

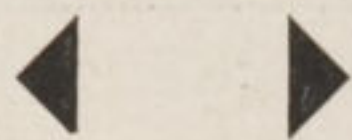


Mr. Borgeson

Harvard Law Record

New Teaching Schedule

American Anarchism



Cuban Report

By David F. Binder & Ralph Nader

Harvard Law Record

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CALENDAR

Notices for publication in the Calendar should be in the RECORD offices not later than noon the Friday before the date of publication.

Thursday

Clement Atlee will speak on "World Government or World Chaos" in an address sponsored by the Boston College Senate at Roberts Center, Chestnut Hill, Mass. at 8:30 p.m. Tickets are \$2.00.

The Society of Harvard Dames is holding an arts and crafts display at Harkness Commons, 8 p.m.

Friday

Gerald W. Blakely, Jr., President of Cabot, Cabot, and Forbes Company (real estate developments) will speak to the Bull and Bear Club on "Industrial Parks — Their Financing and Their Effect on Urban Development," at 1:40 p.m. in the Harkness Commons Meeting Room.

The Harvard Opera Guild is presenting the Metropolitan Opera Version of *Die Fledermaus* by Johann Strauss, at Sanders Theater on the evenings of February 20, 21, 22, 25, 27, and 28.

Tuesday

There will be a meeting of the Student Legislative Research Bureau in the Associated Harvard Clubs Room, Holmes Hall at 7 p.m.

Professor Milton Katz, Director of International Legal Studies, Harvard University, will speak on "Career Implications of the International Scene" at 8 p.m. in the Dunster House dining hall.

Wednesday

Professor Robert Wood of the Massachusetts Institute of Technology will speak on "The Politics of Suburbia" at a Democratic Club Luncheon in the Mallory Smith Room, 1 p.m.

Mrs. Mark DeWolfe Howe will be guest speaker at the Harvard Law Wives meeting in Harkness Commons at 8 p.m. The title of her talk is "View from the Kitchen Window."

Dean Hall Discloses Teaching Schedule

The revised draft of the 1959-60 teaching program reveals, inter alia, the introduction of a new Business Planning course, several new seminars, an experimental fourth section in the second year Taxation course, and a Conflicts of Law section of limited enrollment. Dean Livingston Hall made the new schedules public this week.

The Business Planning course will be taught in the spring semester, three hours a week, in two sections; one by Professors Stanley S. Surrey and Louis Loss, the other by Professors Abram J. Chayes, David Herwitz, and Professor Ernest Brown. According to Professor Surrey, the course is designed to deal with taxation problems in the corporate field although tax considerations of partnerships and trusts will probably be included. Business Planning will be taught in the context of a series of problems similar to the present Advanced Taxation course which it will replace along with the Close Corporations seminar. Corporations II will, however, continue to be taught.

The new seminars which will be given are: Arbitration (Professor Benjamin Kaplan), Comparative Study of Contracts (Professor Arther T. von Mehren), Doctrine of Mistake in Different Legal Systems (Professors John P. Dawson and Clark Byse), Private Antitrust Litigation (Professors David Westfall and Detlev Vagts), Private Law (Visiting Professor Frederick Odgers), and Problems in the Law of Corporate Reorganization (Mr. Peter Coogan with participation by Professor James A. MacLachlan).

The second year course in taxation will be given in four sections rather than the usual three. The fourth section will be composed of 1/4 of each of the three second year sections. The purpose of this innovation, Dean Livingston Hall stated, was to accommodate the number of professors who want to teach taxation and to attempt to determine the advantages of smaller second year sections.

Dean David F. Cavers, returning from a one year leave of absence, will teach a three hour Conflicts of Law section limited in



Livingston Hall

enrollment to fifty students. Special registration will be required for this section which is designed for students interested in doing additional work in the field. Professor von Mehren will teach the three hour section normally given in the spring.

Returning from leaves of absence are Professor Samuel E. Thorne who will resume teaching the second year course in English Legal History and the English Legal History seminar and Professor Charles M. Haar who will resume the Property I course.

Dean Hall and Professor Archibald Cox will be on leave for the first half of the 1959-60 year, Professors Charles Fairman and Henry M. Hart during the second half.

A. James Casner, Professor of Law will not teach Property I, but will teach Property II. He is taking a light teaching load in order to have free time for the Committee on Legal Education, of which he is Chairman.

The teaching schedule for the second year for next year is:

	I	II	III
Accounting	Trautman	Braucher	Herwitz
Administrative			
Law	Byse	Bator	Brewster
Commercial			
Law	Braucher	Turner	Schwebel
Constitutional			
Law	Howe	Sutherland	Freund

Corporations	Vagts	Loss	Chayes
Taxation	Sander	Griswold & Sander	Surrey
Trusts	Scott	Scott	Braucher

In addition, a fourth section of taxation will be given with Professor Brown. It will consist of one quarter of each of the three regular sections.

Second year electives are:

American Legal History (a)	Fairman
(b)	Howe
Civil Law System	von Mehren
Comparison of Soviet and American Law	Berman
English Legal History	Thorne
Jurisprudence	Fuller
Legal Process (a)	Hart
Legal Process (b)	Sacks
United Nations Law	Sohn

The first year teaching schedule is:

	I	II
Agency	Cox	Cox
Civil		
Procedure	Fisher	Kaplan
Contracts	McCurdy	Byse
Criminal Law	Baxter	Hart-Hall
Property I	Leach	Harr
Torts	Katz	Berman
	III	IV
Agency	Hall	Hall
Civil		
Procedure	Field	McNaughton
Contracts	Fuller	Dawson
Criminal Law	Odgers	Bator
Property I	MacLachlan	Leach
Torts	Keeton	Mansfield
		— Murstein

Law Students Consider Anarchism

Dwight MacDonald, presently a columnist with the *New Yorker* and sometime *Fortune* editor, restated the case for anarchism in America while visiting the Law School Coffee Hour last week. He pointed out that anarchy is always mistakenly associated with chaos and confusion. Claiming that anarchism is a positive approach to co-operative living, MacDonald noted that an early spokesman for the theory, Proudhon, was the rival of Marx in the nineteenth century. While Marxism advocated capturing the state to achieve its eventual abolition, anarchism claimed the most important goal was the immediate abolition of the state. MacDonald admitted that one of the advantages of Marxism was that it had had the opportunity of a real trial. However, he claimed that a basic difference between the ultimate goals of the two philosophies is that "anarchism welcomes a society in which there will be dissension." In this sense he suggested that anarchism is revolutionary, while Marxism, seeking uniformity, is reactionary.

As he sallied forth into the things anarchists don't like in America, he singled out New York's world-famous city planner, Robert Moses. "Planning from the top down has always been a terrible deterrent to individual incentive. It substitutes the wishes of one for the desires of all." MacDonald added that most city planners are more interested in automobiles than human beings. He noted that Moses' famous drives have resulted in getting automobiles into

New York City, but not in developing a place to put them when they get there. Believing it is important for people to make their own decisions, MacDonald vehemently denounced the blighted area relocation projects as the birthplaces of crime. He argued that it was a horrible thing to disrupt a "well-functioning slum" because the inhabitants there had learned to cope with their peculiar problems their own way, while the planners did nothing but present them with a new environment, and no knowledge of how to survive in it.

Deploring the trend toward bigness and centralization MacDonald said that once a group reaches its maximum efficiency number, the surplus destroys the individual by reducing him to numerical and practical insignificance. Only the various sub-groups within the society enable us to live, and then only in an incomplete fashion. When a youthful critic harpooned MacDonald by claiming that his suggestions were fanciful and impractical, the anarchist did not disagree. When the critic hopefully asked him what are we to do, Mr. MacDonald harumphed and answered, "Make trouble, you know, make trouble."

The cause for anarchy was further heightened by the presence of three, bearded, denimed, tweeded, self-professed, local anarchists who expressed warm appreciation for the ideas of Mr. MacDonald, along with the 75 others who gathered to hear him.

— Nelson

State Trading Problem Grows

"State trading is a problem of our time and will remain with us for the foreseeable future. Governments are participating more often and more directly in commercial activities through government agencies and state controlled or owned bodies." Thus observed Dr. Martin Domke, International Vice-President of the American Arbitration Association and Editor-in-Chief of the Arbitration Journal, at a meeting of the International Law Club on the evening of February 5.

Because of the exigencies of modern international trade, an increasing number of the countries of the world are finding it convenient to conduct their foreign dealings through specially instituted state trading agencies. This is particularly true of small and newly-developing countries. Those countries

very often adopt state trading as their exclusive form of dealing in foreign commerce. Its use is not restricted to planned-economy governments, but extends to countries of the free world. As a matter of fact, it has recently been proposed to Congress that a United States Trading Corporation should be organized in order to meet the challenge of the Soviet Union in the world market. Such an organization would be wholly owned by the government and would grant loans and subsidies to American traders. It would not participate directly in commercial transactions but would exert an influence on international commercial activity.

The main problem of the state trading system is the uncertainty of the commercial relations caused by political and economic pressures in the trading countries. For example, the Peruvian government recently entered into an agreement with International Standard Electric for the modernization of their telegraph system, but had to cancel the agreement as a result of domestic pressures to reopen the bidding on the project. Another example is the recent American rejection of an English low bid on a turbine contract in favor of an American firm with a higher bid brought about by domestic political pressures.

Under such conditions disputes frequently arise, and the parties to them are presented with perplexing problems in attempting to effect settlements of their claims.

The American foreign trader cannot count on the United States government to espouse his claim since it will do so only as a matter of grace and not of right. Moreover, the United States has generally refused to back such claims for fear of attracting accusation of carrying on a "dollar diplomacy."

The foreign trader must find an impartial forum before which to present his case. Often he will not be able to obtain adequate relief before the national courts of the foreign state trading government for two reasons. First, because the foreign government may be immune from suit in its domestic court, e.g. the United States government is not subject to suit in American courts

Tunnel



The green and gray Toepfer Tunnel winds from Harkness Commons, under Langdell Hall, and finally rises out of the ground in a copper and glass shed that connects with Austin Hall.



Martin Domke

save by express statutory provision. Second, even if the government consents to suit in its domestic court, the American foreign trader may be denied adequate relief as a result of nationalistic bias in the courts.

The trader may also be denied relief from the courts of his own country since if he attempts to bring such a suit, the foreign government will very likely invoke its immunity from local jurisdiction. Notwithstanding criticism from outstanding legal writers, such as Justice Frankfurter who describes the doctrine of governmental immunity as "an anachronistic survival of monarchical privilege", the concept of integral immunity is still pursued by many countries. The United Kingdom grants integral immunity to foreign states although it subjects the British Crown to the jurisdiction of its domestic courts. Other countries, such as Belgium and Italy, have adhered to the principle of a functionally limited state immunity.

The United States seems to have forsaken adherence to the doctrine of integral immunity and adopted the concept of restricted immunity. Thus it will permit itself and others to be sued for their act *jure gestionis*, but not for those *jure imperii*. This policy was announced in 1952 by the Department of State in a letter written by its Acting Legal Adviser, Jack B. Tate. The "Tate Letter" has not yet been tested thoroughly in the courts, but it appears to apply only to immunity from suit and not from execution,

and therefore the attachment of foreign funds in this country will probably not be allowed. Whether the dealings of a foreign government are *jure gestionis* or not is determined by the *lex fori*. In deciding the question, the court will usually consider the object of the act, the aim which the government wishes to attain by the transaction, and whether the activities could be pursued by a private individual in that country.

One illustration of the application of the concepts of integral and restricted immunity and the determination of the public or private nature of the acts of foreign states is afforded by the recent series of nationalization and confiscation cases including the highly-celebrated Anglo-Iranian oil problem. Another is a 1955 case involving the Republic of Korea brought in a United States court, (*New York and Cuba M.S.S. Co. v. Republic of Korea*, S.D.N.Y., 132 F. Supp. 684) which tested the limits of the American restricted immunity policy. American jurisdiction of the controversy could be based only on the seizure by writ of attachment of R.O.K. funds on deposit in New York banks; therefore, when the District Court decided to follow a Department of State letter stating explicitly that the "Tate Letter" did not affect the immunity of foreign funds from attachment, they granted the defendant's motion to vacate the attachment. Since jurisdiction was based solely on the writ, the question of the R.O.K.'s position for the acts giving rise to the controversy under the doctrine of restricted immunity was not really decided, however.

One promising method of settling controversies arising from state trading is submission by the parties to private arbitration. The acceptance of an arbitration clause in an agreement is reasonably easy to reconcile with national prestige, and such a clause affords a relatively impartial forum in many cases. Many states and United Nations agencies agreed to abide by the rules of the American Arbitration Association, Mr. Domke reported, and the U.S.S.R. often submits itself to private arbitration although they desire that the proceedings take place in Moscow.

One such Russian arbitration proceeding, the Israeli-Soviet oil dispute is a showcase for some of the problems involved in such state

trading settlements. These agreements provided that disputes be settled by the Foreign Trade Arbitration Commission of the All-Union Chamber of Commerce in Moscow. The Soviet Ministry of Foreign Trade cancelled export licenses to Israel after Israeli troops entered the Sinai Peninsula in 1956. The Soviet Export Agency backed out of its contract in reliance upon a *force majeure* clause that excused nonfulfillment caused by "any circumstance that is beyond the control of the defaulting party." One of the companies brought a claim for two and a half million dollars damages for arbitration in Moscow. The Soviet arbitration commission refused arguments that Soviet law requires the seller to carry out its contract under these circumstances. It also refused evidence that the seller did not appeal to obtain an export license, and did not take normal steps to save the contract. Counsel for the Soviet Trading Agency based its case on a note from the Soviet Foreign Ministry to the Israeli Gov-

Hastings Sofas

Venerable Walter Hastings Hall will have at least one article of modern furniture in each suite before practicing lawyers report for classes this summer. A sofa, similar to the furniture used as a bed by residents of the Graduate Center, will be placed in each of these suites. This is expected to remove the somewhat barren look that Hastings accommodations have had when furnished with only the standard equipment. Dean Wesley E. Bevins, Jr. gave notice to present residents that they will have to remove their own sofas and armchairs when the new furniture arrives. He offered to arrange for the furniture to be sold through the Purchasing Office for the student's accounts.

Some students while welcoming the new piece of furniture, object to the removal requirement. Others are against the encroachment of modernity.

One student complains, "This is deprivation of property without due process."

"Normally," he adds, "I would expect to sell my new sofa to the student who takes my room." He fears that sale by the University will not bring a fair price. "I don't have time to find a buyer," he adds.

Another complains that the modern-design sofa the University is purchasing will

ernment which stated that oil deliveries had to be discontinued because of Israel's "aggression" against Egypt.

The Israeli company's claim was rejected and the defense that the Soviet export agency was relieved of liability under the *force majeure* clause was upheld. "Obviously," Mr. Domke said, "the *force majeure* clause is meaningless when a party uses it in reference to its own acts, that is, the acts of the Soviet Government."

"State trading," Mr. Domke concluded, "brings us a new challenge and new problems. Government interference in the economic sphere, either through direct state trading or through government control and licensing raises new problems of public and private international law. This new trend must be faced with courage and flexibility in order to develop international economic activity and international economic law."

— J. P. Lagae

look out of place in the old style rooms of Hastings Hall. "Most of the students who own furniture have traditional pieces which look better in these rooms." He adds, "These rooms really look funny when students put in modern furniture."

Each sofa will be a simple platform upon which will rest a four inch foam rubber mattress. It will have neither arms nor a fixed back, but will have shaped bolsters to provide a back.

Record

Two News Editors assume their duties with the publication of this issue of the RECORD. Herbert H. Kaiser, Jr., 2L of Monticello, Ill., and Paul C. Murstein, 2L of Jamaica, N. Y., were named News Editors at a meeting of the RECORD Board Monday night.

Murstein, graduate of the University of Pennsylvania, had served as Department Editor. Kaiser is a graduate of Yale.

Three second year students and two first year students have recently joined the RECORD. They are Morris J. Amitay, 1L of New York City; John G. Gillis, 1L of Detroit, Michigan; William J. Hanlon, 2L of White Plains, N. Y.; Leonard M. Nelson, 2L of Falmouth, Maine; and David L. White, 2L of Athens, Ohio.

FEATURES SECTION

Cuban Report

By David F. Binder & Ralph Nader

"This revolution is the one good thing that has happened to Cuba in the last half-century, the one thing from which real hope can be derived." These words from a leading citizen of Havana express the general sentiment of the newly-liberated population here in Cuba. The revolutionaries have captured the government and captivated the people as well. Seldom in our time does one see such a popular revolution.

The sympathies of the American public were originally with Fidel Castro and his band of rebels. But later reports of "blood baths" and vindictive unjust trials of former officers and members of the Batista regime changed much of the sentiment in the United States from approval to disfavor and disgust. These reports have given, on the whole, a distorted view of the situation.

Perhaps the most telling and valid criticism leveled against the new government was the "Roman Coliseum" atmosphere of the trial of Cuba's "No. 1 war criminal", Major Jesus Sosa Blanco. Blanco was tried and sentenced to death before 15,000 people in the Sports Palace stadium. This was a mistake, to be sure, but a mistake of a new, inexperienced administration subjected to extreme pressures to keep things out in the open so that the world could see what was taking place. The excesses of this open court technique have been corrected. The new government has responded quickly to the adverse criticism and all trials since Blanco's have been held in regular courtrooms which are open but necessarily to a smaller number of spectators. Major Blanco has appealed his death sentence and Castro has declared that he will be granted a new trial.

The argument that the accused are being tried by military tribunals rather than civil courts (which will not be in full operation in Cuba for some time) and are being tried with dispatch rather than with the long and wearisome delay which marks almost all trials held in the United States, does not mean that these trials, *ipso facto*, are un-

just. However many newspaper accounts threatened to establish it as the foregone conclusion.

The war crimes trials which have been taking place throughout Cuba have been held with alacrity, to be sure, but at one time it was widely believed, even in the United States, that quick and efficient court action is most desirable and that justice delayed means justice denied.

As for trial in the civil courts, there has never been any real justice in the civil courts of Cuba where the state was concerned. They have traditionally been the handmaidens of government. Before January 1, 1958 courts were staffed with Batista favorites, many of whom have already been dismissed. More will be displaced in the future. To try the war criminals in these courts would have meant much delay (which, as has been pointed out, may have made them look more Americanized, but not necessarily more just) and would, in all probability, have often resulted in trials by the same judges, in civilian clothes rather than military uniforms.

But neither the war crimes trials nor the revolution itself can be properly understood without an adequate knowledge of the facts behind them.

Cuba has never really known democracy, at least in the sense that the United States knows it. The sugar-producing "Pearl of the Antilles" was a Spanish colony until 1898 (except for a brief period of British occupation, 1762-63). In that year Spain was defeated by the United States in the short but romantic Spanish-American War and was forced to give up all her claims to Cuba. In 1902 the Republic of Cuba was established and the United States formally withdrew from the island.

But Cuba, apparently, was not ready for democratic self-rule and has been governed by a series of dictators ever since, including two regimes each under Gerardo Machado and Fulgencia Batista. Batista ousted Machado in 1933 (with, it is generally assumed, the support of the U. S. government) and was the strong man ruler of Cuba (except for an eight year period of retirement from 1944 to 1952) until last January 1. His reign became

progressively more cruel and corrupt. From the summer of 1956, official terrorism and suppression became insufferable and earned for Batista the ominous title of "Butcher of Havana."

Fidel Castro the supreme power in Cuba today, (described by one of his captains as "10,000 feet above any president") is 32 years old, the son of a rich planter. His brother, Raoul, is 27 years old.

The revolutionary movement is usually dated from the 26th of July, 1953, when Fidel Castro led a small band of men which attacked Batista's Moncada Barracks. The attack was a failure. Most of the rebels were captured and shot. But the lives of Fidel and Raoul Castro were saved by the intervention of priests from Oriente province. They were sentenced to the Isle of Pines for 15 years. After two years, however, Batista, in a move to mollify criticism and resentment against his regime, ordered all political prisoners freed, including the Castro brothers.

Fidel Castro went to the United States. There he met Carlos Prío Socarrás, who had served as president of Cuba from 1948 to 1952, when Batista resumed control of the island in a military coup. Socarrás decided to give Fidel Castro financial backing.

In December of 1956 Castro sailed from Mexico and landed at Cabo Cruz on the coast of Oriente Province in Cuba with 82 men. They were soon attacked and only 12 escaped with their lives to the Sierra Maestra. But this 12 included the Castro brothers.

It did not seem that 12 men could withstand the combined force of an army and a police of 65,000 men. But the movement was popular and the oppression of the people real. The revolutionaries were joined by scores of volunteers and received help from Cubans everywhere. Members of Batista's army deserted and many refused to fight against the rebels, or did so only perfunctorily. The victory of the rebels against almost insuperable odds (the rebel army numbered no more than 1500 men on the day of its victory) was due primarily to the support and sympathy of the Cuban population as a whole. As the movement grew the Batista regime became more cruel and oppressive and bloody. Killings and torture became common, conducted in the open to

intimidate those who were helping the rebels. But finally Batista was forced to take flight on January 1 and all of Cuba fell to the revolutionaries.

When Batista left Havana, however, he failed to take with him his lieutenants and captains of police and others who carried out the terroristic campaign which marked his last years in office. These were left to face the rebels alone. It is they who are now being prosecuted at the military trials.

The impression one gathers here is that the trials have been fair, much fairer than one would expect immediately after the end of a revolution. It is only natural to suspect that, when the victor puts the vanquished on trial so soon after the battle, the trial will have no real substance; that retaliation, not justice, will be its motive. Perhaps that was the reason that many foreign observers were so hostile and critical of these trials when they started.

But only the most notorious have been arrested and placed on trial. Proof of the guilt of these people is very simple and very convincing. The people of Cuba who suffered under the Batista regime, particularly during the last two or three years, were watching, waiting, marking time, some keeping records, until the revolution would be accomplished. Now they are coming forward as witnesses in droves to identify the men whom they saw commit murders, atrocities, and brutal crimes.

The military trials here are considered by the new government as part of a gigantic "house cleaning job" which must be done. The sooner it is completed the sooner the energies and abilities of the government can be put to the more constructive purposes of bringing the economy back to normal and increasing the standard of living of the citizens. The revolutionary government hopes and expects to have the trials over with in about 45 days, by which time all civil tribunals should be back operating on a normal basis.

Fidel Castro explained to this reporter today (February 7) that no new institutional safeguards will be necessary to assure the political independence of the judiciary, but that with honest judges and an honest government, the present Constitution will be sufficient to do the job.

A Dissenting View of the British Bench and Bar

Two summers ago, five thousand American Bar Association representatives and their wives, including Mr. Chief Justice Warren, Mr. Thomas E. Dewey, Dean Griswold, and Professors Baxter, Brewster, and Casner, convened in London to reaffirm their professional ties to England. (See 25 Harv. L. Record, No. 1, pp. 1-2, September 26, 1957.) While not deploring this, W. Bernard Richland here argues that it ought not be forgotten that it is the American, not the British Bar, which has become the leading branch.

Mr. Richland, formerly assistant corporation counsel of New York City, was born and grew up in England. He is now practicing privately in New York, specializing in appellate briefing and argument. He has published articles on constitutional and municipal subjects in the *Columbia*, *Fordham*, and *Municipal Law Reviews*, the *New York County Bar Bulletin*, and the *RECORD*.

By W. Bernard Richland

Many of our successful lawyers who make flying visits to England return all aglow with tales of the ceremonies of the English courts and the dignity and standing of their English counterparts. They visit the Inns of Court, imbibe their hallowed air, and get as bemused as if instead of spending an afternoon at Lincoln's Inn, they had spent a night at the Pig and Whistle Inn. They take every possible occasion to drag into their speeches references to obscure traditions of the Inns of Court and recollections of pointless observations made in British trials by Lord Justice So-and-So, Sir Patrick This-and-That, or Marshal Thingummy, K.C.

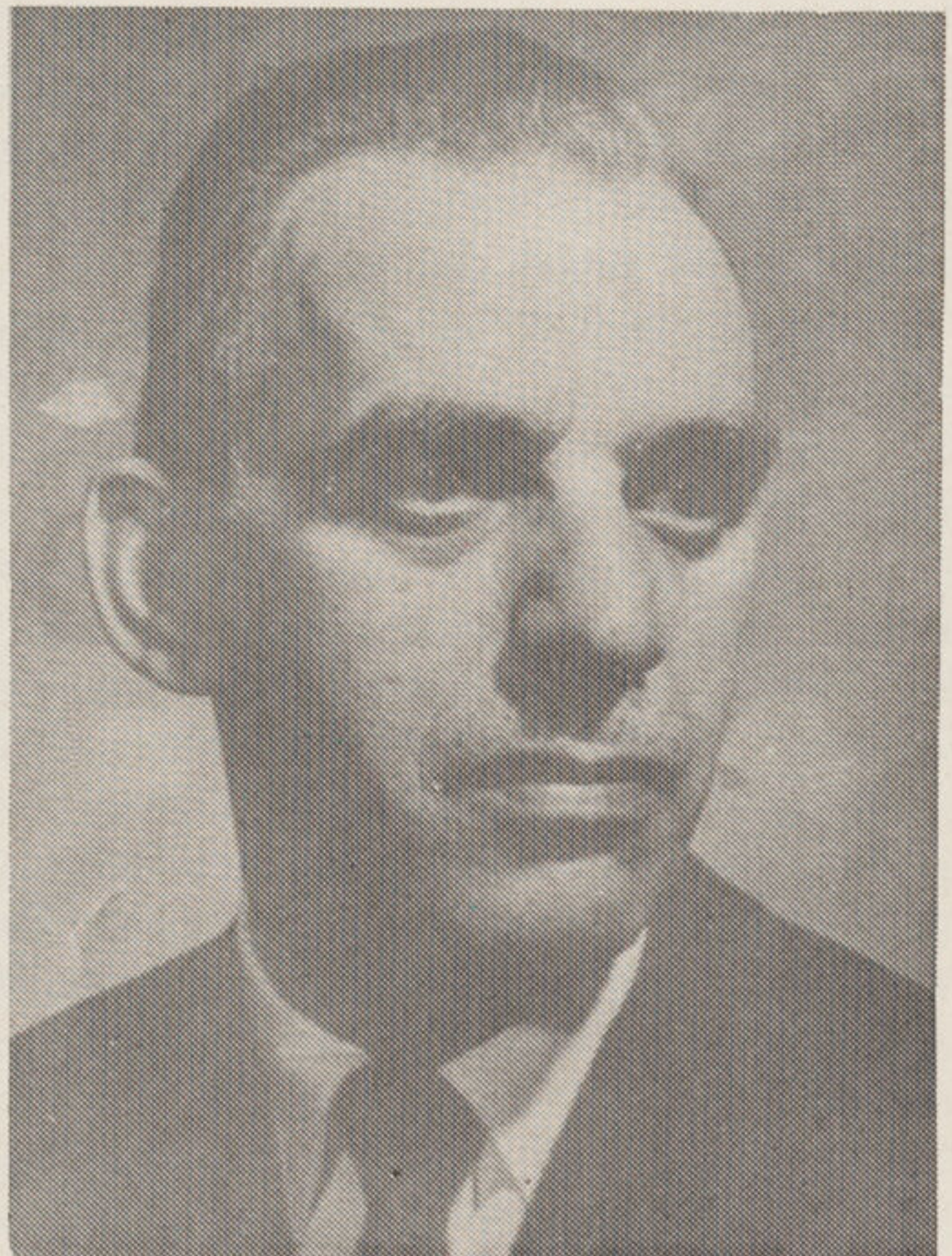
A few years ago, the New York Bar was addressed on the art of cross-examination by a distinguished New York trial justice. The speech ran well over an hour and was most interesting. However, it was characterized by this

peculiar quality: every single example and every single authority referred to came from English trials. Moreover, the examples given were no more striking than many which have occurred in New York courts. Their principal quality seemed to be that the author of each example referred to had a Sir or a Lord before his name, or a K.C. after it. One would have expected that the experienced New York trial justice would have taken instances from his own experiences, from proceedings in his own court, or in those of his colleagues, but such was not the case. Indeed, a person listening to the lecture might well assume that Clarence Darrow, Samuel Seabury and Max D. Steuer had never tried a case, and that Francis Wellman had never compiled his scores of excellent American examples in *The Art of Cross-Examination*.

An appellate court judge, of one of our eastern States, returned

from a visit to England with a bad case of post-Inns of Court syndrome. Among other matters, he was deeply impressed by an argument which he heard in a British High Court. He expressed great admiration for one of the barristers who, he said, argued for four hours solid without reading from notes. Now, of course, that is no mean feat, but more significant is the fact that the judge who was so moved by four hours of argument had his own Court adopt a rule which limits argument to forty-five minutes, and has been known to cut off a lawyer whose time has expired, in the middle of a comma.

While there is much to admire in the Judicial System of England, there is also much to criticize. There is, at the American Bar, too much fulsome and uncritical praise for the English courts and for English administration of law. Praise can properly be left for



— Photo by Bob Oliver

others and this essay limited to criticism.

To begin upon a minor note: The trappings of the British Bench seem more than a little silly.

Looked at coolly, how impressive, really, is the mummery of an English Lord Justice, garbed in elaborate scarlet gown with blue sash or blue gown with scarlet sash, topped by an enormous wig drooping down to his shoulders? How really impressive is the K.C. with his curious costume and wig, particularly the special wig he wears to the House of Lords, an enormous, basket-like apparatus which hangs down past his shoulders and from the front of which he peers out at the Bench?

Rats and Oakum

Consider the observation with which Thomas Jefferson disposed of wig-wearing justices in the newly-founded United States of America, "I am opposed to the monstrous wig which makes judges look like rats peeping through bunches of oakum."

English justices are selected from an elite. Consequently, it is not surprising that they should manifest unawareness of the ordinary affairs of society and the problems of people generally. Justices are chosen from among barristers who pass their professional lives carefully guarding themselves from contact with all but solicitors and other barristers. The biographies of the high court justices in *Who's Who* reveals the fact that they bear the "class hallmark," attendance at the select English prep schools, — Harrow, Eton, Rugby, etc.

American lawyers are easily misled by what the British Bench and Bar say about themselves in this connection. There was a typical article in an American lawyers' magazine a short time ago in which the British method of selecting judges was lauded by an American lawyer.

He had communicated with a former Lord Chancellor in regard to the matter and had been informed that in the selection of judges politics plays no part. Indeed, the Lord Chancellor observed

that although during his term of office he had appointed many judges, only two were active members of his own political party.

Leaving aside, for a moment, this business of looking down one's nose at politics in the selection of judges in a political society, this is really a remarkable state of affairs. However, it indicates either of two things: the Lord Chancellor deliberately discriminated against his own party members; or there are factors present which made his own party members ineligible or unacceptable. Obviously, the latter must have been the controlling factor and simple analysis should have shown this to the author. The fact that he seems to have overlooked is that the particular Lord Chancellor was appointed to office in the Labor Government and was a member of the British Socialist Party. Considering the origin and recruitment of barristers (of which more later) from whose ranks alone judges can be chosen, it is unremarkable that there was a paucity of candidates for judgeships in the Socialist Party. Indeed, if the choice of Federal Judges was limited to alumni of the Hasty Pudding, or even of his own Groton, President Roosevelt might have experienced great difficulty in finding candidates for judicial office among active members of the Democratic Party.

A Lord Chancellor once described his method of selecting members of the Bar for the Judiciary, "I enquire, 'Is he a gentleman?' Of course, if he also knows a little law, then so much the better."

One may always assume that an English Judge is indeed a gentleman. One may not always assume that he is a man of worldly understanding. As a matter of fact, English judges, even those to whom it does not come naturally, affect ignorance of worldly things. A typical example is the judge who, upon hearing a witness refer to ladies' underwear by its proper term, says: "Lingerie, what is lingerie?" Counsel advises the Court, "M' Lord, it is a name applied to certain articles of women's attire worn

beneath the outer garments." The Justice, acknowledging this bit of information, says: "Quite!"

Englishmen find comfort in these displays of naiveté in their judges and are quite willing to assume that mature, literate men to whom daily newspapers are readily available are so monastic in their interests and so remote from society as to be completely in the dark as to the commonplace facts of life.

The judicial humorist is another special type of English character. To find amusement in such humor, one should be an addict of the pun and have the proper attitude of mixed respect and fear for the Bench which the English have cultivated for centuries and which finds relief in the slightest unbending of the judge. Bits of judicial humor are sought out by *Punch* and by the press and the judicial wits are followed on circuit by newspaper reporters. Here are typical examples:

There came before a stipendiary magistrate — let us call him Magistrate Fuzz — the case of a woman charged with breaching the peace, inebriation and kissing a constable. The defendant said she was not inebriated, that she had only drunk a little absinthe. Whereat, Fuzz, S.M., said: "Ha, absinthe makes the heart grow fonder." This quip was duly reported in the press throughout the land.

Punning Pughs

From that day on, Fuzz, S.M., who had been doing an obscure but adequate job, was a ruined man. He let no occasion pass for punning and strove mightily to repeat his success. He once tried a woman named Pugh, accused of street fighting. Fuzz, S.M., asked Mrs. Pugh if it were not the fact that she had been before him a month before on an identical charge. She denied it and the Magistrate, after checking with the clerk and finding that it was a Miss Pugh, delivered himself of what he hoped was another entry in the annals of judicial humor. "Ha, Right charge, but wrong Pugh." (An explanation is in order for this one. It is a pun, based

upon the saying, "The right pew, but the wrong church." With a proper accent, it comes out a little better.)

Often the stuffiness of an English solicitor or barrister is mistaken for dignity, and precise diction and an apt use of 18th Century English are mistaken for scholarship. There is perhaps less to an English lawyer than meets the eye — or ear.

Contrary to the illusion under which those leaders of our Bar labor, English solicitors and barristers come to their profession with far less education than do their American brethren. Legal education in England is half a century behind legal training in the United States.

American Preparation

In most States, a man cannot come to the bar unless he holds a law degree from a university and he may not gain admittance to a first-class university law school in the United States unless he already possesses a university degree in the Arts or Sciences.

But degrees alone do not admit to membership in the Bar. In substantially all the States, a man comes to the Bar only after he survives a stiff Bar examination. The apprentice method of legal training was abandoned many years ago in most states, after experience demonstrated that except in extraordinary cases, it no more produced adequately trained lawyers than the apprentice system produced properly trained physicians.

The English lawyer is quite differently placed, whether he be a solicitor or a barrister.* The apprentice method of reading law in a law office still maintains to a substantial degree. Solicitors and barristers commonly possess no degrees from universities, and those who do, trail them after their names on their visiting cards and stationery in a manner practiced in this country principally by pharmacists, podiatrists, and Certified Life Insurance Underwriters.

Professor Gower of the University of London, puts it very neatly, "Anyone can become a barrister or solicitor without having read law (or anything else) at a university."

In order to become a barrister, i.e., a lawyer authorized to plead and try cases in the intermediate and highest courts of England, one joins an Inn of Court and "keeps terms," eating dinners at the Inn and reading law during three years. To be called, he must pass two parts of a Bar examination. In preparation for the Bar examination, he can, if he so chooses, attend lectures and classes. He may also, if he so chooses, spend a few months in a solicitor's office or become a pupil and read law in the chambers of a practicing barrister. However, he does not have to do any of these things. The only essential requirement is attendance at the Inn and the ability to pass an examination.

In order to become a solicitor, a candidate passes a preliminary examination or is otherwise admitted to be "articled" as a clerk to a working solicitor for five years. Theoretically, he is supposed to be gaining experience while studying, but such is seldom the case.

Before being admitted, he must pass an intermediate and final examination and during his clerkship, he must take lectures for one year. Candidates for admission as solicitors or barristers get most of their learning in the law from cram courses conducted by private firms of crammers.

One may well ask why, if this is all so, is not the Bar of England overcrowded. The reasons are social and economic.

In order to become a barrister, a man must spend three years keeping terms at an Inn of Court. He is subject to very heavy expenses and fees, and for at least five years after he is admitted as a barrister, is practically guaranteed to earn almost nothing.

A man who would be a solicitor is under a similarly heavy burden. To begin with, he gets no salary and has to pay a premium of about five hundred guineas to another solicitor in whose office he is to be articulated. After admission, it is unlikely that he will earn more than four hundred pounds per annum for many years to come.

The result is that the Bar in England is a preserve for the privileged. Since they have the proper social background and the advantage of attendance at private schools in which special speech accents are cultivated, visiting Americans are often left under the illu-

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sion that English solicitors and barristers are well-educated men. It is merely coincidence that a man with good diction is a man with good sense. Certainly, it is not a rule.

Grading the Judges

Since the British Bench is, after all, selected from the British Bar, we might expect no higher educational standards among the justices than are indicated for the members of the British Bar. English judges, as noted above, are chosen from among the barristers. Since there are only about 1200 barristers in England, about twice the number of members of Parliament, it will be seen that a very small, select group of men control the administration of justice. There is certainly no heavier concentration of Learned Hands, Oliver Wendell Holmes', and Benjamin N. Cardozos on the English Bench than there is on the American Bench. Indeed, Professor Gower in the later of the above-cited essays candidly observed, "It is probably true that the very best American judges are even better than any that England has recently produced."

The English Bar's attitude is that things are quite alright and that critics of existing methods of training for the law are uninformed outsiders.

It is generally agreed that English justice is expeditious and scrupulously fair. However, there are certain aspects of practice in the English courts which, one would think, cannot but detract from the proper administration of justice.

Under the English practice, trials, except in minor courts, are conducted by barristers who are briefed for the occasion by solicitors. The barristers try their cases on notes supplied by the solicitor and commonly consult neither with the litigant nor with the witnesses. Often, the first time a barrister sees his own witness is when he calls him to the stand. It has been the expressed view of leaders of the English Bar that the barrister should not interview the witness he is to

put on the stand. Thus, the American lawyer, reading the reminiscences of Sir Patrick Hastings, K. C., is startled at the off-hand remark of that eminent trial counsel in regard to a man he was defending against the charge of murder: "I had never spoken to him, indeed, I had never seen him before." He expresses it as an "inflexible rule" that he would never interview a prisoner whose defense he was undertaking. During the actual trial, the barrister relies upon the notes which have been prepared for him by his Junior, or more often, by his substitute, known as his Devil. When a surprise turns up, the barrister gets whatever aid he can from whispered suggestions siphoned from the solicitor, through the Devil, through the Junior.

In an English trial, the two men who know most about the case, the solicitor and the Devil, are muzzled, and often sit silently by and watch their case being ruined by expensive barristers. Now, such a practice, although not utterly unheard of in American courts, is extremely rare, and when practiced, is frowned upon. Indeed, a lawyer who so conducted his practice would not long have a practice to conduct. It is impossible to believe that a trial lawyer, however competent, can adequately conduct important litigation without that insight into his own client's or his witness' personality which can only be gained by meeting and conferring with him face to face.

Yet, otherwise discerning American lawyers talk enthusiastically at

Bar Association meetings of the remote and insulated position of English barristers, and not only is there no criticism of these curious practices heard from them, but one can discern a note of envy in their observations. Yet, if one of these leaders of our Bar were to catch his office trial man snubbing his own witnesses until they were at the instant of examination in court, he would make short shrift of him.

It is evident that the English practice of isolating the trial lawyer from the living characters until it is too late for him to adequately measure them, is unsatisfactory.

A man was on trial for his life in an English court not many years ago. He was accused of having set his automobile afire, burning his passenger to death. The prosecution claimed that he had deliberately loosened the gas line so that the car was flooded with petrol, and then dropped a lighted match into the car before leaping out himself. The defense claimed that the gas line had worked loose under the pressure of extreme heat, and called as an expert a mechanic who testified that such an event could occur. The gas line was in two parts, one of which was brass and the other copper, and they were coupled with a collar screw. The

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prosecution opened its cross-examination of the defendant's expert with what has been regarded as a brilliant and incisive question: "What is the co-efficient of expansion of brass?" The mechanic had never heard of such a thing in all his life and broke down in utter confusion under a battery of questions along that line.

Now, this incident teaches no lesson of brilliant cross-examination at all. It teaches a lesson of poor preparation by defendant's counsel. The prosecution's opening question was a perfectly obvious one, designed to lead into a consideration of the relative rates of expansion of the two metals and their effect upon either tightening or loosening the joint. No man who had prepared his case properly by talking to his witness and measuring his qualities could possibly have avoided just such an inquiry of the witness as the prosecution made. Obviously, the difference between the rate of expansion of two coupled metals was the crux of the case. One would expect that a trial lawyer with any understanding would have made quite sure that his witness, on so vital an issue, knew what he was talking about.

Of course, under the English practice, it is hard to blame the barrister in the case to which reference is made, because it is entirely likely that he had never seen the witness in his life until he took the stand.

Another example is provided in the famous Seddons poisoning case. A man and his wife were tried for the murder of their lodger. The man was convicted and his wife was acquitted. It was generally recognized at the time of the trial that if the man had not been placed on the stand, the chances are that he would not have been convicted, since the Crown's case was weak. However, he was placed on the stand by his counsel, one of England's outstanding barristers, and utterly destroyed on examination. Of course, it cannot be said with any degree of certainty that if the barrister had conferred with his

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client and measured him as a man, he would have decided that he would make a poor witness and left him off the stand. However, this at least, is clear. If the defendant's barrister had conferred with the defendant, he would most assuredly have been in a better position to judge his quality and his ability to stand up under examination.

The splendid isolation of the barrister is further aggravated in a criminal trial by the circumstance that throughout the proceedings, the prisoner stands marooned in the "dock" on the far side of the court room. He can communicate with his solicitor — not the barrister — only through written notes delivered by one of his guards.

In an American court, a defendant is given every chance to aid his counsel in his own defense and for that vital purpose may sit at the counsel table with him. Very often, it is the observation or comment of the prisoner during the examination of a witness, quickly passed to his counsel, which exposes a falsifying witness and breaks the prosecution's case.

It is difficult to understand why leaders of our Bar should be so unqualified in their praise of the English Bench and Bar. Their attitude must surely come from lack of understanding, because no one can come away from a study of England's men of law, their origin, training, and habits, without concluding that they have many serious short-comings. They are not well-recruited, they are not well-trained, and many of their practices are archaic, outmoded, and poorly calculated to promote the proper administration of law.

Leading members of our Bar seem dazzled by the glitter of tinsel and scarlet which characterizes the ceremonials of English justice. They seem overawed by splendid deportment and fastidious manners, precise diction and carefully cultivated speech accents. They would do well to consider the observations of the American scholar, Charles E. Grinnell, who, in 1882, expressed

impatience with American lawyers who turn their eyes to England "to learn how to behave and what to think about." As he aptly noted "The excellence of America extends beyond law books, to laws and customs and a reasonable spirit." Whatever excuse there was seventy-five years ago for deferring to the English Bar, obeisance by our present-day Bar to the Bar of England seems plainly unwarranted.

*See Gower, *English Legal Training*, 13 Mod.L.Rev. 137 (1950) and Gower, *Legal Profession in England and the U. S.*, 20 Mod.L.Rev. 317 (1957).

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