives wide acclaim today. Over 50 former VAPs have gone on to careers as law professors at law schools throughout the country.

The successful Legal Writing program also led to another remarkable program. At the behest of students Ron Petri and Tom Krebs, the faculty approved the creation of the Moot Court Society. Students who had excelled in the first-year second-semester Legal Writing oral advocacy competition were invited into the Society, and received credit for participation in an advanced intra-mural competition. From this competition, students were chosen to staff Chicago-Kent teams in an increasing number of inter-mural national moot court competitions. Almost immediately, student teams began winning local rounds of national competitions and then advancing to the final rounds of competitions such as the very prestigious National Moot Court Competition and the ABA National Advocacy Competition.

Professor Ron Staudt was responsible for the next innovation the law school could justly claim—the establishment in 1983 of the Center for Law and Computers. Professor Staudt received a grant from IBM to install desktop computers into a student computer laboratory, and to teach students how to create their study materials, do legal research and experiment with the creation and drafting of legal documents using this then novel tool. Doctrinal faculty, who at first were against the use of the new gadgets, were taught word processing and research, and soon became supportive advocates for the program.

The Legal Clinic, begun as a supplier of legal services for the poor, was turned into a full fee-generating law firm under the direction of Professor Gary Laser. The Chicago-Kent Law Offices was and is still the only law school clinic of its kind in American law schools. Clinic lawyers and students worked on famous cases, such as representing John Wayne Gacy. One clinician, assisted by students, won acquittal on attempted murder charges for Vietnam veteran Jerald Wood based on a Vietnam stress syndrome defense. The Law Offices also initiated an externship program, placing students as law clerks for credit with judges.

In the 1980s, the Trial Advocacy program began sending teams to a number of national competitions. In 1988, a Chicago-Kent team, consisting of Lauretta Higgins, Peter Roskam and Joel Daly, and coached by Professor Warren Wolfson, won the 13th Annual National Trial Advocacy competition, the start of a marvelous string of victories in national competitions.
Dean Collens also devoted much attention to hiring and financially supporting the best possible scholars to teach at Chicago-Kent. Thus, within a few years of his decanal appointment the following nationally recognized scholars joined the faculty: Dan Tarlock, Mike Spak, Sheldon Nahmod, Stuart Deutsch, Howard Eglit, David Gerber, Marty Malin, Jeffrey Sherman, Joan Steinman, Margaret Stewart, Richard Wright, Steve Heyman, and Jacob Corre. The law school also benefited from semester or year-long visits by distinguished professors from elite law schools, including John Hart Ely of Harvard, and Gerald Gunther of Stanford. Special lectures were delivered by celebrated dignitaries including Justice Arthur Goldberg, Judge Abner Mikva, Governor Adlai Stevenson III, Mayor Harold Washington, and Mayor Richard J. Daley. Financial support for Chicago-Kent faculty scholarship was augmented by a grant from Paul Freehling in honor of his father, a Chicago-Kent alumnus.

Wise decisions also were made in judging young talent. Teachers who were given their start at Chicago-Kent, developed into leading experts in their fields, and then moved on to other schools included: Fred Abbott, Randy Barnett, Dale Nance, Anita Bernstein, Linda Hirshman, J. Gordon Hylton, and Carol Silver.

Another major change for the law school was the establishment of a number of specialized J.D. programs and several graduate programs. The graduate programs during this period were in Tax Law, currently run by Professor Gerry Brown, Financial Services, currently run by Hank Perritt, and an LL.M. for foreign students, currently run as part of our international programs under the direction of Ed Harris. J.D. specialization certificate programs were available to students in Environmental Law and Labor Law, later joined by Litigation and Dispute Resolution and Intellectual Property.

The successes of the school’s innovative skills programs led Chief Justice Burger in 1986 to single out Chicago-Kent for special praise. The high quality of scholarship produced by the faculty played a key role in having Chicago-Kent inducted into the prestigious Order of the Coif, the 70th school to receive that honor. And, in 1990, U.S. News and World Report listed Chicago-Kent as the top “Up and Coming Law School in the Country.”

In 1987, the law school celebrated its 100th anniversary. The all-day celebratory program featured visits by alumni and guests to the law school, a convocation at McCormick Place, the bestowal of honorary Doctor of Laws degrees on Hon. Harry Blackmun of the U.S. Supreme Court and Professor Gerald Gunther of Stanford. Speeches were given by representatives of the students, faculty, alumni, legal education organi-
zations, and IIT. Dean Collens listed the agenda the school faced for the next 100 years. The list included: establishing faculty chairs to attract and retain great faculty; establishing interdisciplinary research centers in such subjects as environmental law, energy, computers and the law, legal theory, and problems of the elderly; creating exchange programs abroad to enhance the teaching of international and comparative law; expanding scholarship programs to attract great students and ease their financial burdens; and to expand the physical plant to accommodate expected growth in students and faculty. All of these and more would be accomplished in the next 25 years.

D. The Last 25 Years

The year 1990–91 was one of the most important in the school’s history. First, when IIT’s President Meyer Feldberg suddenly resigned, Lew Collens was elected by the IIT Board of Trustees to fill that position. He served as President until 2007. Professor Joan Steinman served as interim dean for one year. Rick Matasar, the associate dean at Iowa, was then selected to become Chicago-Kent’s next dean, the first Chicago-Kent dean to be chosen from outside the ranks of the existing faculty.

Second, the IIT Board of Trustees seized an opportunity to sell the existing law school building at 77 S. Wacker Drive and to raise additional funds with which to construct a new, state-of-the-art building at 565 W. Adams St., near Union Station. Among the many innovations in the new building were the Abraham Lincoln Marovitz Courtroom, a 500-seat auditorium, full computer technology in all offices and classrooms, a large fresh food cafeteria, and multiple student function areas. The building was finished and occupied in 1992.

During the 1990–96 era the law school faculty and dean focused on trying to improve the school’s reputation among peer groups—i.e., scholarly faculty at other law schools. Dean Matasar therefore created a number of Distinguished Professorships, rewarding some of the faculty’s most productive scholars. Many fine scholars were added to the faculty, including: Cheryl Harris, Lori Andrews, Katherine Baker, Fred Bosselman, Evelyn Brody, Bartram Brown, James Lindgren, Richard McAdams, Richard Warner, Harold Krent, Steve Sowle, Richard Hasen, Rafael Gely and Sarah Harding. The annual law school catalog listed 12 pages of law review articles and books for this period.

Dean Matasar resigned in 1996 to become dean at the University of Florida School of Law, and Professor Stuart Deutsch filled in as interim dean for a year. Professor Steve Sowle took over as assistant dean from long-time Associate Dean Howard Chapman, who continues to teach major courses in the curriculum.
Professor Henry Perritt of Villanova was selected as dean of the law school in 1997 and served until 2002. Perritt was a pioneer in the use of computers in legal education, wrote a multi-volume treatise on labor law, and consulted on issues related to the war and recovery in Kosovo. As dean he established the extensive multi-disciplinary Global Law and Policy Initiative through which faculty, students, and alumni worked together on issues related to international criminal law, assisting the media to deal with political censorship in Bosnia, computerizing infrastructures for courts and business in Poland, and providing advice to refugees from the war in Kosovo.

Among the faculty hired during Dean Perritt’s term were: Graeme Dinwoodie, Steven Harris, Mark Rosen, Claire Hill, Tim Holbrook, Christopher Leslie, Nancy Marder, and Peggie Smith.

By the end of Dean Perritt’s term in 2002, Chicago-Kent was ranked in the top third of all law schools by U.S. News and World Report. It was one of only a few schools with an evening division to be ranked that high. It ranked behind Chicago, Northwestern and Illinois among law schools in the state.

In 2003, Hal Krent was selected to succeed Perritt as Chicago-Kent’s dean. He still holds that position. It is fair to say that since his appointment the law school has succeeded in every major respect, from faculty recruiting, to scholarly production, to superior skills training, to having a major role in legislative and societal planning. The quality of the students has increased dramatically. Members of the faculty are leaders in their fields, invited to appear on nationwide programs as well as deliver talks to individual law school audiences. They are regularly recruited by more elite schools, but luckily most have remained at Chicago-Kent. The Moot Court and the Trial Advocacy programs are consistently ranked among the top 10 in the country. The three-year Legal Writing program remains unique and emulated. The physical plant has been continuously upgraded and is still a state-of-the-art facility. The school has added many international and LL.M. programs, attracting over 100 students annually from all corners of the globe.

The beginning years of the twenty-first century continued the wonderful successes of the Moot Court program. Under the direction of Professor Sanford Greenberg and, for the last nine years, Professor Kent Streseman, the Chicago-Kent Moot Court program has achieved remarkable successes in national competitions. Our teams have won 36 national and regional moot court competitions, along with over 80 individual awards for brief-writing and oral advocacy. It has the distinction of being the only school nation-wide to win back-to-back national titles in
the National Moot Court Competition, the oldest and most prestigious tournament in the country.

Similar successes have come in the Trial Advocacy program. Under the direction of former Judge Dave Erickson, and with coaching assistance of many Chicago trial lawyers and judges, the Chicago-Kent trial teams and members have excelled in national and regional competitions. Since 2000, Chicago-Kent teams have been National Champions four times. In various regional competitions Judge Erickson’s teams have been declared Champions nine times.

Under the direction of Mary Rose Strubbe and Susan Adams, Chicago-Kent’s three-year Legal Writing program continues to be a model emulated by many other schools and consistently ranks among the top writing programs in the country. The program has a group of very experienced and dedicated teachers: Elizabeth De Armond, Suzanne Ehrenberg, Doug Godfrey, Sanford Greenberg, and Kari Johnson. Cherish Keller was hired recently to work with teaching foreign students in the LL.M. programs. Outstanding Visiting Assistant Professors fill out the program before going on to tenure-track teaching jobs at other
law schools.

The Law Offices of Chicago-Kent greatly expanded during the last 25 years. It now offers a wide range of long-standing programs in live-client clinical legal education that accommodate more than 150 students in the fall and spring semesters and more than 50 students in the summer semester. The programs are diverse, covering the practice of criminal defense law, health and disability law, immigration law, employment discrimination law, tax law, family law, business law, and mediation and alternative dispute resolution. Current full-time teacher/practitioners in the clinic are Gary Laser, Richard Kling, Daniel Coyne, Richard Gonzalez, Laurie Leader, Heather Harper, Rhonda de Freitas, Edward Kraus, Ana Mencini, Jonathan Decatorsmith, and Pam Kenfra. Natalie Potts runs a program in Open Government. Vivien Gross supervises the Judicial Externship and Legal Externship programs in which students are placed as law clerks for credit with a judge or legal practice.

The last 10 years have seen the greatest growth in the breadth and credentials of the faculty. Dean Krent raised one and a half million dollars from 450 alumni to create Chicago-Kent’s first endowed chair, The Ralph L. Brill Chair in Law. Professor Adrian Walters, a world-renowned expert on bankruptcy law from the United Kingdom, was appointed as the first chair-holder. The school’s excellent reputation aided the dean and faculty in recruiting outstanding teachers including, Sungjoon Cho, Carolyn Shapiro, Michael Scodro, Daniel Hamilton, Felice Batlan, Bernadette Atuahene, William Birdthistle, Kimberly Bailey, César Rosado Marzán, Christopher Buccafusco, Edward Lee, David Schwartz, Stephanie Stern and Christopher Schmidt.

Chicago-Kent’s reputation for constant innovation has continued in the early twenty-first century. The energy of the new faculty and of the dean has led Chicago-Kent to become home to several institutes and centers, with missions that range from conducting scholarly and practical research on legal and social issues to providing topical programming for the legal community to developing public interest initiatives. Students who become involved in these activities, many of which involve cross-disciplinary projects, learn to appreciate and adapt to major social and global influences changing the nature of legal practice.

II. The Future

I hope that one reading this history is impressed with the tremendous growth of this great law school, from the Evening Law Class meeting in the chambers of Justice Bailey in 1887 to a vibrant, innovative, state-of-the-art educational institution. Among the thousands of its gradu-
Ralph L. Brill has been a member of the IIT Chicago-Kent College of Law faculty since 1961. He served as Associate Dean from 1970 to 1973, and Acting Dean from 1973 to 1974. For 14 years, Professor Brill was director of Chicago-Kent's unique three-year legal research and writing program, for which he is widely known. He has been the recipient of numerous awards for his contributions to the field of Legal Writing, including the Burton Foundation Legends Award, The AALS Section on Legal Writing, the Reasoning and Research Annual Award, the Legal Writing Institute Lifetime Achievement Award, the ALWD Leadership Award, and the special LWI/ALWD Ralph L. Brill Award for Long-Time Service. Chicago-Kent's first endowed chair is named after him, and is held by Ralph L. Brill Professor Adrian Walters. Professor Brill is co-author (with S. Brody, C. Kunz, R. Newmann and M. Walter) of the American Bar Association publication, A Sourcebook on Legal Writing Programs, has written numerous practical articles on Tort law, and has prepared appellate briefs in many important Tort cases.