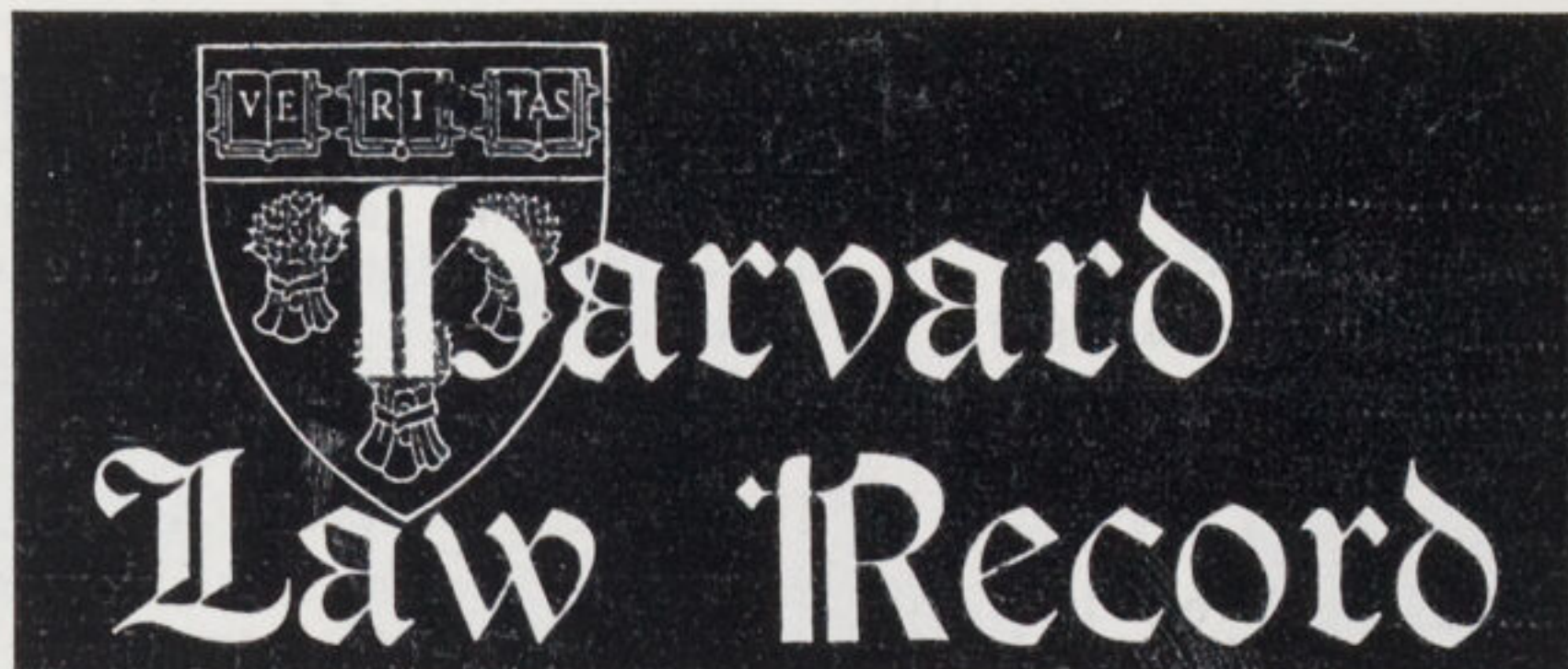


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NO. 9

Patent Club Hears Trade Secrets

Mr. Elmer Gorn, Chief Patent Counsel of Raytheon Company, addressed the Harvard Patent Law Club last week on the subject of trade secrets, the unpatented technological know-how possessed by a business, and cited



Elmer Gorn

the increasing importance of trade secrets as the subject matter of intercompany contracts.

Mr. Gorn pointed out that the longevity of a valuable trade secret depends on several factors: the rate of technological advance in the field causing obsolescence of the subject matter; the leakage of the information into general industry resulting from the movement to different firms of technological employees possessing the knowledge; and the

pressure on the company to publish all its discoveries and thereby exchange the value of the trade secret for increased prestige and reputation in the field.

A peculiarly difficult problem in the field results from the receipt by a company of unsolicited information advanced for sale by eager inventors. The company may have discovered the subject matter of the disclosure independently. However, when the company rejects the offered information and then later utilizes its similar knowledge independently obtained, the circumstances are suspicious, and such a company is often hard pressed to prove that it did not steal the trade secret contained in the disclosure. For this reason

(Continued on Page 4)

Faculty Members Probe World Disarmament

The RECORD learned last week that several members of the Law School faculty have been participating in a series of national research projects concerned with problems of world disarmament.

The series, which has had four stages, has included in its ranks distinguished scholars and practicing engineers from as far away as California, but the great majority of its participants have come from M.I.T. and Harvard. It reached its peak membership this past summer when there were some 50 persons working under the program, but it has never enlisted the efforts of less than 20 persons. Its purpose has been to study a

(Continued on Page 4)

Harvard Law Record

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Hearsay

It becomes a matter of serious moment when the conduct of some members of the student community must be taken to task in this space. To show our readers that there are a few among us who have missed one of the more easily learned lessons of the maturation process requires no more than the citation of the present conditions existing in the library.

Anyone who passes through the library can hardly fail to notice the literal barricades of books thrown up in front of the Ames competitors. They have taken it upon themselves to line up anywhere from five to fourteen books (by actual count) in complete disregard of their fellow researchers. In some cases, the books sit there unused while the culprit goes out for a cigarette or even for dinner.

Perhaps an even more serious misdemeanor is the careless abandon with which reference books are misplaced or, in some cases, not replaced. These are the tools with which all research is begun; the fruits they have to offer can be plucked in a few brief moments, and without transporting them farther than a few feet from their shelves. It requires little effort to return them.

That this situation must not continue is evident. The fault lies not with the library staff but with the students who are either intentionally disregarding of their fellow man or improperly trained in the character trait of respect for the rights of others. Be he a member of either group, the student who is guilty of the offense must be made to realize that his action is one that impedes another's work and reflects on his own lack of proper upbringing.

The legal profession is one that requires of its members a full social awareness. This means not only recognition of the community's goals but also a regard for its manners. A lawyer must live a life that will win respect both for himself and for his profession.

If the Law School does not conduct a course in ethics it is because the administration feels that the caliber of student which it attracts does not require that "the good" be driven home to him while "the bad" is forever dispelled from his mind by a series of formal lectures. It is thought that the graduates of this school, even more so than

(Continued on Page 15)

CALENDAR

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

Friday, November 18

The BULL AND BEAR CLUB will present Henry Hornblower II and William R. White of the brokerage firm of Hornblower & Weeks speaking on the subjects of "Financial Opportunities for Lawyers" and "Stock Market Effects of Kennedy's Election," in the Meeting Room of Harkness Commons, at 1:40 p. m.

Monday, November 21

The INTERNATIONAL LAW CLUB will present J. P. verloren van Themaat, a delegate to the United Nations from the Union of South Africa, in the Dean Roscoe Pound Room, at 8 p. m. Mr. van Themaat will speak on the topic of "The Union of South Africa and International Law." Dean Erwin N. Griswold will introduce the speaker.

Tuesday, November 22

The INTERNATIONAL LAW CLUB'S discussion group program will feature Dr. Garcia Amador of Cuba, a member of the International Law Commission of the United Nations, at a meeting in the Wheeler Room, in Holmes Hall, at 4 p. m. The subject of the discussion will be "The International Obligation to Respect Acquired Rights."

The first semifinal argument of the AMES COMPETITION will be held in the James Barr Ames Court Room in Austin Hall, at 8 p. m. Judges for the argument, which is between the Gower-Herwitz and Magruder Clubs, will be the Hon. Simon E. Sobeloff, Hon. Philip Halpern and Mr. Hans F. Loeser.

Thursday, November 24

THANKSGIVING DAY is a holiday, and no classes will be held at the Law School. Classes will be resumed on Friday.

FUTURE EVENTS

Tuesday, November 29

The second semifinal argument of the AMES COMPETITION will (Continued on Page 15)

Legal Wits Matched at Annual Model Trial



Keeton & Plaintiff

Justice Hudson

St. Clair & Defendants

The annual Model Trial took place last week in the James Barr Ames Courtroom. Professor Robert E. Keeton and James D. St. Clair, Lecturer on Law and a Boston attorney, matched legal wits in an illustration of trial procedure for the benefit of the first year class.

Professor Keeton represented the plaintiff and Mr. St. Clair, the defendants. The Hon. Eugene A. Hudson, Associate Justice of the Massachusetts Superior Court, presided over the trial.

This year's case, *Schofield v. Armstrong*, was an action for damages resulting from an alleged false imprisonment and battery committed by Howard Armstrong, manager of a department store, and his assistant, Roger Featherstone, against Mrs. Ellen Schofield, a customer.

The incident arose when Mrs. Schofield paid for a purchase by check and signed with a different name than the one she had used a few days previously in the same store. As she had recently remarried, she had inadvertently signed the first check with her name by the previous marriage.

'Imprisoned' In Office

Armstrong began to question her, and while he was doing so she turned to leave the store and collided with Mr. Featherstone. Unable to produce identification, Mrs. Schofield was asked to go to the manager's office, where she stayed for half an hour waiting for her husband.

A lay jury of seven women and five men found for Mrs. Schofield on the false imprisonment charge but found for Armstrong and Featherstone on the battery count. They awarded her \$4,350 for loss of salary, as she was unable to work because of illness precipitated by the incident, and medical expenses amounting to \$142.

One juror, upon interview, reported that there was some confusion in the jury room as to the technical aspects of Judge Hudson's charge. This juror stated that the deciding factor for the jury was the expert testimony of Dr. Manderson, a neurologist and psychiatrist, about Mrs. Schofield's post-traumatic anxiety neurosis, precipitated by the occurrence at the store.

A female jury member reluctantly admitted that the deliberations were largely dominated by the men, quickly adding, "But we all contributed to the discussion." It was also reported that the deliberations of the jury were tape-recorded with their consent.

The most humorous incident of the trial occurred when Mr. St. Clair, implying that Mrs. Schofield was a hypochondriac, suggested to Dr. Manderson in cross-examination that her illness was like seasickness, being "all in the mind." Dr. Manderson in reply said, "If you had ever been seasick you would know that it is not all in the mind." This exchange drew a large round of applause from the audience.

The litigation of the case will continue at the Model Appeal on December 13th, which will see Dean Erwin N. Griswold and Professor Braucher as opposing counsel.

— Rapchak

Wary of Inventions

(Continued from Page 1)

many companies either refuse to look at disclosures on matters not already patented or require all persons submitting disclosures to waive their legal rights and rely on the good faith and fairness of the company.

Government Contracts

Mr. Gorn emphasized the difficulties involved in doing work under a government research and development (R & D) contract. The finished products and the written data amassed during the work belong to the government. However, previously-held trade secrets used by the company in making the products, the know-how consisting of the critical organization of the extremely complicated and multitudinous data and the practical experience resulting from, and only obtainable by, actually doing the work are rightfully retained by the company under the contract.

The government would like to lower its costs for mass production of finished products by submitting the production contract to competitive bidding; however, the essential data which it can offer to potential competitors of the developing company is so voluminous and detailed as to be practically meaningless. The value of the technical know-how of the developing company comes in a general saving of time, money and effort through an avoidance of practical production mistakes through past experience, as well as in an avoidance of "destructive testing," the careful taking apart of a costly finished product to determine its organization and mode of operation.

When the government desires to have a foreign government produce a complicated and massive defense product, such as the HAWK missile system developed by Raytheon Company and used by the United States and her allies, it is often necessary for the government to pay for and send engineers of the developing company abroad to supervise the operation. On the other hand, the usual R & D contract is on a cost-plus-fixed-percentage basis, the fixed percentage being much lower than the profit margin usual in the industry. Therefore the company feels justified in retaining as additional compensation some of the knowledge obtained by performance of the R & D contract and definitely rejects the idea of disclosing any previously-held trade secrets used in the development without ob-

taining further government compensation. Furthermore, the information retained by the developing company is often just not the type which can be communicated easily, if at all.

Joseph Weingarten of the Boston patent law firm of Weingarten, Orenbuch & Pandiscio will talk on the financial exploitation of patents on Wednesday, November 30, at 7 p.m. in the Mallory-Smith Room in Harkness Commons.

— Rosenberg

World Disarmament

(Continued from Page 1)

broad variety of problems associated with arms control, including technical, political, legal and other aspects.

The program began in December, 1959 with a grant from the Institute for International Order to support research by a group of 20 experts into what could be done to facilitate disarmament. The research done under this project led some of the members to think it would be a good idea to publish a symposium on disarmament for popular consumption, and in January, 1960 a slightly larger group was formed under a grant from the Johnson Fund to put together the papers printed in the September, 1960 issue of *Daedalus*.

The complexity of the problems dealt with by the *Daedalus* group led to the group's being enlarged still further in the spring of 1960, and under the aegis of the Academy of Arts and Sciences and with a grant by the Twentieth Century Fund, the Summer Study on Arms Control was formed to do intensive research over a wide area for the duration of the summer. The program is currently being carried on by a small group which is financed by the Rockefeller Foundation and which meets bi-weekly as the Joint Arms Control Seminar.

Professor Louis B. Sohn is the only person from the Law School who has been a participant in the program at every stage. Professor David F. Cavers and Professor Roger Fisher were members of the Summer Study and are presently meeting with the Joint Seminar. Professor Milton Katz is a member of the Joint Seminar.

The results of the Summer Study on Arms Control will be published by the Twentieth Century Fund in late December of this year.

— Baron

Latin American Discussion

Communist Influence in Education

"Communist Influence in Latin American Education" was the subject of a discussion meeting held last week by the Inter-American Law Students Association. Taking part in the exchange of ideas were representatives from Argentina, Cuba, Colombia, Mexico, Panama, Puerto Rico, the United States and Venezuela.

The meeting was opened by Miguel A. M. Hernandez, Grad., of Mexico, who related some of his personal experiences from his years in school in his own country. He emphasized the following two points: first, the strongest tide of Communist influence in Mexico is already a thing of the past, and second, the appearance of Communist influence within the student population at present is very sporadic.

Another member of the discussion group pointed out that he had noticed primary school textbooks with a definitely communistic interpretation of history being used in Mexico not very many years ago. Mr. Hernandez took exception to this and stated that such is no longer true.

The argument was then made that if in fact the generation of the 1930's was communist-influenced, the danger has not yet passed, for these are the same people who now are serving as teachers in Mexican schools.

Control of Education

The discussion then focussed on the problem of the control of the educational system, and the role of the church and of democracy as antidotes to communism was developed. The point was made that in most Latin American countries the educational system is in the hands of the church, which should, therefore, have been able to prevent the spread of communist infiltration in the system.

In the summing up it was pointed out that there are three basic and not so distinct forces underlying Latin American education. These are the church, communism and democracy.

But because of the effective organization of the first two they are far more influential than the latter. One of the reasons suggested for the apparent lack of strength of the democratic faction within these countries is the presence of very powerful and exclusive ruling classes which prevents the spread of deeply popular democratic movements.

At the close of the meeting the officers of the club who have served during the past year were introduced by the president, Francis C. Brown, Jr., 3L, Montclair, N. J. He announced that an election of officers for the coming year would be held at the next meeting, which is to be held tomorrow, November 18, at 4 p. m. in the Wheeler Room in Holmes Hall. The subject for discussion at that meeting is "Tax and Social Reform in Latin America."

— Garcia-Passalacqua

Kennedy Picks Ex-Dean To Study Agencies

James M. Landis, former dean of the Law School, was last week appointed by President-elect John F. Kennedy to conduct a study of the government's regulatory agencies. The report is to be turned in to Senator Kennedy in the middle of December.

The former dean, who has served as chairman of the Securities and Exchange Commission and also as chairman of the Civil Aeronautics Board, is at the present time a candidate for the office of president of the A. F. L.-C. I. O. Air Line Pilots Association, a union whose 14,000 members include pilots on all of the nation's major airlines.

The election for this office will be held early next week. The candidate is reported to be calling his wide experience in federal regulatory agencies a more important requisite for the position than experience in the kind of work done by the union members whom he will be representing.

Alumni Notes

LL.B. '07 *c.l.* — The death of Arthur A. Ballantine on October 10, 1960, was announced by the firm of Dewey, Ballantine, Bushby, Palmer & Wood in New York City, of which he had been a partner.

LL.B. '31 *c.l.* — Lawrence S. Lesser has withdrawn from the firm of Pehle, Lesser, Mann, Riemer & Luxford and has become a partner of the firm of Phillips, Nizer, Benjamin, Krim & Ballon resident in Washington, D. C.

LL.B. '37 — Eugene C. Gerhart has been appointed editor of the Bulletin of the New York State Bar Association.

LL.B. '49 *c.l.* — Edwin L. Gasperini has announced the opening of his offices for the general practice of law at 375 Park Avenue, New York 22, New York.

LL.B. '51 — Lewis A. Aronowitz has been elected a national vice president of the United States Junior Chamber of Commerce.

LL.M. '57 — Robert G. Meiners is on leave of absence from his position as Associate Professor at the University of Santa Clara Law School as a Sterling Fellow at the Yale Law School.

LL.B. '57 — Leonard H. Moché and LL.B. '58 — Stephen L. Bernstein have joined in the formation of a partnership for the general practice of law under the name of Bernstein & Moché, 39 Broadway, New York 6, N. Y.

LL.B. '58 — Leonard E. Cohen has had an article entitled "The Maryland Law of Strikes, Boycotts and Picketing" published in the current issue of the *Maryland Law Review* (20 Md. L. Rev. 230).

LL.B. '59 *m.c.l.* — Jay Erens has been named a professorial lecturer at the Northwestern University School of Law, Chicago, and will teach a course in Restitution.



J. J. W.

Ames Games

Foreign Service Offers Opportunities

During the present period of growing concern with effective representation abroad, the United States Foreign Service is offering exceptional opportunities to young men and women interested in the field of diplomacy. The increase in the number of sovereign states in the world has caused the United States to open many new posts abroad in the past few years. This in turn has heightened the demand for qualified young Americans to represent the country.

The Foreign Service is assigned the task of conducting the foreign affairs of the United States. In addition to the obvious duty of representing our government to governments abroad, this function includes interpreting our policies to foreign governments and citizens, preparing reports for the Secretary of State on the economic and political conditions in foreign countries, issuing passports to Americans and visas to foreigners who wish to come to this country, protecting the welfare of American citizens abroad and promoting and protecting American commercial interests abroad.

Foreign Service officers are chosen on the basis of their scores on written and oral examinations given annually. In addition, candidates must pass physical and background examinations in order to qualify for an appointment. College graduates between the ages of 21 and 31 who have been citizens of this country for at least nine years are eligible for appointment.

The first stage of a Foreign Service career is in most cases a three-month course of instruction at the Foreign Service Institute in Washington. Following this, the career officer may or may not be given language instruction, depending upon his fluency in one of the "world languages" (French, German and Spanish). The young diplomat is then ready for his first assignment, either abroad or in the Department of State in Washington.

During the early part of his career a Foreign Service officer will be assigned to functions which give him varied experience. He can expect to spend time in most of the following fields: administration, consular work, economic reporting, political reporting and public affairs. After several years of such

training he is able to specialize to a certain extent, spending most of his time in the one or two of the five branches to which he is best suited.

Law School graduates receive no preference in terms of salary over those who enter the Service directly from college. The salary range for Class 8 officers is from \$5,085 to \$6,345, depending on the qualifications, experience, marital status and age of the person involved. Salaries range up to \$20,000 for a career ambassador.

— Griscom

Bull & Bear to Hear Brokerage Partners

Henry Hornblower II and William R. White, partners in the brokerage firm of Hornblower & Weeks, will appear together before a meeting of the Bull and Bear Club tomorrow, November 18, at 1:40 p. m. in the Harkness Commons meeting room. Mr. Hornblower will speak on the subject of financial opportunities for individuals with legal training. Mr. White will discuss current and future stock market trends. Both men addressed the Bull and Bear Club in 1956.

Mr. Hornblower graduated from Harvard College in 1941. He was then employed by the Cape Cod Company, a cranberry growing and processing company of which he is still a director. He joined the Boston office of Hornblower & Weeks in 1946 and became a partner in 1950. He is currently a governor of the Association of Stock Exchange Firms and a trustee of the Boston Museum of Science.

Mr. White is in the New York office of Hornblower & Weeks. He is the firm's principal security analyst and writes its stock market letter. In his talk he will give particular emphasis to the effects that President-elect Kennedy's election is expected to have on the stock market.

There will not be an issue of the RECORD next week, as Thursday, November 24, is a holiday. The RECORD will resume publication after Thanksgiving on Thursday, December 1.

Schlesinger Sr. Speaks on History

The Henry Adams Club of Harvard University presented the distinguished Professor Emeritus Arthur Schlesinger, Sr. to a standing-room-only crowd in the Associated Harvard Clubs Room of Holmes Hall recently. The speaker, who was introduced by John Dizikes, president of the club, spoke on the subject of "Research Areas in American History."

Reminiscing on the founding of the Henry Adams Club 35 years ago, Mr. Schlesinger recalled that Paul Buck, University Librarian and professor of American History, was a graduate "Americanist" who felt overwhelmed by the History Club in the fall of 1925. He seceded to form a club devoted exclusively to American history.

The problem of the club label was solved by Professor Channing, who suggested the name of Henry Adams, under whom he had studied. Channing spoke of himself as one of Adams' "failures," with reference to Adams' own estimation of his years on the Harvard faculty as set forth in his autobiography.

Turning to the topic of the evening, Professor Schlesinger suggested five areas in American history that particularly merited research. First he noted urban history, the obverse of Turner's theory of frontier influence, and mentioned comparative studies of the colonial seacoast towns as springboards for outward settlement, centers of culture and prime movers of the American Revolution. He said that a current study of pre-Civil War towns in the South is the first to approach the study of slavery from the viewpoint of the use of slaves in towns. Another approach is the city biography — which earned one scholar a position as city historian of Rochester, New York.

Journalistic history is the second area he suggested, and he gave as examples the study

of regional and local newspapers as opinion-formers and mirrors of political and social life. Thirdly, he said that almost nothing has been written about the role of women. For the student of this subject the Women's Archives at Radcliffe contain the largest and finest collections of source material, such as the papers of the Stowe and Beecher families.

He mentioned fourthly the history of the family and said that although a three-volume "social history" written in 1917 is available, it is undocumented, poorly organized and unreadable. Subjects needing exposition are reasons for the changing birth rate, the status of women and American attitudes toward sex.

As his fifth area of suggested research, he noted the role of education and reminded his audience that "formal instruction is only one element in the organic process of education. Today, despite a high rate of literacy and an immense public school system, who would dare say that the minds of the young are shaped primarily by a few daily class hours?"

Although he expressed a personal preference for research in these five areas, Professor Schlesinger did not discount the value of studies in the history of American law. Commenting on job prospects for historians who cannot or will not teach, he mentioned opportunities with the federal government in the preservation of houses of historical interest and the historical editing of great American papers. In conclusion, he remarked that he had received more in payment for a week's work in writing an article on "Songs of the American Revolution" for Columbia Records than for either of his two books on the American Revolution.

Club President Dizikes invites all interested law students to participate in the club's activities. Notice of future activities will be made available.

— Drachman

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Recent Books

By Robert M. Bonin

DELAY IN COURT, by Hans Zeisel, Harry Kalven, Jr. and Bernard Buchholz. Little, Brown and Company, Boston, 1959.

"For who would bear the whips
and scorns of time,
The oppressor's wrong, the
proud man's contumely,
The pangs of despised love, the
law's delay.?"

To this, Judge Ulysses S. Schwartz of the Illinois Appellate Court would add that although Hamlet, in summarizing the seven burdens of man, put the law's delay fifth, "If the meter of his verse had permitted he would perhaps have put it first."¹ Hamlet's words again came to my attention in a popular magazine heading a column on justice postponed and the ill-fated proposal to create 40 additional federal judgeships.²

The authors of this study readily admit that the creation of additional judgeships is the one sure cure for delay — no special study is required to demonstrate this. The scheme of the book is first to measure the extent of delay and then examine and evaluate available remedies other than the ultimate one of additional judgeships.

Value Judgments

The study is basically quantitative, but the authors must discuss certain controversial measures and therefore make value judgments. They do so with impartiality and judgment, casting far more light than heat. "We think the profitable concern is not with the allocation of blame but simply with an evalu-

Robert M. Bonin holds both his A.B. and LL.B. degrees from Boston University. He also has an LL.M. from George Washington University School of Law. He is former Assistant Editor-in-Chief of the N.A.C.C.A. Law Journal and former Editor-in-Chief of the B. U. Law Review. A member of the Massachusetts bar, he is presently associated with the law firm of Fine & Ambrogne, Boston, Massachusetts.

ation of the relative strength of the various proposals designed to remedy delay."³

Even if it were possible entirely to eliminate qualitative factors in evaluating remedies for court delay, the result would be sterile — a mere study in statistical analysis of more interest to the mathematician than the lawyer. As it is, the reader is occasionally overborne by the charts and figures and gets the impression that he is being chided for statistical ingenuousness.

In 1952 the Ford Foundation made a grant of \$400,000.00 to the University of Chicago for the study of "Law and Behavioral Sciences." One of the subjects chosen by the University faculty for study was the jury system, and *Delay In The Court* is the published result of a portion of the jury project.

New York Court

It is a detailed study of delay in a single court system, the Supreme Court of New York County. (One of the concluding chapters discusses the application of the study to other courts.) In selecting the Manhattan court for study, the authors indeed chose a hotbed of personal injury activity.

Although only three per cent of the country's insured automobiles are licensed in New York City, nearly one-third of all automobile personal injury suits in the entire country originate in that city.⁴ This is a court which is basically current in that its dispositions equal or exceed new filings, but it is delayed due to an inherited backlog.

With this first mention of the word backlog, it is appropriate to note the book's carefully documented caveat on the use of backlog as a measure of delay. For example, in 1956 the backlog in the Massachusetts Superior Court was 67,529 cases.⁵ Looking at the number of cases which the Superior Court judges can dispose of each year,⁶ the lay impression, and, I fear, the impression among many lawyers, is

(Continued on Page 10)

By Paul Seabury

THE LIBERAL HOUR, by John K. Galbraith. Houghton-Mifflin, Boston, Massachusetts, 1960.

This urbane collection of Professor Galbraith's newest essays carries an ambiguous title. This reviewer, for one, has puzzled a bit over the relation between it and the contents of the book itself. Certainly, *The Liberal Hour* is no eleventh-hour call to liberals, to spur them on to new Heights of Endeavor in the Challenges of the Sixties. On the contrary, it is a collection of quiet and skeptical essays on the most diverse and (apparently) unconnected themes.

They were written, the author says, in the hope that they "might be considered a contribution to a more relaxed debate" about social and economic issues. For whatever might be the other "major menaces" to our way of life, Galbraith is convinced that possibly the worst one is our "terrible solemnity" and our "massive introspection" — qualities which only add to our political and intellectual inflexibility, when flexibility is much needed. The title thus hints at a much-needed condition of repose under which the author asks us to contemplate our orthodoxies, dogmas and mistakes — in other words, a pause in the day's occupations that is known as the liberal hour.

The diffuseness and wide-ranging character of these essays should first be noted. They range from such macroscopic topics as the "strategy of peaceful competition" with the Russians to the miniscule economic eccentricities of Vermont gentlemen-farmers, basket-weavers and innkeepers — a subject possibly of interest to Eastern college professors or to exhausted New York commuters, but hardly to Californians or, for that matter, to the Kremlin.

In between these two extremes
(Continued on Page 13)

Paul Seabury is an associate professor of political science at the University of California.

that it would take decades to dispose of the backlog.

However, only a very small proportion of cases ever reach trial, an even smaller proportion are finally tried, and it is only at the trial stage that cases are a heavy time burden on the court. Backlog by itself means very little, as the size of the backlog does not bear a constant relationship to delay. Backlog can increase while delay decreases as well as vice-versa.⁷

Scientific Method

Geoffrey C. Hazard, Jr., Associate Professor of Law at the University of California School of Law, has written a critical, provocative review of this book.⁸ He challenges whether the study produces enough to justify the obviously large expenditure of money and effort involved. He further challenges the assumption on which he believes the study rests—continuation of the civil jury—suggesting that the assumption would better be explored than acted upon.

I would suggest that this book presents a reliable blueprint for studies gathering data essential to evaluating the desirability (from a delay standpoint) of retaining the civil jury in any particular jurisdiction. The project does not assume continuation of the jury; it finds the jury in existence as an institution to be subjected to realistic investigation. Professor Hazard wishes to argue the merits of the jury before all the evidence is before the judges.

It is too easy to criticize the social scientist. Poincaré said that while physical scientists were busy solving their problems, social scientists were discussing their methods. The application of scientific method to law may not be an unmitigated success, but this hardly means it should be indiscriminately dropped. That we do not always succeed in attaining health is no argument for being satisfied with disease.

Implications Rejected

I would reject the implications of Professor Hazard's statement that the lawyer's "vocational relation to judicial machinery is not that of student but of mechanic," imposing upon him a duty incompatible

with scientific inquiry and experimentation (only as to experimentation would I tend to share Professor Hazard's doubts).⁹

He concludes that assuming the ultimate objective of the project to be reform, the problem is less one of proof than of persuasion. And "a like sum devoted to the less anti-septic job of selling the public might have been a wiser expenditure".¹⁰

Ultimately, reform is the objective. But this study is quantitative—it seeks to measure delay and the effect of reasonably available devices. It does not pretend to be more. Everyone realizes that there are many values and probably more important ones than delay reduction at stake in such things as impartial medical testimony and pre-trial. Let us measure the measurable and eliminate facile statistical generalizations before we even proceed to the important value judgments.

The authors recognize the limitations of statistical methods as applied to law—factors are difficult to isolate and statistics cannot solve purely juristic problems.¹¹ Meticulously the study lays out the basis of the conclusions. When difficult choices have to be made among factors, the evidence is placed before the reader, who is then free to accept or reject the conclusions. I am not a statistician

but would venture the opinion that all of the important findings are statistically relevant. Certain tangential items are based on thin evidence, but conscientiously exposed thin evidence.¹²

Measurement of Delay

The New York Court has four law calendars: personal injury, personal injury non-jury, general jury and general non-jury. Lowest priority in trial dates is given to cases on the personal injury jury calendar. Whether or not this discrimination is warranted or is rather like a feeble attempt to confine untidiness in a small corner; there is an unfortunate side-effect. An illusion is created that personal injury jury cases cause the delay. Whereas personal injury jury cases are delayed some thirty-nine months, the average delay on all cases in the court is only ten months. As later statistics in the study tend to show, the personal injury jury case may well be the victim rather than the author of the delay.

Of the 3,218 suits filed in the court in 1956, of which approximately one-half were injury claims, 64 per cent were settled before as-

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signment, seven per cent were settled before trial, 14 per cent were settled during trial and only 15 per cent were tried to completion. Yet the 29 per cent of filings in which trial was commenced consumed 84 per cent of the court's time.

Based on the previous year's experience in the number of cases reaching the various stages prior to disposition and based on the amount of work done by one judge in one year, it would take 11.7 judge years to eliminate the backlog of the New York Court. Thus, three new judges would eliminate the backlog in approximately four years.

Jury Trial Time

One of the critical questions taken up by the study is how much longer a jury trial takes than a bench trial. This turns out to be a rather difficult estimate to make in the absence of controlled experimentation. One simply cannot compare average times, as the quality of the case often determines whether or not there is a jury waiver.

Using varying estimating procedures, the conclusion is reached that the bench trial is 40 per cent shorter than the jury trial; or looked at the other way, the jury trial is 67 per cent longer than the bench trial. If all the personal injury jury trials were shifted to bench trials, the New York Court would save 1.6 judge years annually (in a court which has 25.7 judges available, of whom 15.1 are assigned to law trials).

This saving is not insubstantial. Yet if it can only be achieved by eliminating all personal injury juries, we face most serious problems on which there are a wide disparity of views. These range from the need to keep the jury for the confidence it inspires in litigants to its damnation as an inefficient, coin-flipping relic.

The 1.6 judge years are, in the authors' opinions, a "price tag" for the jury system. It would appear to be a relatively small price tag, at that, so perhaps the merits or demerits of the institution should be judged by other standards without primary reference to the time factor.¹³

Schemes to increase voluntarily the number of jury waivers and thus reduce delay are not very promising, as paradoxically the major inducement to jury waiver is delay itself. Rather than attempting to take away with one hand (enforced waiver) what the other has given (jury trial), a concerted effort might be made at speeding up jury trials.

A comparison of the New York and New Jersey experiences indicates that this is a fruitful area for exploration. New Jersey tries its jury cases in 40 per cent less time than New York — coincidentally, the same 40 per cent figure by which jury trials exceed bench trials in New York.

Under the heading of "Increasing Settlements", the study treats several subjects including: whether delay itself induces settlement (probably not); impartial medical testimony (may increase settlements, but infrequent use in New York clouds claims of efficiency); interest from the date of the accident (no discernible effect on settlement ratio); pre-trial (question of whether judge time spent on pre-trial could be more profitably spent

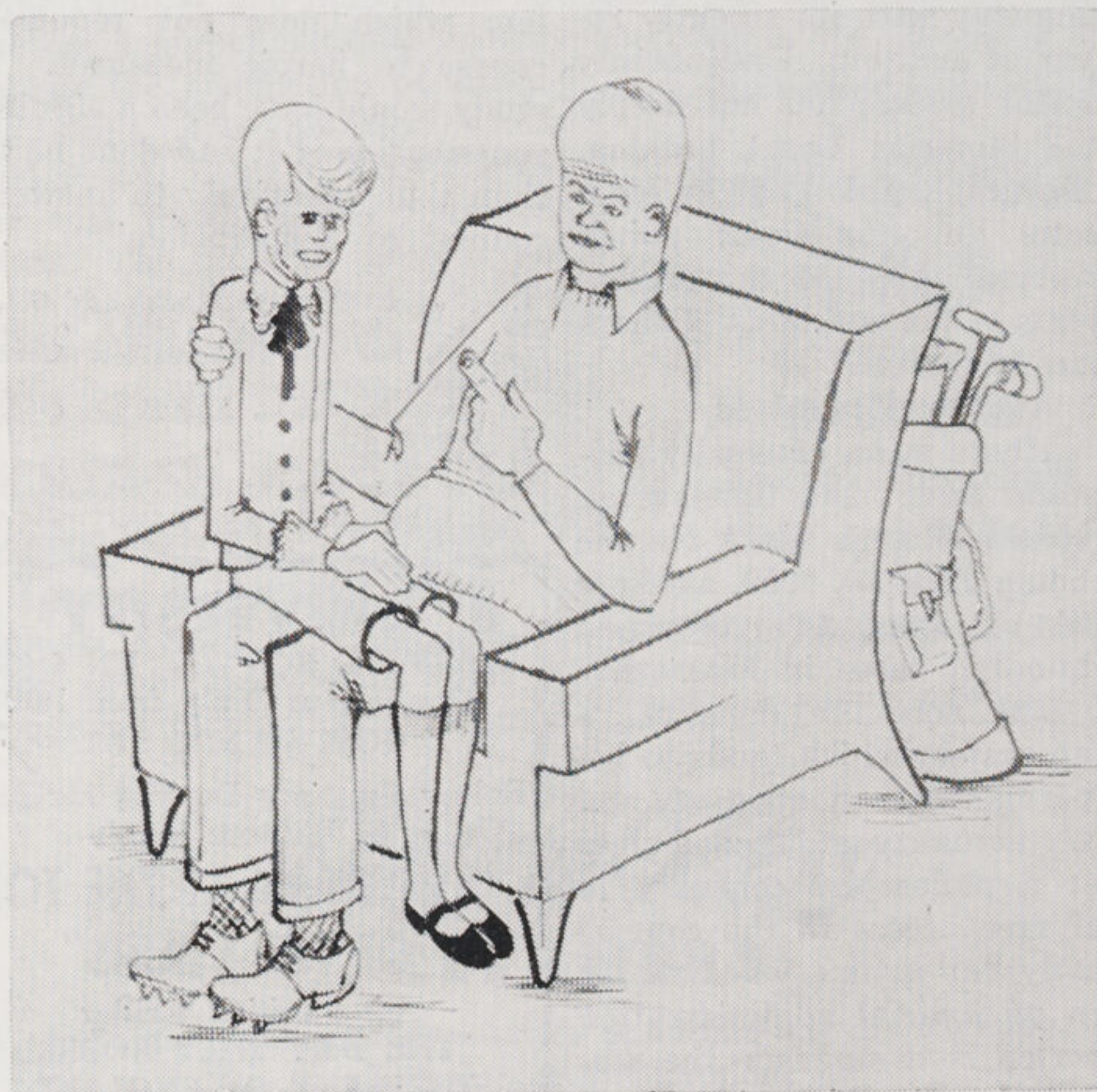
in trial); and the certificate of readiness (a New York procedural device that has worked very well in commercial cases but not in injury cases).

Impartial Testimony Disliked

Impartial medical testimony is heartily disliked by the organized personal injury bar.¹⁴ In Massachusetts, pre-trial "has not been an unmitigated success."¹⁵ We already have interest from the time of suit in this state and, if anything, this rule tends to stimulate filings, thus, if not increasing, at least not reducing the workload of the court.

The certificate of readiness has not reduced personal injury filings in New York, although it has had an inexplicable effect on commercial cases. One can well imagine the reaction of the bar to a proposal calling for a statement that discovery procedures have been completed, that settlement has been discussed and that the case is ready for trial.

I think of the rule 33A statement in Massachusetts that damages will be at least \$1,000.00 or the case will be remanded from Superior to District Court. Probably no rule is



"Let's cut this briefing session short, Jack. I've got some last-minute things to do."

so frequently disregarded or overlooked by the bar.

It is somewhat upsetting to see the tables on judge time in New York — particularly in New York, where a Supreme Court Justice is paid a staggering \$34,500.00 a year and has the privilege of appointing a law clerk at \$12,500.00, an attendant at \$6,270.00 and three court officers at \$6,270.00 each.

Judicial Laxity

The New York Court averaged 170 trial days out of a possible 196 with an average judicial trial day of 4.1 hours. The correlation between lost days and short hours among individual judges, along with a surprising number of long weekends, suggests judicial laxity.

New Jersey gets 19 per cent more time from its judges than New York. Bringing New York judges up to the New Jersey level would be the equivalent of adding three more judges to the New York Court (almost twice as many as needed to make up for the longer time it takes to try a jury case in New York).

In the absence of more judges, we encounter various schemes for substitute judges. Massachusetts leads the way with its recently revived use of auditors. Undoubtedly the auditor system has cut deeply into the Superior Court backlog. Chief Justice Reardon of the Massachusetts Superior Court points with distinct pride to the accomplishments of the auditors.¹⁶ Others are more skeptical.¹⁷

Auditors Appraised

The authors in an unusually positive stand admit the time-saving effectiveness of such plans (in the year ending June 30, 1959, auditors disposed of some two thousand eight hundred cases in Massachusetts¹⁸) but note the dangers: a stop-gap system which tends to become permanent; an aura of, and often an actuality of, second-class justice; a philosophy contrary to that of free access to the courts; and lastly "at a time when major concern of judicial administration in America is to upgrade the status, stature and independence of the judiciary, the utilization of the

substitute judges seems to be a step in the wrong direction."¹⁹

Chapter 17, "Enlarging the Trial Bar", deals with the concentration of the trial bar as a delay factor. Concentration is indeed a fact, but it can cause delay only where it actually causes gaps in trial scheduling. The suggestion made is that, alternatively, assignment procedures recognize the concentration and seek to accommodate it to a point, and greater firmness be exercised in refusing continuances, placing on the law firm the responsibility for being adequately manned.²⁰

The last section of the book deals with other related problems — claims consciousness, the case for the official experiment (which this reviewer found far from convincing), forecasting the future workload and application to other courts.

The study will not by itself reduce or eliminate delay. If enough members of the bar take the time and trouble to read it carefully, we will be in a position to do something. Here we have an effective prototype and not merely one of the many inconclusive studies of the past. Delay emerges as a problem which does not require recourse to heroic measures. "The study would have been a significant contribution if it had done no more than thus effectively to answer the counsel of desperation."²¹

1. *Gray v. Gray*, 6 Ill. App. 2d 571, 578, 128 N.E. 2d 602,606 (1955), quoted in *Delay In The Court* (hereafter referred to as *Delay*) xxiii.

2. *Time Magazine*, August 22, 1960, 17.

3. *Delay*, 4.

4. *Id.* at 227, n.5. Two factors contribute to this figure: (1) a high claims level; (2) a high rate of court entries.

5. Reardon, "Civil Docket Congestion: A Massachusetts Answer", 39 B. U. L. Rev. 297,298 (1959).

6. For the year ending June 30, 1959 Superior Court judges tried 1,674 jury cases and 606 non-jury cases. Third Annual Report to the Justices of the Supreme Judicial Court, table opposite p. 64 (1959).

7. *Delay*, 44.

8. 48 Calif. L. Rev. 360 (1960).

9. *Id.* at 361.

10. *Id.* at 372.

11. Morris R. Cohen, "Law and Scientific Method," reprinted in *Jurisprudence in Action* 115 (1953).

12. See Keeton, Book Review, 27 U. Chi. L. Rev. 578; Professor Hazard suggests that the thin backing for certain findings "raises doubts about the better established conclusions. *Falsus in uno . . .*" 48 Calif. L. Rev. 360, 369 (1960). I personally find Professor Keeton's temperate observations more digestible.

13. See remarks of Mr. Justice Clark reprinted in 23 NACCA L. J. 279, 283-284 (1959).

14. Lambert, "Impartial Medical Testimony: A New Audit," 17 NACCA L. J. 25 (1956).

15. Reardon, "Civil Docket Congestion: A Massachusetts Answer," 39 B. U. L. Rev. 297, 312.

16. *Id.* at 308-310.

17. Goldman, "The Auditor System: A Study of Certain Aspects," 27 Boston Bar Bull. 133 (1956).

18. Third Annual Report to the Justices of the Supreme Judicial Court, table opposite p. 64 (1959).

19. *Delay*, 220.

20. *Delay*, 16. See the discussion in the recent case of *In Re Ackroyd's Case*, 163 N. E. 2d 271 (Mass. 1960).

21. Keeton, Book Review, 27 U. Chi. L. Rev. 578, 581 (1960).

Weekend

Entertainment

BRATTLE — Come Dance With Me — (Thru Sat.); 5:30, 7:30, 9:30. (Starts Sun.) Grisbi.

UNIVERSITY — The Dark At The Top Of The Stairs — (Thru Sat.); 1:45, 5:30, 9:15. Day They Robbed The Bank Of England — 3:45, 7:35. (Starts Sun.) Jungle Cat; Under Ten Flags.

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EXETER — I'm All Right, Jack — 2:05, 3:50, 5:40, 7:30, 9:20.

KENMORE — Song Without End — 1:00, 3:10, 5:20, 7:30, 9:30.

TELEPIX — "M" — 11:56, 1:56, 5:56, 7:56, 9:56. Cartoon & The Golden Fish — 11:30, 1:30, 3:30, 5:30, 7:30, 9:30.

UPTOWN — The Dark At The Top Of The Stairs — (Thru Tues.); 1:00, 5:15, 9:20. The Subterraneans — 11:25, 3:35, 7:40. (Starts Wed.) Carry On Nurse; The Thirty-Nine Steps.

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Liberal Hour

(Continued from Page 9)

there are a number of sensible essays on the decline of the centrality of the "machine" in the modern economy, the relationship of art (and artists) to economics, the vagaries of economists' treatment of fiscal policy in American history (notably, the Civil War and the early New Deal), the reputations and eccentricities of Henry Ford (which includes digs at some overly-reverential business historians), the role of social nostalgia in the making of national economic policies and — just to round the picture out — reflections on the ambiguous attitudes held by Canadian midwesterners about the British royal family.

Galbraith's playful mind and catholic interests — unusual, to say the least, in a trained economist — thus make a brief review of this book rather difficult. Each essay deserves its own review, and this reviewer is hardly competent to take all of them on. But, fortunately, Galbraith the author serves as guide along these tortuous paths. Here he is acting as social critic, and he employs his skills as economist to this purpose. He is concerned with one over-arching problem: the influences of economic policies, half-truths, dogmas and illusions upon the surrounding culture of America.

Two essays dominate this book: Galbraith's sensible advice and strictures on "peaceful competition" with the U.S.S.R. and his essay on the "decline of the machine." In the first, several important points are made. American

competition with the Russians in economic growth rates and gross national product, in and of itself, makes no sense as strategy. Even from the standpoint of military security, competition in industrial growth is absurd, since weapons of war no longer consume vast quantities of raw materials and metals as once they did.

Flexing Muscles

Nor, argues Galbraith, does the flexing of industrial or agricultural muscles make much sense as "co-existence strategy," if this is done merely to impress Communists of our superior productive capacity. If competition of this sort merely resulted in more food (for weight-conscious Americans), more automobiles (for a country already clogged with dump heaps of discarded cars), etc., it would only aggravate serious problems of overproduction.

To be sure, Galbraith argues, economic growth might indirectly benefit individuals and families who still, incongruously, are ill-fed, ill-clothed and ill-housed. But are Herculean efforts at increased economic growth the proper or most direct way to do this? These lower income families and individuals require not a higher national growth rate but the acquisition of education, skills and abilities which would enable them to earn the income with which to buy that production. The place to begin is the income problem with wider opportunities for access to income.

Does peaceful competition with

the Russians, then, have any economic implications at all which make sense? Here Mr. Galbraith's personal preference for capital investment in the "public sector" crops up again: "The backlog of public needs is massive." He urges a greatly accelerated foreign-aid program, based not on considerations of military security but upon more benign American motivations: generosity and compassion. He also suggests that we establish a periodic inventory of our scientific progress so that we may ascertain from time to time whether our science is slipping.

But the score-card of the game of peaceful competition should be drawn up neither by the Russians, who have needs and goals alien to our own, nor by the "wisdom of solemn men" who seem to assume that competition should chiefly be in terms of the successes in space exploration, where the Russians are way out in front. Were we to concentrate on propagandistic displays of our "technological virtuosity" — bigger corn, niftier machine tools, shrunk ornamental shrubs, cyclotrons — we might well obscure from the world and the Russians our most benign American qualities — our "capacity for eco-

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conomic and social experiment and change" and the "freedom and diversity of our culture." To which, of course, amen.

Galbraith's thesis about the decline of the machine and the reappearance of labor at the center of the American economic stage seems equally sensible. Machines, plus industrial investment in physical capital, he argues, are obsolescent measures of future economic progress. Industry must display greater concern for personal development, for the "highly improved man," if technological advances are to continue. The share in economic advances attributable to "technological improvement and to the improved skill and ability of workers, technicians, and managers, is increasing."

Traditionally we in the United States have waited for the flowering of our Thomas Edisons; they just happened. Industry all along has neglected to bear a proper share of the expenses of American higher education; since it could not purchase indentured teen-age chemists and hold on to them after they got out of college, why pay for their education? Unless we were to revive laws permitting indentured servants, we must figure out a way of pouring investment capital into these factories of the mind.

Our competitor in the cold war suffers from no such handicaps in financing its higher education. It simply considers human resource development in universities a normal burden of the state, if not the primary one. Why is this not true here? If corporations are the largest employers of trained talent, why shouldn't they and not just the

community and parents of students help foot the bill? Galbraith's proposal, a special corporation tax for education and training, makes sense. So does his suggestion that the public at large, via state sales and excise taxes, pay for its higher education.

Galbraith has other advice for the businessman — notably, his sermon on the needed reconciliation of art (and the artistic imagination) with business. The Sewell Averys, Henry Fords and other moguls of industry were, or claimed to be, less concerned with aesthetics and design than with good engineering, costs, packaging and distribution. Canons of practicality and functionalism may be well and good for poor societies and developing societies, but are they sufficient in highly developed ones?

Consumers in rich societies place premiums on commodities which also look and *are* attractive; the vulgarity in design of many American commodities, Galbraith suggests, may have contributed to the flagging competitive position of American manufacturers in the world economy. "Artistic perception is as necessary to the modern manufacturer of consumer goods as engineering skill."

These are the main messages. The remaining essays are either embellishments or diversions from them. Clearly, this economist likes his dismal science well-seasoned with the finer things of life. Also, like other dissatisfied Americans, he shares dismay at the external

ugliness of a society which takes pride in its private opulence and satiation.

But if the book is a clarion call to action, this call is played in the mellifluous tones of lute, harpsichord and recorder — muted instruments which, unfortunately, are easily drowned out in the noise of heavy auto traffic, jet planes and anti-American demonstrations. Galbraith's "Liberal Hour" of relaxed and cultured contemplation of our dogmas and foibles may conduce to some sense in thinking about our national problems next morning. But this reviewer has an uneasy feeling about the *tone* of this sensible discourse. It is pleasant, literate and tweedy. Probably it is designed for pleasant and tweedy people and for others who, evidently, should aspire to become the same. But people in the 1960's need a kick in the pants, not just intelligent analysis and humorous discourse.

As Hilaire Belloc once wrote, we are often "tickled by . . . irreverence, [the] comic inversion of our old certitudes and our fixed creeds . . .; we laugh. But as we laugh, we are watched by large and awful faces from beyond; and on these faces there is no smile." Galbraith deprecates solemnity and introspection, but the goodly company of liberal-minded men is a tiny minority in a populous world of impoverished men who are listening more and more to angry neo-Puritans, revolutionaries and Wahhabis.

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- HEARSAY -

(Continued from Page 2)

others, should know what to do and what not to do. In most instances the sons of Harvard do follow the proper path.

But if the current practices in the library are any indication of the character of some of the future sons of Harvard, something must be done to set the wanderers right. It is time that they were broken of their uncivilized habit. Perhaps the most successful method would be by the moral suasion of their classmates. Failing this, members of the library staff could make more frequent collections of books from the tables. Although this would increase the staff's work, it might end this horrendous situation rather quickly if a number of the misde-meanants had books snatched up from before them.

Letters to the Editor

To the Editor:

I am not a very self-confident student. I am reluctant to comment in class, although I feel it is an excellent way for one to "work out" his problems and thinking fallacies.

There is, however, in the first year class (Section 4) an atmosphere that stifles any comment that is not impeccable. It has become a common practice to "hiss" anyone who may make a comment not to the liking of the class. This hissing has been applied to the teacher's jokes as well.

Perhaps my feelings on the matter are so contrary to the accepted policy of behavior at this law school that I appear naive, but I think that this practice is very rude, to say the least, both to the professors and to the students who should be

able to say *anything* without being subject to such childish abuse. . . .

T. R. Mitchell, 1L

To the Editor:

When I read your features section "From Blackstone to Blacktop," with illustrations, I thought we were in for some elucidation of the asphalt anti-trust cases.

As I understand the statute, consent decrees may not be introduced to establish a prima facie case in actions by private litigants for treble damages for violation of the anti-trust statutes (15 U. S. C. A. Sec. 15).

Maybe the Harvard Voluntary Defenders should raise their sights to aid those whom Judge Wyzanski characterized (Boston Herald 10/9/60) as non-government litigants, that they might be able "to bring more easily actions which they might not otherwise be willing to bear the expense of or have the talent and skill successfully to prosecute."

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CALENDAR

(Continued from Page 2)

be held in the James Barr Ames Court Room, Austin Hall, at 8 p. m. Judges for the argument, which is between the Jaffe Club and the Gardner Club, will be the Hon. John Biggs, Jr., Hon. Clement F. Haynsworth, Jr. and Hon. Andrew A. Caffrey.

Wednesday, November 30

The PATENT LAW CLUB will present Joseph Weingarten of the Boston patent law firm of Weingarten, Orenbuch & Pandiscio, who will speak on the subject of "The Financial Exploitation of Patents," in the Mallory Smith Room of Harkness Commons, at 7 p. m.

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