

M. A. Moody



Harvard Law Record

Ernst Indicts Big City Lawyers

Library Moves Books



"Nothing Ever Really Changes..."

Electoral College

Warsaw Convention

(Part II)

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, October 15

The STUDENT BAR ASSOCIATION will present J. Newton Esdaile, Esquire speaking on "The Presentation of Medical Testimony" at 1:40 P.M. in Harkness Commons today.

Sunday, October 18

The FORD HALL FORUM will present Editors Harold E. Clancy and James A. Wechsler discussing the question: "Nixon as President: Statesman or Politician?" in Jordan Hall at 8:00 P.M.

Tuesday, October 20

The INTERNATIONAL LAW CLUB will present Professors Milton Katz and Louis B. Sohn conducting "An Introductory Look at International Law." at 2:30 P.M. in Harkness Commons.

Wednesday, October 21

The HARVARD LAW WIVES will present Mr. Arthur T. Gregorian will speak about "Oriental Rugs and the Stories They Tell." at 7:30 P.M. in Harkness Commons.

CHERCHEZ LA FLAMME BARBER SHOP

• EIGHT EXPERT BARBERS
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Ernst Indicts Big City Lawyers

Morris Ernst, prominent civil liberties trial lawyer, warned against the dangers to the nation if leaders of the bar refuse to represent unpopular defendants. He was speaking before the Student Bar Association last Thursday evening in Harkness Lounge.

Mr. Ernst stated that big city lawyers refuse to represent defendants in unpopular proceedings for fear of being "kidded at the country club."

Social pressures, according to Mr. Ernst, account for the "abdication of leadership" by lawyers who are best qualified by talent and prestige to defend the rights of unpopular defendants. As a result, such lawyers are isolating themselves from the mainstream of American life when they should be acting as stabilizers in our fast moving society and guarding against any attempt to suppress the free exercise of our liberties.

Mr. Ernst also noted with concern the dependence of the bar on legal aid societies and public defender organizations. He opposes the further establishment of such organizations because they are a cheap way of protecting our liberties. They represent to him devices which enable most lawyers to offer excuses for not participating in unpopular proceedings. He said that the more we depend on these devices, the more the defense of an accused will become a game in which the state will be the only player. As an alternative, he suggested that leaders of the bar should assume a direct responsibility for providing adequate counsel, and that judges should be given the authority to appoint eminent members of the profession as counsel for unpopular defendants.

Sense of Urgency

If the present trend should continue, Mr. Ernst believes that leadership of the bar will have to come from lawyers practicing in the smaller communities. He pointed out, however, that it would not take many people to change the present situation. All we need are a few people with a sense of urgency. He

cited Chief Justice Warren as an example of a great judge and leader in the defense of civil liberties.

In support of his thesis that leaders of the bar have neglected an obligation to defend unpopular defendants, Mr. Ernst pointed to the terrible shortage of trial lawyers. He also stated that the press has not given adequate support to civil liberty causes. Often, the press has prevented counsel from presenting a client's case to an unbiased jury because of the impact on the jury of sensational reporting. He remarked that he had more optimism in the good future of the bar than in that of the press.

In his concluding statements, Mr. Ernst emphasized the lawyer's obligation to take an active part in protecting civil liberties. All we have to do, he said, is to invent plans designed to help us enjoy our liberties. He maintained that the practice of law can be great fun, and observed that in looking for unpopular causes to defend, lawyers should realize that there are other unpopular things in life besides Communists.

Library Exhibits Open Law School Lore Shown

The Law School Library's program of exhibitions begins this year with the *History of the Harvard Law School*, now being shown in the Langdell Treasure Room. Among the exhibits are pictures of the earliest buildings associated with the Law School, the record of the student Moot Court in the early 1820's, and President Charles W. Eliot's letter notifying Christopher Columbus Langdell of his appointment to the faculty.

The Treasure Room also is exhibiting a number of early writs of trespass in medieval manuscript and sixteenth-century "black-letter," along with the original French text of the great case of *I. de S. and Wife v. W. de S.*

In Langdell Reading Room there is a series

of displays on legal research techniques of particular interest to first year students.

Assistant Librarian Philip A. Putnam has invited all students to take advantage of the Treasure Room exhibits. He noted that the imposing glass doors of the Treasure Room seem to discourage students from viewing the exhibits which are on display for their benefit.

Several other presentations are now in preparation. These include a history of the law of copyright, a biographical history of Justice Cardozo, some aspects of English legal history, a history of the law of war, the Fairfax land grant litigation, and Joseph Story's role in international law. Miss Edith Henderson is in charge of the program.

The dates of presentation of these exhibits and the names of their authors will be noted in future editions of the RECORD.

— McGinn

Esdaile Speaks Today

J. Newton Esdaile, Esq., leading Boston attorney, will address the Student Bar Association today at 1:40 p.m. in Harkness Commons. Mr. Esdaile was credited last year with the highest award of damages brought in by a jury, in a negligence case, in the history of the state of Massachusetts. He is an authority in the field of medical testimony and his talk will deal chiefly with the problems of presentation of such evidence.

Young Republicans Host

The Harvard Law School Young Republican Club acted as host recently to a joint meeting of the Massachusetts Council of Young Republican Clubs and the College Caucus of Young Republican Clubs. Massachusetts State Senator William E. Hays, LL.B. 1929, spoke to the state-wide gathering of Republican delegates on the subject of "Vagaries of Massachusetts Politics."

Student delegates from numerous New England Colleges represented the College Caucus. Radcliffe College, with three delegates, sent the largest number of representatives. Manning L. Muntzing, 3L, is president of the organization.

Bull and Bear Talk on Things to Come

Mr. Charles K. Devens, president of the Parker Corporation, spoke on the "general financial outlook" at the Bull and Bear Club's first meeting of the 1959-60 academic year. The Parker Corporation runs both Incorporated Investors and Incorporated Investors Income Fund, mutual funds with combined assets of \$425 million, over 46,000 shareholders and over 46 million shares outstanding.

Admitting to no idea at all of the next short-term move of the stock market, Mr. Devens offered an optimistic opinion on the behavior of the country's economy over the next two years. Foreseeing a good year ahead for the steel and auto industries, and a continued expansion of corporate capital expenditures in plant and equipment, Mr. Devens predicted that the Gross National Product would be at a rate of about \$500 billion, with the Federal Reserve Production Index at 156 or 157. He felt that the continued rise in corporate capital expenditures and expenditures by state and local governments would more than offset such possible negative factors as a decline in federal spending and a decrease in residential construction.

Projecting further, Mr. Devens saw continued growth in 1960, tempered later in the year by a tapering off and possible reversal in the rate of inventory accumulation and a credit squeeze due to tight money. He estimated for the end of 1960 a GNP of 518 billion, a Production Index of 163; and corporate profits at a 54 billion rate; or about 6% growth over the 1959 prediction for each index. The next decline in the economy, Mr. Devens felt, would set in late in 1960 or early 1961.

Legal Aid Additions

The Legal Aid Bureau has announced two new Directors for the year 1959-1960.

Calvin W. Torrance, 3L of Jamestown, N.Y. was elected Secretary. Leon Freidman, 3L of Malden, Mass. was elected Junior Director II.

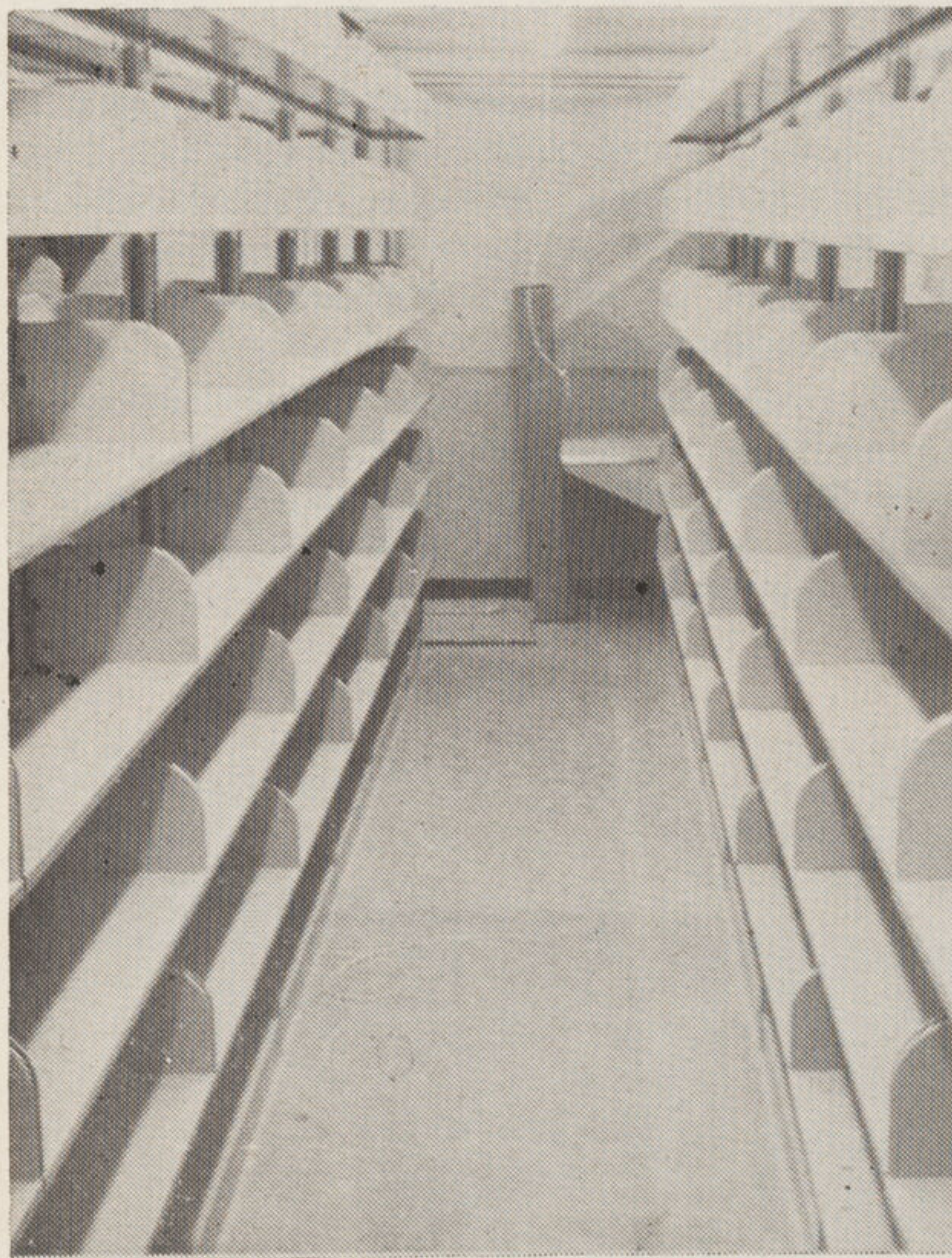
Jay Erwin Orlin, 3L of Philadelphia, Pa. has been invited to membership.

Library Collection

Books Shift to International Wing

A substantial redistribution and augmentation of the foreign and international law collections of Langdell Library followed the summer opening of the International Legal Studies Wing.

Two-hundred thousand volumes were moved into the new wing from Langdell. Now



1944 volumes are missing

all reference works in the international and foreign field can be found in the ILS Reading Room; the documents of international organizations are available on the mezzanine. Current periodicals, papers, and new acquisitions are located in the lounge area opposite the circulation desk. The collection in the new wing is available on an "open stack" or self-service basis. Reference service is available, however, through Assistant Librarian for Foreign Law Reference, Vaclav Mostecky.

The bulk of the Anglo-American collection was not moved from Langdell. But the vol-

umes were relocated so that the number of books directly accessible in the Main Reading Room has increased. Availability of this collection as a whole, however, remains on a non-open stack system. Reference service for these materials is provided by Assistant Librarian Philip Putnam and Assistant Librarian for Reference, George Strait.

In the process of moving the 10,800 volume international law collection, an inventory was taken for the first time in thirty years. It revealed 1.8% of the materials missing. The figure is expected by the library to be reduced when its tracing process is completed.

Historical information and description of the present arrangement of all the collections are set out in the revised edition of the Library Guide. Copies are available at the Circulation Desks.

— Bacon

Ames Trials Begin

Last Saturday the annual Fall assault on the library began. The Ames competitions had begun. On that date, the facts were issued for the first of the eight qualifying rounds in the second-year competition. Two hundred sixty-four seasoned veterans representing thirty-three optimistic clubs got down to work. Next Thursday, the first-year students will receive the facts for their arguments. Five hundred thirty-eight fresh recruits in sixty seven clubs will join the race to the appellate reports. With a total of eight hundred two participants crowding the Reading Room, the shelves in Langdell will become as bare as a trustee's title. The activity will reach its peak with the oral arguments in November and December.

The second-year arguments will employ a different brief-exchange method this year. An experimental answering brief system will be used. It was tried with inconclusive results ten years ago by the Student Board of Advisors. However it is hoped that this time the system, which comprises three levels of brief preparation instead of two, will mean more sharply framed issues for the arguments.

Alumnus New Assistant Attorney General

Robert Kramer, LL.B. '38, new Assistant Attorney General in charge of the Office of Legal Counsel, was sworn into office in ceremonies held in the office of Attorney General William P. Rogers October 1, 1959. Supreme Court Associate Justice Felix Frankfurter administered the oath.

The new head of the Office of Legal Counsel was born in 1913 in Davenport, Iowa, and spent his boyhood there. He received an A.B. degree *cum laude* from Harvard College in 1935. He attended the Law School and received his law degree *magna cum laude* in 1938.

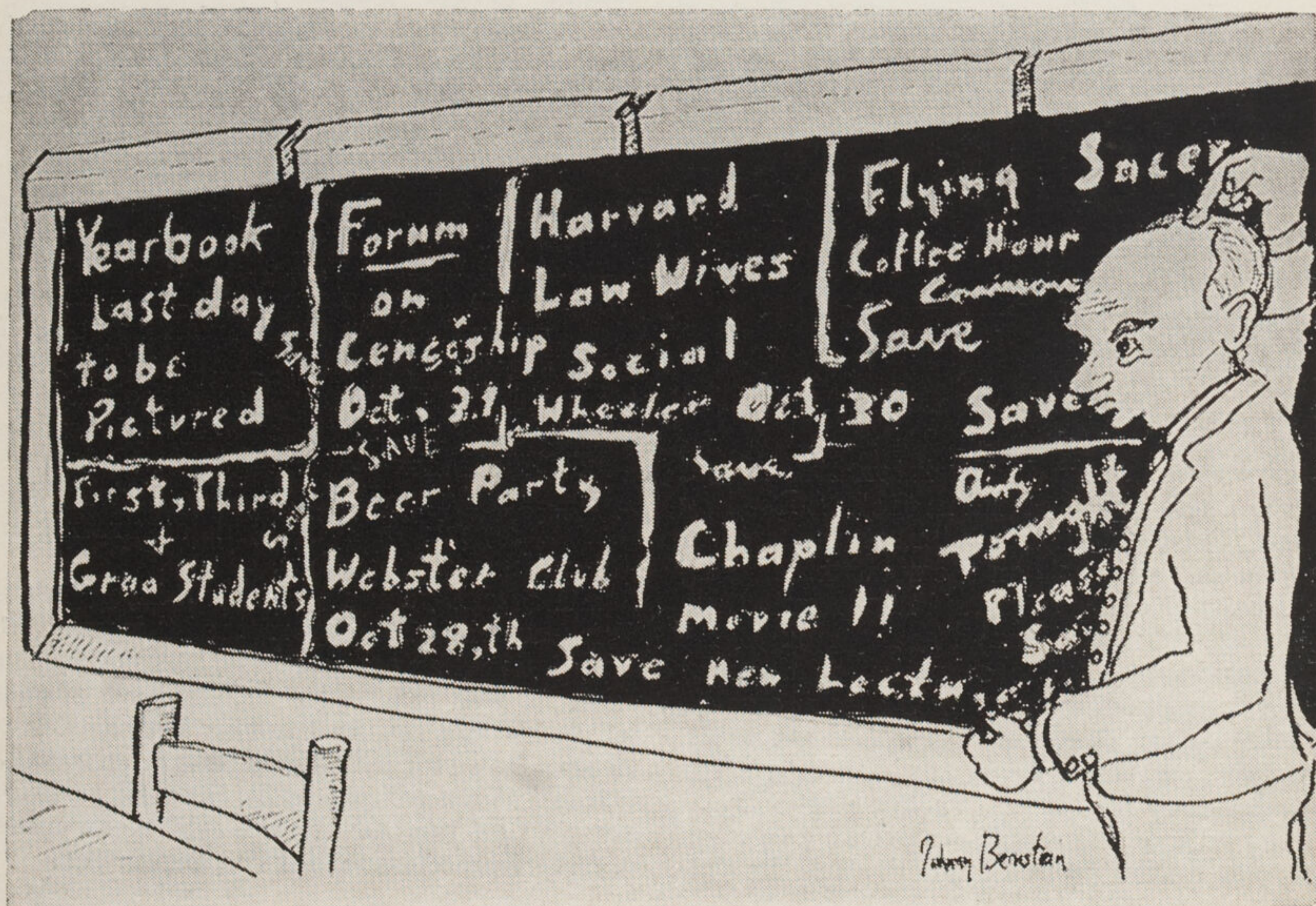
He was a Phi Beta Kappa at Harvard College and served for two years on the *Harvard Law Review* while at the Law School, acting as legislation editor for the *Law Review* during the second year.

Following graduation from Law School he became an attorney with the National Labor Relations Board in Washington, D.C..

In 1941 he entered the army and served for five years in the Office of the Chief of Ordnance in Washington. He acted during that time as the general counsel of the Research and Development Division of the Ordnance Department. He received the Legion of Merit for this service. Mr. Kramer entered the army as a second lieutenant and was separated from service as a lieutenant colonel. He currently holds that rank in the U.S. Army Reserve.

Following his army service he entered private practice with a New York City law firm. In 1947 he became a member of the faculty of the Duke University Law School and has been a professor of law at that school until his present appointment.

He presently is a member of the Executive Committee of the Association of American Law Schools. Mr. Kramer is the author of a book on federal estate and gift taxes published in 1956.



"Nothing Ever Really Changes . . ."

More than a century ago a fledgling lawyer named Rutherford Birchard Hayes attended Harvard Law School. The intervening period has seen the death of the formal lecture, the adoption of the case method, and the introduction of the Socratic technique, yet, as a perusal of a biography of this student who later became president* and some of his diary entries during his stay in Cambridge show, things have hardly changed at all.

Even before his entry to Harvard, Hayes had the benefit of some advice of elder members of the profession, and on it formulated rules for himself, some of which seem automatically exacted of today's student:

Read no newspapers.

Study law six hours, German two, and Chillingworth two.

In record Blackstone's *Commentaries*, record my difficulties.

Others seem quite impossible:

Rise at seven and retire at ten.

While he would ban the reading of newspapers, his interest in politics, which was to lead him to the White House, overcame all resolution. Yet, Judge Story, one of the leading lights at Harvard at that time, had some advice which might come from a faculty member today: "The law has been styled a jealous mistress. She will not share a divided heart. A lawyer must never become a political meddler, if he wishes to have a lawyer's mind." Judge Story's advice included other lessons which, not so explicitly stated now, are often made painfully apparent to the first year student in the course of his class participation. It was noted that one must always "keep a constant guard upon temper and tongue," or trouble was imminent.

Although there was no case method, and no formal Socratic technique, Hayes' comparisons of professors were not unlike those heard around the School today:

Mr. Greenleaf is very searching and logi-

cal in examination. It is impossible for one who has not faithfully studied the text to escape exposing his ignorance. Judge Story, on the other hand, is very general in his questions, so that persons well skilled in nods, affirmative and negative shakings of the head, need never more than glance at the text to be able to answer his interrogatories. He is very fond of digressions to introduce amusing anecdotes, high wrought eulogies of the sages of the law, and fragments of his own experience.

In the middle of the 19th Century, "Ames Games" were not yet in fashion, but there apparently was a reasonable facsimile styled, simply, "Moot Court Work." Hayes' comments on his preparation for this event is not unlike some overheard today in Langdell Hall.

Reading for authorities is indeed like feeding on narcotics. The stimulus is too great for the healthy stomach; agreeable and exciting at first, but speedily followed by satiety and disgust.

After it was over, he was a little more charitable, and not surprisingly he resolved to spend a fair allotment of time on development of his oral advocacy.

Again, his impressions of courses cast some light into the future. For modern first year students who wander in darkness through Civil Procedure, he records Professor Greenleaf's foreboding forecast which may have spotted the cause of latter-day perplexities:

Greenleaf says you might as well attempt to abolish light as the principles of pleading.

And for those troubled by the Rule in Shelley's Case and perturbing perpetuities:

The law of real property is difficult, but I begin to see a little further before me, and do not despair of some day becoming informed upon the subject.

Not faced with present day requirements, Hayes completed his legal training in a year and a half. Even though he was subject to fewer requirements and no exams, his closing entries indicate that things were no breeze at the Law School in 1845:

I shall be glad when this term is through. My health requires more attention than can

* Williams, Charles Richard, *The Life of Rutherford Birchard Hayes*, Vol. I, Chapter 2. Ohio State Archaeological and Historical Society, Columbus, 1928.

be given it while engaged in study . . .
Since I commenced the study of the law,
I have taken no sufficient recreation.

One suspects that an oral presentation on the same subject to his fellow students might not have been couched in quite the same dignified terms.

The overall impression one gets from these remarks is that the Law School, for all its growth in enrollment, its periodic building programs, and its reaching innovations, is

not materially different in spirit a century and more later. "Sufficient recreation" may now be the movie-a-month, but that can be put down to invidious technological advance. The Spartan flavor of Hayes' "rules" continues to apply, although the spread between the hour of rising and that of retiring seems to have increased. "Teaching law greatly" reaches us in a different form, but with much the same substance.

— Skornia

Book Review

Lucius Wilmerding, Jr., *The Electoral College*. New Brunswick, New Jersey: Rutgers University Press, 1958. xiii, 224 pp. \$5.

By GERALD POMPER

Distrust and dislike of politics is a common characteristic of Americans, manifesting itself in the voter's cynical references to "dirty politicians" as well as the legislator's plea to "keep politics out of foreign policy" (or farm, labor, tax, or civil rights legislation). This same distrust and dislike, combined with a neglect of political realities, dominates Lucius Wilmerding's study of Presidential electoral methods.

His book is essentially a plea for a change in the method of electing the President. At present, the electoral vote of each state is decided on the general ticket system, with the candidate receiving a popular plurality winning the state's entire electoral vote. After examining this and two proposed alternatives — a direct popular vote and proportional division of each state's electoral vote in the ratio of the popular vote obtained by each candidate — Wilmerding endorses the "district" system. Under this arrangement, widely used in the early years of the republic, each state is divided into a number of districts equal to the number of seats it holds in the House of Representatives. Each district elects a single elector and the candidate receiving the highest vote in the entire state receives an additional two electoral votes, equal to its representation in the Senate.

Under this system, Wilmerding argues, the votes of statewide minorities would no longer be "lost." Republican sections of the South and Democratic districts of the Midwest would no longer be submerged under vast opposition pluralities from the traditional areas of their states. With election by districts, the President would no longer be "the man of the states," claims the author, but "the man of the people."

The argument is unconvincing. In any election conducted under any system other than proportional representation (which Wilmerding disapproves on grounds unrelated to his major thesis), the minority's votes are, in effects, "lost," and this would be as true for the district as for the state-wide system. But, replies the author, under the general ticket system, not only are the minority's votes "lost" but they are counted as if cast in favor of the opposition. This is only a matter of words. As in most American elections, the prize to be won is decided by a plurality vote; in the Presidential election, the prize is a number of seats in the Electoral College. This contest does not differ in kind from others where the prize to be won is a single seat.

A second major virtue claimed

Mr. Pomper is a Harold W. Dodds Fellow from Princeton University. He has done work towards his Ph. D. degree in the Princeton Politics Department.

for the district system is that it would remove control over Presidential elections from "the leading politicians in the several states," and restore it, again, to "the people." "Party tyranny" and the "greedy grasp" of politicians would be ended, as "cooperation of individuals" supplanted "cooperation between the leaders of one state and those of another."

These claims make it obvious that Wilmerding objects to the fact that politics is the business of politicians. The sordid activity of making up tickets, playing for public support, and seeking party advantage distresses him. He would prefer to re-create the allegedly idyllic days of the Athenian republic, each voter acting virtuously and of his own volition. In a nation of over 100 million voters, however, the conduct of elections requires organization, professional politicians, and "schemes of ambition." While a different electoral system might modify the party system, it would not decrease its extensiveness and necessity.

The district system, then, would not bring about the improvements claimed. Moreover, any such change would have important consequences which, in this reviewer's opinion, would be detrimental. This is because of certain political realities which are not considered by the author.

The present system gives a dominant role in the nomination and selection of the President to the heavily-populated, urbanized

and industrialized states of the Northeast, Midwest, and Pacific Coast. Because relatively few popular votes may result in the gain of a large bloc of electoral votes, candidates are named and base their appeals in order to gain support from these areas. Only the Presidency, of all national offices, is biased in this direction; the others are slanted in the reverse way. In the Senate, every state has and is constitutionally guaranteed perpetual equality. Thus, 18 predominantly rural states with a combined population less than that of New York have 36 Senate seats. The House, the "popular" body, is similarly constituted in fact, although not constitutionally. Congressional district boundaries are established by state legislatures which are almost universally controlled by over-represented rural areas. Regardless of party, rural interests construct Congressional districts to reduce urban representation and, it should be noted, could be expected to do the same in the

case of Presidential elections, if the district system were adopted. Wilmerding takes note of the argument presented above and dismisses it in three paragraphs. Evading the practical point raised, he rejects it as putting group interest above that of "the people at large."

The author ignores the modern role of the President as initiator of policy and dynamic element of the federal government, and the ways in which the President's performance of this role has been encouraged by his means of election. By making the Chief Executive responsive to the demands of urban and industrial areas, the general ticket system has also stimulated attention to the needs and demands for new government policies which have been presented by these same areas. Presidential sympathy has generally been much greater than that of Congress concerning, for example, the problems of housing, old age security and unemployment.

Space allows only brief mention of other objections to this book:

1) Wilmerding's research is unevenly distributed, being concentrated too heavily on the early years of the 19th century.

2) The author's interpretation of the intentions of the Constitutional Convention is open to serious question. One may doubt, in opposition to Wilmerding, that the framers intended the President to be a "man of the people," if this characterization is applied to such as Jackson, Lincoln or the Roosevelts. What was intended, as Hamilton explained in *The Federalist*, No. 71, was that the Executive, "when occasions present themselves, in which the interests of the people are at variance with their inclinations," would defend the former. The President would be a check "to a prevailing current, either in the community or the legislature." It is for this reason that the President was to be elected indirectly, and that democrats like



Crowds clamor for food at Harkness Commons each day at 1:10 p.m.

George Mason opposed the plan and aristocrats like Gouverneur Morris approved it.

3) Wilmerding adopts the Burkean theory of "virtual representation," asserting that the voters of a given community will also represent the wishes of those who do not vote, since "the interests of a community, considered in relation to other communities, are homogeneous." Thus, he reasons, Southern Negroes will benefit from any increase in the electoral impor-

tance of the South, even if they continue to be excluded from the franchise. An increase in Southern power would mean added federal expenditures in the area, which would benefit Negroes, says Wilmerding, while any civil rights legislation thus defeated is considered relatively unimportant. However, it is possible for conflict to exist within an area, and for some groups within a community to monopolize all of the advancements made in that community.

Thus, without the prod of outsiders, one may doubt that recent Southern economic advancements would have contributed greatly to Negro equality.

Mr. Wilmerding has proven successful in government service and in academic research. The tone of scholastic philosophy which characterizes this book, however, does no credit to his reputation. Realistic appraisal of American politics will serve better in revising the system of Presidential elections.

Warsaw Convention and the American Lawyer

Air law specialist seeks renunciation of both the Warsaw Convention and its substitute treaty, the Hague Protocol. He urges American lawyers to help repair the defect in our legal system created by these international treaties.

By
STUART M. SPEISER

II

The defenders of the Warsaw Convention dare not claim that it is just; they say that it is a necessary evil. Let us examine their arguments:

1. THE CLAIMS RISK IN AVIATION IS CATASTROPHIC, AND THE INDUSTRY REQUIRES SPECIAL PROTECTION: This is debunked by the record of our domestic airlines, which have developed the finest air transportation system in the world, without benefit of any such limitation of liability, in spite of the fact that their accident rate is higher than that of the overseas carriers. The aviation industry is now the largest

in our nation, and it is well able to pay for the damages incident to its further development.

2. THERE ARE LIMITATIONS ON RECOVERY FOR WRONGFUL DEATH IN SOME

The author is a member of the New York law firm Speiser, Quinn, & O'Brien. A former military and commercial pilot, he has acted as counsel for plaintiffs in most of the major air disasters in the past ten years. He is chairman of the Aviation Law Section of N.A.C.C.A.. In addition to law review articles, he has authored Preparation Manual for Aviation Negligence Cases, Federal Legal Publications, Inc., New York, 1958.

OF OUR STATES: This argument would set our legal standards at the lowest level of our public morality. It is true that there are still a dozen states which have monetary limitations on recovery for wrongful death. However, the entire trend in the past quarter-century has been away from this 19th Century railroad-inspired attempt to cheapen human life. Every one of these states has raised its limitations substantially in recent years; and rarely does a session of their legislatures go by without the introduction of a bill to remove all limitations. Many other states which had such limitations have removed them completely in the past two decades. All of our federal leg-

isolation touching upon such claims has been enacted without limitations. Some of our states have *constitutional* prohibitions against such limitations. Furthermore, the Warsaw Convention limits recoveries not only in death cases but in personal injury cases as well. This our state legislatures could not constitutionally do even if they were so inclined.

3. THE PASSENGERS MAY PURCHASE TRIP INSURANCE AT REASONABLE RATES: Under this rationale, we should limit the penalties and civil damages for burglary, because burglary insurance is also available to the homeowner. The availability of trip insurance does not stem from the Warsaw Convention. It came about through the great advances in safety, made largely by our domestic airlines, which have always operated without exacting the forfeiture of civil rights from their passengers. Under our legal system, liability is based upon fault, and we have found it extremely sound to make it expensive for negligent people to injure others, particularly in the case of common carriers. The right to purchase and pay for insurance is a privilege of the passenger; but it does not lessen the duty of the common carrier to exercise the highest degree of care for his safety, or to respond in damages for failure to do so. The abrogation of the Warsaw Convention would not affect the availability of trip insurance in any way; again, our domestic air transport system is proof of this. The passenger is already paying for liability insurance, which is an operating expense considered by the C. A. B. in the fixing of fares. The negligent air carrier is no more entitled to receive credit for the limited insurance purchased by the passenger than the drunken driver is to a deduction for the amount of his victim's life insurance.

4. THE CONVENTION GIVES THE PASSENGERS LEGAL RIGHTS WHICH THEY WOULD NOT OTHERWISE HAVE, IN RETURN FOR THE LIMITATION

OF LIABILITY: This myth is exploded upon a cursory reading of the reported cases. The Convention does not create an independent cause of action; it merely limits whatever rights the passenger might have under the law of the place of the accident (*Noel v. L. A. V.*, 247 F.2d 677). Thus, it is a ceiling, but not a floor, and if the place of the accident has a limitation lower than \$8,300, Warsaw does not confer any greater rights on the passenger. So far as the burden of proof is concerned, the Convention does no more than codify the rule of *res ipsa loquitur*, which exists in our state laws independent of the Convention.

5. THE CONVENTION REDUCES LITIGATION, AND BRINGS ABOUT QUICK SETTLEMENTS: This lofty objective is attained in even more striking fashion by Soviet law, under which the nearest policeman settles claims arising out of traffic accidents, and there is no litigation at all. Over here, we are willing to pay the price of litigation, if it is necessary to effect justice. Moreover, there has been plenty of litigation arising out of the Convention in this country. Although the cards were stacked against him in 1929, the average plaintiff's attorney is loath to send a widow away from his office with \$8,300 to support her family for the rest of her life, if there is the slightest chance of getting more money for her in court.

6. THE CONVENTION GIVES UNIFORMITY OF LAW, WHICH IS NECESSARY IN THE INTERNATIONAL FIELD: Even if we assume that the Convention achieves a measure of uniformity, again it is uniformity at a level far below the requirements of American justice. Furthermore, we are not here in the "international field". The claims of passengers

against commercial airlines are matters of private domestic law, to be dealt with by our courts according to our own laws. These private legal rights are not appropriate subjects for international treaties in the first place.

7. WITHDRAWAL FROM THE CONVENTION WOULD PLACE THE UNITED STATES IN A BAD LIGHT INTERNATIONALLY, AND PROVIDE THE BASIS FOR ANTI-AMERICAN PROPAGANDA: This is the type of argument that we may expect in support of any international treaty which we ratify, regardless of changing conditions. Its fallacy lies in the unwarranted premise that the Convention is in accordance with the principles for which this country stands. Obviously, the direct opposite is true. As long ago as 1876, the United States Supreme Court declared that limitations of liability of common carriers in personal injury and death cases were against our public policy (*Bank of Kentucky v. Adams Express Co.*, 93 U.S. 174.) If we are to continue to be known as the champions of freedom and individual rights (something for which we are spending billions in foreign aid), then the *denunciation* of the Warsaw Convention would be a giant step in the right direction. It might even lead to an improve-

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TOWER OF PIZZA TO OPEN IN CAMBRIDGE

Cambridge, Oct. 8 — Lou Catania, owner and operator of the original Tower of Pizza in Allston, Mass., today announced that the grand opening of a new Original Tower of Pizza in Cambridge will take place in the near future. Located at 1728 Mass. Ave. (North of Harvard Sq.), the Tower of Pizza will feature take out and delivery service. The exact date of the opening (when free gifts will be distributed) is to be revealed in a later issue of the Record.

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ment in the legal position of the individual in other countries.

8. WITHDRAWAL FROM THE CONVENTION WOULD PLACE AMERICAN CARRIERS IN AN UNFAVORABLE COMPETITIVE POSITION, DUE TO INCREASED INSURANCE RATES: This argument is contrary to the facts, and has never been supported by a shred of proof. Actually, the American overseas carriers are constantly fighting for lower fares, against the determined opposition of foreign carriers. Only recently, our overseas carriers had to reluctantly agree to a fare increase on European flights, on the insistence of the foreign airlines. Our carriers are already paying higher insurance premiums for workmen's compensation and other types of insurance; and they are paying much higher wages than the foreign lines. Yet, they are able to operate more economically than the state-owned foreign airlines, and they pay dividends to their stockholders. The increased insurance premiums (if any) brought about by withdrawal from the Convention, could not possibly affect this competitive balance. In fact, there has been absolutely no evidence put forth by the airlines or their insurers, indicating any appreciable rise in operating costs which would follow denunciation of the Warsaw Convention. It appears that they must carry liability insurance beyond Warsaw limits at the present time, for there is always the possibility that a particular accident may involve passengers whose carriage is not affected by the Convention. Indeed, our domestic lines appear to operate more economically than our overseas carriers, and they have never had a Warsaw Convention enacted for them.

9. WITHDRAWAL FROM THE CONVENTION MAY AFFECT THE ABILITY OF OUR CARRIERS TO MAINTAIN OPERATING RIGHTS IN FOREIGN COUNTRIES: Again, there has been no evidence advanced to support this contention. Operating rights are a matter of reciprocity. If Belgium became angered by our denuncia-

tion of the Warsaw Convention, and decided to revoke the operating rights of our airlines into her airports, she would be giving up her own lucrative routes to New York. The hard facts of economic life make this argument a fantasy, for the American is the principal traveler on all the major airlines of the world. Indeed, it is more likely that one effect of our denouncing the Convention would be an enforced tightening of safety policies on the part of the foreign airlines. No carrier likes to suffer an accident, but there is nothing more conducive to a higher degree of care than the threat of large judgments. If each airline added only one safety inspector as the result of denunciation of Warsaw, this would be enough to outweigh all of the arguments put forth in favor of the Convention.

So much for the arguments which Warsaw's proponents espouse publicly. In the privacy of their own councils, the matter is treated somewhat differently. The following is a direct quotation from the appendix of the U. S. Senate Hearings on the Insurance Industry, held pursuant to Senate Resolution 231, 85th Congress, Aug. 6-15, 1958, at p. 497:

"As to the revision of the Warsaw Convention, he wanted to make the American position clear. American insurers had had plenty of experience of dealing with the Convention and were fully alive to its defects, but generally speaking, it had enabled settlements to be made at lower figures than the average for non-Convention cases and its validity had been upheld and affirmed by the American Courts in a series of cases. There were three dangers about revision. The first was that although revision would no doubt cure some of the defects, it might introduce new ones. In the second place, there was quite a seri-

ous danger that a revised Convention might not be ratified by the American Senate, since the Convention contained several principles which were completely repugnant to American law and the original Convention owed its easy passage through the Senate to the exceptionally wide powers exercised by President Roosevelt at that time. Finally, even if the revised Convention were passed, it would necessitate fighting a series of actions in the Courts to establish its validity and the existing decisions would be rendered valueless."

The "he" referred to in the foregoing quotation was Mr. George G. Orr, Director of Claims for United States Aviation Underwriters, Inc.; the forum was the meeting of the International Union of Aviation Insurers held at Brussels on May 12, 1949.

The Hague Protocol

The rank injustice of the Warsaw Convention gave rise to an international conference at The Hague in September, 1955, to discuss revision. This conference was inspired principally by the United States, whose representatives had been working for some time toward removal of the limitation of liability. The conference resulted in the drawing up of "The Hague Protocol," which is actually a new treaty, designed to replace the Warsaw Convention.

Since our representatives had only one vote among the 45 nations represented, the sum total of their progress was a new provision, increasing the liability limitation to

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approximately \$16,600 (double the present Warsaw Convention limitation). Many of the countries represented expressed the view that even \$8,300 was a high award for injury or death to passengers.

The doubling of the limitation was not gained without a price. Other provisions of the Hague Protocol were designed to plug up "loopholes" which had been developed by desperate plaintiff's attorneys. Under the Warsaw Convention, the airline's employees may be sued personally, and they cannot avail themselves of the airline's limitation of liability, even though covered by the airline's liability insurance, since this relates only to the "carrier" (*Pierre v. Eastern Airlines and Foxworth*, 152 F. Supp. 486). Article 25-A of the Hague Protocol would put the employees in the same position as the carrier. The Protocol also eliminates the "wilful misconduct" exception to Warsaw, and substitutes a requirement that the accident must occur "with intent to cause damage, or recklessly and with knowledge that damage would probably re-

sult", in order to defeat the limitation of liability.

The Hague Protocol of 1955 does not become effective until ratified by 30 of the Warsaw signatories. To date, only 9 nations have ratified it: Czechoslovakia, Egypt, El Salvador, Hungary, Laos, Luxembourg, Mexico, Poland and the U. S. S. R. Therefore, the Warsaw Convention is still in effect today.

The Senate must act upon the Hague Protocol, and therein lies the opportunity to bring about a reappraisal of the principles of Warsaw-Hague.

The Present Choices

The Senate will have the choice of three courses of action:

1. TO RATIFY THE HAGUE PROTOCOL.

2. TO VOTE AGAINST RATIFICATION OF HAGUE, AND STAND BY THE OLD WARSAW CONVENTION.

3. TO VOTE AGAINST RATIFICATION OF HAGUE, AND AT THE SAME TIME DENOUNCE THE WARSAW CONVENTION, THEREBY RESTORING TO PASSENGERS ON OUR INTERNATIONAL FLIGHTS THEIR BASIC RIGHTS UNDER AMERICAN LAW.

At first blush, it might seem prudent to those opposed to the Warsaw principles, that they seek ratification of the Hague Protocol. It appears on the surface to be an improvement over Warsaw, and half a loaf is better than none at all. In the writer's opinion, this would be a grave mistake. Whatever action is taken on the Hague Protocol will very probably govern

the rights of our international passengers for the rest of our lives. Ratification of Hague would serve to cement into our law the abhorrent principle of limitation of liability in private litigation, through a treaty drawn up at the behest of the defendants.

Furthermore, despite the great odds, plaintiff's attorneys have made some progress in the courts against Warsaw. Quite a few cases have been settled at figures substantially above the \$8,300 limitation, through the threat of "breaking" the Convention by proving "dol" or by bringing suit against the pilot individually. Ratification of Hague would wipe out this progress, so that the end result would be a lowering of the compensation actually received by victims of these disasters.

The pressure of proposed legislation upon our Senators is so great today that we cannot expect another chance in our times to strike down the Warsaw principles. This

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CAPRI — Sapphire — 2:05, 4:03, 6:01, 7:59, 9:57
EXETER — Wild Strawberries — 2:20, 4:05, 5:55, 7:40, 9:48
GARY — Big Fisherman — 1:15, 4:15, 8:15
SAXON — Career — 10, 12, 2, 4, 6, 8, 10
TELEPIX — Senechal — 11:30, 1:30, 3:30, 5:30, 7:30, 9:30
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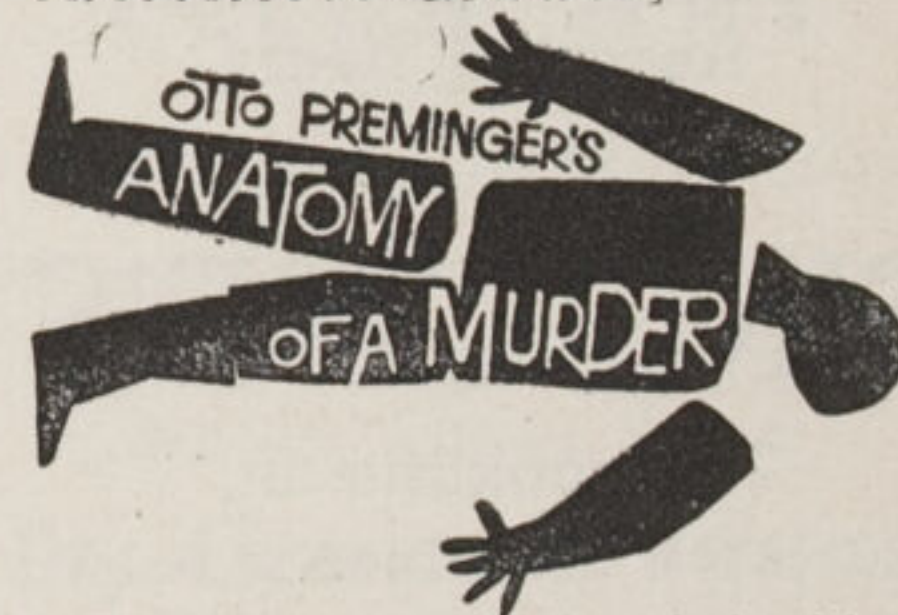
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Mr. Magoo — Travel — Late News

is not state legislation, which can be brought up each year. Further raising of the limitations requires joint action by 44 other nations, none of which have shown any interest in the matter beyond the protection of the airlines which they own and operate.

The second choice is likewise unacceptable, for obvious reasons. It is submitted that for anyone concerned with the preservation of our legal system, the third choice, complete denunciation of Warsaw and Hague in their entirety, is the only conscionable course.

The Lawyer's Role

When the Hague-Warsaw problem comes before the Senate, the airlines undoubtedly will make an elaborate presentation of their case. Who will oppose them?

The traveling public has no lobby. Few air travelers are aware of the existence of the Warsaw Convention, and fewer still will give it a second thought until disaster strikes them personally.

It has been one of the proud traditions of the American lawyer to come forward and repair the defects that crop up in our legal system. In the Warsaw Convention, we have a challenge that thrusts at the heart of that system. Nobody but the American lawyer can bridge the enormous gap between law and justice that the Warsaw Convention has bulldozed; nobody else will fight this battle.

Some of us are trying. The National Association of Compensation

Claimants' Attorneys (N. A. C. C. A.) has sent representatives to appear before the President's Air Coordinating Committee, which will make the initial recommendation on Hague-Warsaw to the President. We were the only ones who appeared in opposition to the Convention. The airlines and their insurers were, of course, well represented.

Although N. A. C. C. A.'s six thousand members include incumbent Senators and Representatives, we cannot begin to wage this fight alone. Our position is attacked on the grounds of self-interest; we are told that we are interested only in the few "big" verdicts, as opposed to a nice "averaging out" of all claims, on the basis of Hague-Warsaw, (with the airlines, of course, determining what the average should be.) That is why we need the support of every attorney who believes in our legal system, and who feels that the word "average" was left out of the Constitution and the Bill of Rights because it was the intention of the founding fathers to seek perfect justice in every single case that comes into our courts.

What can you do about it? You can bring the question up for a vote in your local and state bar association, not by a select committee of aviation lawyers, but by

your entire bar association. You can forward your resolutions to the Air Coordinating Committee, and to your Senators and Congressmen. And when Hague-Warsaw comes up for action in the Senate in the next few years, you can make your own views known to your Senators. This time, I think they will listen to us. It will not be easy to sell this privately-sponsored "treaty" to the present Senate, at the price of unrequited suffering of widows, orphans, and cripples. Not unless the American bar lets the case go by default.

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Letters to the Editor

To the Editor

In your issue of October 8, William Rehnquist has argued persuasively that the basic outlook and attitudes of nominees for the Supreme Court ought to be known. But surely it does not follow, as the concluding statement in the article may be taken to suggest, that the Senate should "inquire of men on their way to the Supreme Court something of their views" on fundamental issues.

The practice of inviting nominees to appear for questioning by the Judiciary Committee began in 1939 when Professor Frankfurter's nomination was pending. It is worth recalling his opening statement before the committee. After pointing out that this practice was a new departure, save for a limited appearance by Harlan F. Stone, in order to explain a certain episode in his Attorney Generalship, Mr. Frankfurter continued:

"While I believe that a nominee's record should be thoroughly scrutinized by this committee, I hope you will not think it presumptuous on my part to suggest that neither such examination nor the best interests of the Supreme Court will be helped by the personal participation of the nominee himself. I should think it improper for a nominee no less than for a member of the Court to express his personal views on controversial political issues affecting the Court. My attitude and outlook on relevant matters have been fully expressed over a period of years and are easily accessible. I should think it not only bad taste but inconsistent with the

duties of the office for which I have been nominated for me to attempt to supplement my past record by present declarations."

It was in similar vein that Lincoln spoke at the time of his nomination of Chief Justice Chase: "We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it."

Paul A. Freund

Carl M. Loeb University Professor

To the Editor:

I feel impelled to take radical issue with President Ross L. Malone of the American Bar Association, who contends that "many of the nation's law schools, and the legal profession itself, are not placing enough emphasis on ethics and professional responsibility in the training of law students" and further, that a "law school which graduates a student deficient in his appreciation and regard for the professional responsibilities of the lawyer has done a great disservice to the legal profession and to society, regardless of how well educated the student may be in substantive and procedural law."

In my three years at the Harvard Law School (1900-1903) I recall very vividly and distinctly that the phrase "legal ethics" was not even mentioned. There was, of course, no course in the Law School on that subject. And when I took the Ohio Bar examination in 1903 and

found I was to be examined on legal ethics, my first reaction was, "Why is that necessary?"

It seems to me that a course in legal ethics is as fruitless and unnecessary for the prospective practitioner of law as the taking of the oath of Hippocrates by the prospective practitioner of medicine. Unless the moral and ethical foundation is there, no amount of instruction will avail. Decency is instinctive — it cannot be cultivated.

Several years ago, the late Professor Beale addressed informally a group of Harvard Law School graduates in Cleveland. At that time he had been teaching in the Law School for fifty years. I can never forget with what pride he said at that meeting that, during his half century of service, as a member of the faculty, he knew of only one Harvard Law School graduate who had ever been disbarred. Perhaps Mr. Malone will argue that even so glorious a record could have been improved if that wayward graduate had enjoyed the benefit of a course in legal ethics.

Alfred A. Benesch LL.B. '03

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