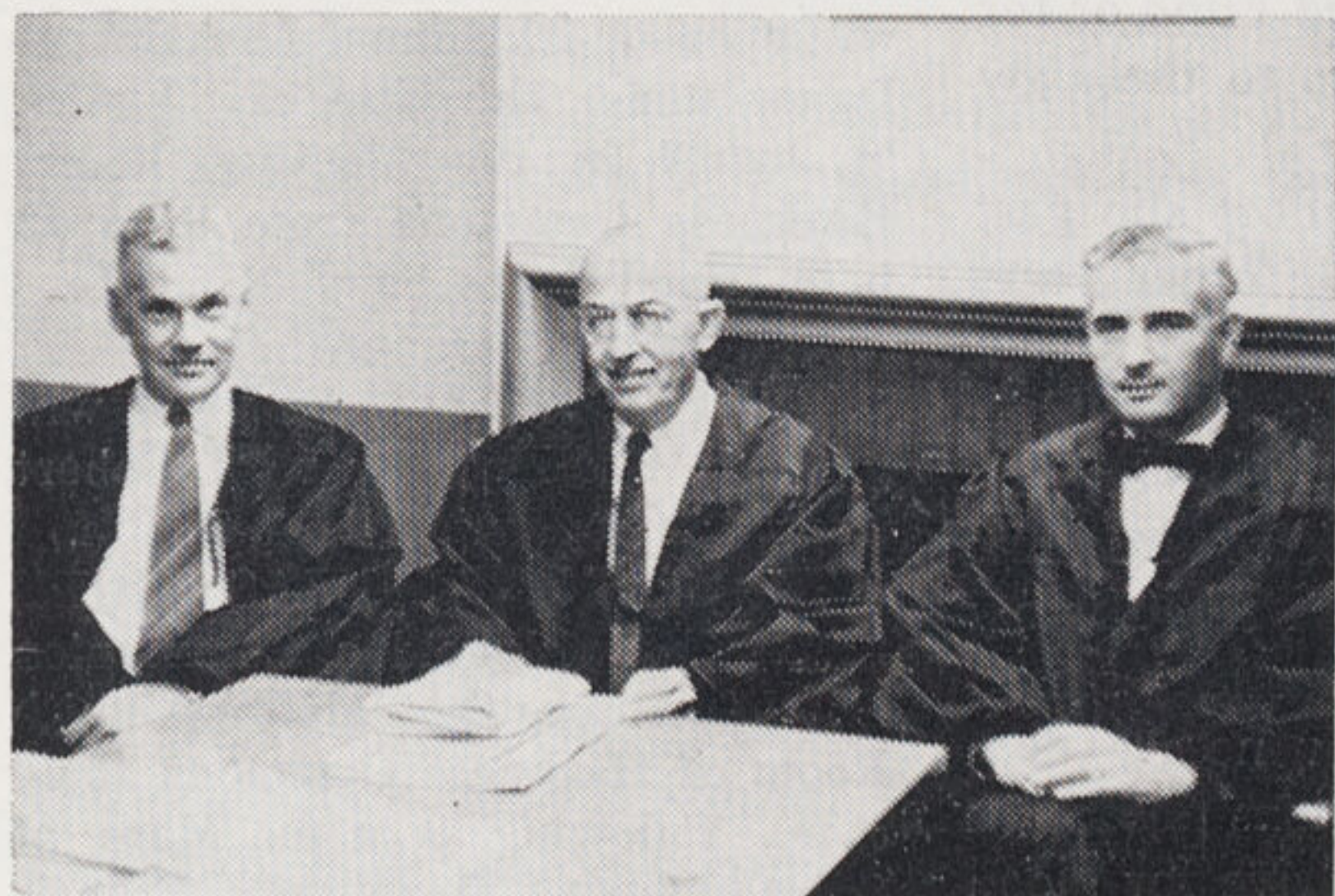


Magruder, Jaffe to Ames Finals

NOTE: The Jaffe Club, with oralists Thomas A. Skornia and Charles C. Collins, Jr., emerged victorious over the Gardner Club in the second argument in the semi-final round of the Ames Competition. The story of that argument will appear in the RECORD next week. The Jaffe Club will meet the Magruder Club in the final round in the spring semester.

The Magruder Club has emerged victorious in the first of the two arguments of the Ames semi-final competition. Arguing the case last week against the Gower-Herwitz Club, the Magruder Club was judged to have done better overall on considerations of brief and oral performances.

The case was argued before a three man



The Judges (l. to r.): Woodbury, Sobeloff and Loeser.

court consisting of the Hon. Simon E. Sobeloff, United States Court of Appeals for the Fourth Circuit, Hon. Peter Woodbury, United States Court of Appeals for the First Circuit

and Mr. Hans F. Loeser of the Boston law firm of Foley, Hoag & Eliot.

The Magruder Club was counsel for the defendant-appellee in an action entitled *Thompson v. Whittier*. The plaintiff-appellant in the case, a World War II veteran and member of the Communist Party, was seeking a reversal of a decision of the Administrator of Veterans Affairs terminating



Winning Oralists: Wisdom and Conway

plaintiff's disability benefits. This had been done by the Administrator (defendant-appellee) under a statute declaring forfeiture of benefits of veterans who are shown "by evidence satisfactory to the Administrator" to be guilty of "rendering assistance to an enemy of the United States."

A three-judge district court had held that the action of the Veterans Administration

(Continued on Page 4)

Harvard Law Record

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Hearsay

The Thanksgiving holiday is now history, and students have settled down for the three weeks of classes that remain before the Christmas vacation. Local merchants meanwhile herald the start of the season which has become, at least for the commercial world, a month-long period of great activity. Indeed, the buying of gifts for this holiday season began the day after Thanksgiving.

At this time, therefore, when people are giving serious thought to acts of giving to others to help make the season one of cheerfulness and high spirits, it does not seem inappropriate that the Law School community is presented with the opportunity to make its one annual effort toward giving to those who have real need. This week alone of the entire year is the time set aside for the University Charity Drive to which all are encouraged to give generously.

The list of charities which are benefitted by the Charity Drive provides a lengthy gamut of activities to satisfy the most particular donor. Gifts may be earmarked for ends as general as the United Fund or for one that is closer to home and provides direct benefits to the Law School itself, *i.e.* the Phillips Brooks House.

Students sometimes let drives such as this present effort slip past with a minimum of notice. And law students have in other years allowed the rest of the University, with the Business School a conspicuous example, to shoulder a disproportionate share of the load. We hope this year will prove to have been a time when students heeded the words of the P. B. H. Law School Committee and their fellows and did not hesitate to dig down deeply to push the Charity Drive over the top. A little extra today can make the holiday season and the entire year a happier time for those who are in need.

Lest we think that money is the extent of contributions needed at this time, we need only look a week ahead to see the drive for blood donations making its appearance on the Harvard scene. This is an occasion which produces direct benefits for the community. Students and their families are eligible to receive blood for a year and a half after the time of the donation. And we do not doubt that there are many among us who have already learned the value of this gift at a time when it was needed.

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, December 1

Law students interested in discussing "Law and Protestant Thought" are invited to a LUNCHEON MEETING at Canterbury House, Christ Church, from 1:10 to 2:30 p. m. The topic for discussion will be Emil Brunner's conception of the relationship between law and love. The luncheon will include sandwiches, coffee and dessert. The charge is \$.60.

Saturday, December 3

The FEDERAL TAX INSTITUTE OF NEW ENGLAND will hold a forum on individual deferred compensation contracts, new tax law on real estate investment trusts and tax problems in charitable giving, at John Hancock Hall, in Boston, starting at 9:15 a. m. Dean Erwin N. Griswold is chairman of the meeting. Assistant Professor Frank E. A. Sander is a member of the panel.

The STUDENT BAR ASSOCIATION will present Melvin Belli at 3 p. m. in the Lowell Lecture Hall. Mr. Belli will speak on "Trends in Trial Practice and Developments in the Law of Warranties."

The HARVARD LAW WIVES will sponsor its annual Law School Dance under the title of "Justice 'n Jazz," in the Meeting Room, Harkness Commons from 8 to 12 p. m. Good dance band. B.Y.O.L.

Sunday, December 4

The FORD HALL FORUM will present "An Evening with Robert Frost" in Jordan Hall, at 8 p. m.

The SAINT THOMAS MORE SOCIETY will hold a Communion Breakfast in the Mallory-Smith Room of Harkness Commons at 10 a. m., following 9 a. m. Mass at Saint Paul's. Monsignor Francis Lally, editor of the *Pilot*, will speak on the subject of "The Catholic Press."

Tuesday, December 6

The INTERNATIONAL LAW
(Continued on Page 15)

Analysis of Future Stock Trends

Addressing the Bull & Bear Club recently were Henry Hornblower II and William R. White, partners in the firm of Hornblower and Weeks of New York and Boston.

Mr. Hornblower (Harvard, B.S. '41) spoke briefly on the unique opportunities in finance for law school graduates. He commented on the fact that brokers, as members of "the most regulated business in the country," are constantly in need of legal advice. Although starting salaries are a little below those of New York law firms, this situation does not necessarily continue indefinitely.

As the second speaker on the program, White gave an analyst's view of the past and future market. In so doing, he relied on his experience as chief securities analyst for Hornblower and Weeks, whom he has been with since 1920. He is also president of the New York Analysts Association.

High and Low

Stating his conclusion first, Mr. White said that the market has probably made its high and low for 1960. As to 1961, he predicts the market will stay within the 120-point Dow-Jones range of this year. Projecting this a little further, as measured by what he terms the "unsatisfactory Dow-Jones average," he feels the market will move sideways within these limits.

As background for the explanation of his predictions, Mr. White emphasized that the narrow range he forecasts would have been much wider under comparable conditions 20 years ago. Furthermore, with the present average of 575 representing 18 times corporate earnings, this means that stocks are not cheap, particularly when compared with the figures for 1949 or 1953 when the average was at 12 times earnings. On this basis, although stock prices should go down in the midst of bad business conditions such as we have today, they do not do so because of the stronger cash flow.

According to Mr. White, future market performance can be analyzed in terms of three factors — political, economic and technical.

As to the bearing the present political situation will have on the market, Mr. White believes the election of a "vigorous youngster" as President of the United States lends a "cheerful outlook" for the coming year. Businessmen are confident there will be economic growth. This feeling is largely based on expected increases in government spending and reduced interest rates. But it might be added, in this regard, that the international scene is much less encouraging.

Inflation On Its Way

The economic analysis, another of the future market indicators, points to inflation being here to stay. Indeed, Mr. White feels there will be more of it as a result of continuing wage demands, stronger unions and increased government spending.

Business has been in a decline since August, 1959. Following the steel strike, business produced huge inventories at high costs due to overtime payments. Consequently, corporate income has risen, but profits have fallen. The decline has now flattened out, however, and the Federal Reserve Board index should rise in February.

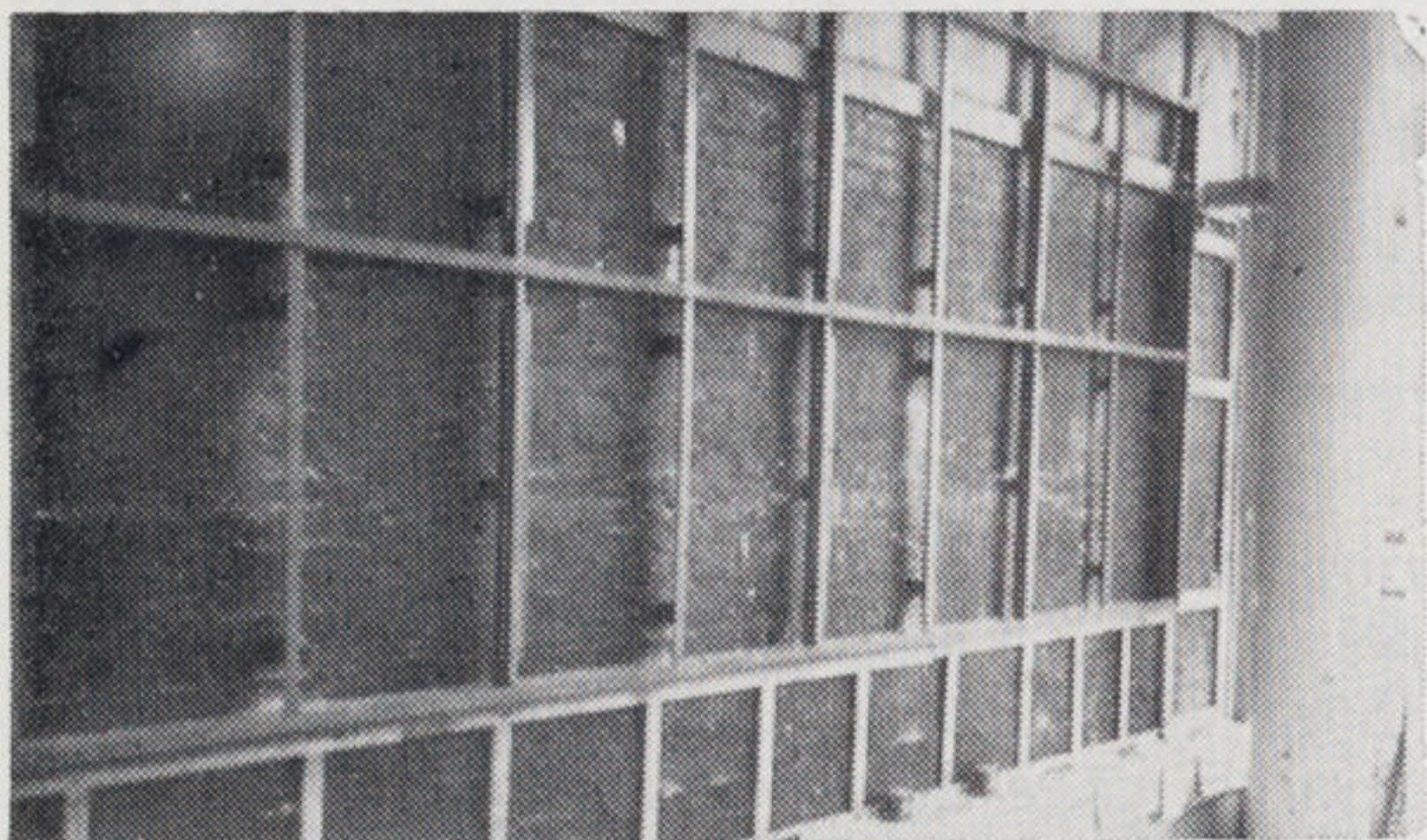
In the final area, that of technical analysis, it is Mr. White's feeling that the January, 1960 Dow-Jones high was not accurate, since stock prices had actually been on the decline since August, 1959. Such decline was noted on the basis of the more reliable Standard and Poor's index. Since nothing in price action indicates that a bottom has now been reached, the next term will probably see a further price decline.

The next meeting of the Bull & Bear Club will be held on Wednesday, December 14 at 8:30 p. m. in Harkness Commons. Thomas F. O'Neil, president of R. K. O. General, Inc., will address the club on the subject of "Subscription Television." The annual Christmas Cocktail Party will be held at the conclusion of Mr. O'Neil's remarks, with wives and dates of members cordially invited to attend.

— Libbey

Miró Mural on the Wall

Doubtless, few will be surprised to learn that fumes from the kitchens of Harkness Commons have produced a large hole in the north wall of the Graduate Dining Room. The Department of Buildings and Grounds recently completed the removal of the large Joan Miró mural which hung on that wall. This was done because the piece of modern art was visibly wilting in the atmospheric conditions which prevail on the second floor



The Big Hole in the Wall

of the Commons. All that remains at present is a large plaster socket.

The mural, which has been one of the more notorious features of the Commons since the building went up in 1951, was removed by entreaty of its creator. When Mr. Miró was visiting the school a few months ago, he noticed that his oil painting was not holding up well against the onslaught of heat and hamburger fumes. He lodged a request with the University that the painting be saved for posterity by its being turned over to him in exchange for another produced in ceramic tile. The Administration quickly decided to grant his wish.

The Law School first became aware of the agreement when Buildings and Grounds moved into the north dining room and erected against the wall a little lean-to from which diners were serenaded by an assortment of bangs, scrapes and tortured screeches for the several weeks during which the operation was being carried on.

Buildings and Grounds has now left, but the lean-to will remain until the new mural is put up in place of the old. Chances are that students will have the opportunity of dining in the shadow of the jerry-built structure for some time yet, since the assistant of

Mr. Miró who is to do the new mural is experiencing visa problems which may keep him out of this country for several weeks.

Those who know the painting (which has been described by one local wit as "symbolic of a coed trunk murder") have no reason to rejoice at its demise. The ceramic mural which will be going up in its place will be an exact duplicate of the original oil.

— Baron

Ames Final

(Continued from Page 1)

was not subject to judicial review. The Magruder Club, in its brief and oral arguments, sought to have this holding affirmed. It further argued that there was substantial evidence to support the finding that the appellant was guilty of "rendering assistance to an enemy," that there were no violations of appellant's First or Fifth Amendment rights and that the statute under which the action was taken should not be construed so narrowly as to exclude the appellant's conduct from its coverage.

At the conclusion of the argument, the court commented on the fine work that both sides had done in their brief and oral arguments. However, the court declined to give a decision on the questions of law involved.

Oralists for the victorious Magruder Club were Thomas G. Conway, Kingston, N. Y. and John Minor Wisdom, Jr., New Orleans, La. Counsel on the brief were Richard I. Burnham, Cooks Falls, N. Y.; Jacqueline Crawford, Ridgewood, N. J.; Garret A. Hobart IV, New York, N. Y.; Edward C. Leckey, Johnstown, Pa.; Sheldon R. Shapiro, Malden, Massachusetts; and Herman Wilson, Tyler, Tex.

Oralists for the unsuccessful Gower-Herwitz Club were George B. Martin, Jr., Royal Oak, Mich. and Robert A. Zeiger, Harrison, N. Y.

Law & Protestant Thought

Law students interested in discussing the subject of "Law and Protestant Thought" are invited to a luncheon meeting to be held at Canterbury House, Christ Church, today from 1:10 to 2:30 p.m.

FEATURES SECTION

New England Conscience and Prisons

By James V. Bennett

As a New Englander myself I have often speculated why the New England conscience with respect to crime is so much different from that which apparently prevails in other sections of the nation. This difference is shown most strikingly in the fact, for instance, that of all states New Hampshire has the lowest number of men in prison per hundred thousand of population.

For the nation as a whole there are 120 men in prison per one hundred thousand population; in the District of Columbia there are ten times as many (257) as in New Hampshire (25). In Massachusetts people get sent to prison even for the common offense of adultery, yet it has only 40 men and women in prison per hundred thousand of population as contrasted to 137 for California, where no one ever goes to prison for adultery.

Our statistics also show that in New England the Federal judges grant probation to about 50 percent of the cases, whereas in southern Iowa, for example, only 12 percent are given probation. The juvenile delinquency record is equally good, measured in terms of persons known to the juvenile courts. Moreover, the time actually served by offenders for particular offenses is shorter in New England than almost anywhere in the country. For instance, the average time served for all offenses is lowest in Vermont, 10 months (16 months in New Hampshire), and highest in Illinois, 38 months.

Fewer Major Offenses

Now what do all these figures prove? Certainly they cannot be used to demonstrate that crime is more prevalent in New England than elsewhere in the country. According to the FBI Crime Index, the number of major offenses known to the police runs about 408

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The author of the article, James V. Bennett, is Director of the U. S. Bureau of Prisons.

per one hundred thousand inhabitants in New Hampshire, 459 in Vermont and 468 in Maine, as compared to a national rate of about 900. Clearly, New England has not followed in the beaten path of beaten men who believe that crime can be stopped through harsh penalties.

The latter approach has been tried in countless jurisdictions ever since imprisonment was substituted for mutilation, banishment or death. There are a number of reasons why this popular nostrum for crime does not work. (That it does not work is easily proved by the twin circumstance that our American penal statutes are already the most severe in the Western world and at the



James V. Bennett

same time our crime rate is the highest.)

In the first place, the odds are with the offender to get away with any single act of crime. For all major crimes, only 1 out of 7 is followed by conviction and the imposition of punishment. The actual rate varies by type of crime. There are, for instance, 290,000 automobiles stolen during the course of a given year, but only 10,000 persons are convicted and sentenced to prison or probation for this offense. Add to this the fact that numberless crimes are not even detected and reported, particularly the sex and white collar varieties.

For another reason, existing laws are compromised, and under practical pressures the district attorneys dicker with the defendants. In return for a plea of guilty, the district attorney will often prosecute for a lesser offense than the one which the defendant really committed. In the Federal jurisdiction, for example, from 80 to 90 percent of all criminal convictions are brought about on pleas of guilty, and the rate is much the same in the state jurisdictions. Hence, any deterrent effect the law may have is badly crippled from the outset, not to mention any possible rehabilitative treatment that a sentence based on all pertinent factors in the case might have brought the defendant.

Then why saddle the prison with any part of the blame for the high crime rate?

In response to this some persons cite the high rate of recidivism among persons released from prison. Admittedly the rate is high. Although we do not yet have valid statistics on the rate of recidivism among prisoners released from Federal prisons, we do know that two-thirds of the people who come into our institutions have served one or more prior sentences in local, state, or federal institutions.

Offenders Not Committed

But this does not justify the argument that the prison is a failure and at fault for much of the crime rate. We have already seen that the majority of offenders during a given year are not committed to prison. Hence, the prison deals only with a small segment of the criminal population. In addition, of those persons convicted in our courts, an average of 40 percent are placed on probation, although in some courts it ranges as low as 10 percent and in others as high as 80 percent. The prison gets largely the more unregenerate, assaultive and confirmed types of criminals.

There are today about 210,000 men and women in the 230 state and federal prisons, reformatories, farms and camps. Not included are an estimated 300,000 more in the nearly 3,000 local and county jails and workhouses. The institutions in which these persons are housed are old, inadequate and overcrowded. One-third are more than seventy years old, and some like Wethersfield, Trenton and Baltimore are rounding out nearly 150 years of service.

Consider for a moment the kind of men and women who get into prison. Some, make no mistake about it, are vicious, unregenerate enemies of society. Some, and a much larger number, are handicapped physically and mentally. Some are sexual deviates. Some are social misfits, and some there are who look upon work as the white man's burden. Some are the disadvantages of our teeming cities and our distress areas of the mountains, blighted railroad or mining towns, or victims of alcohol, drugs and barbiturates.

Serious Crimes

It is difficult, indeed, to catalog these law violators by their personality characteristics. It is not so hard to describe the kind of things they do. While most recorded crimes are such offenses against the public order as disorderly conduct and drunkenness, it is the perpetrators of more serious crimes who end up in state and federal prisons.

The largest number of these men by far are those who have been convicted of acquisitive crimes — burglary, larceny, forgery, automobile theft and the like. In this category fall about 65 percent of the major offenders who are committed to state prisons during a typical year. The next largest number are robberies, 11.7 percent, and then come the aggravated assault cases and the drug violators, with 10.7 percent. Homicides, rapes and kidnappings together account for about 9 percent. The remainder are for miscellaneous crimes like arson, gun-law violations and, I suppose, adultery.

As a result of the many different kinds of laws applying to criminal acts and the many different ways they are administered, there is an utter lack of consistency in the sentences received by convicted offenders. Depending on the jurisdiction, two offenders who are quite similar in their backgrounds and crimes may receive substantially different penalties, and, convicted say of car theft, one may receive probation or a month or two in jail while the other may receive five or ten years in prison. The effect is to create a profound disrespect for the law in the very persons in whom the prison is charged with inculcating a greater measure of respect.

To add to this already difficult situation, the offenders sent to prison for corrective treatment are very often persons who need treatment of another sort. A prison is no

place for persons whose crimes stem primarily from alcoholism, mental illness and vocationally crippling medical disorders. But these persons comprise a growing proportion of prison populations, and treatment programs intended primarily for persons whose antisocial behavior is the product of character defects are further handicapped and compromised.

But, in its rehabilitative efforts, the prison's most burdensome handicap is the prevailing moral atmosphere of "payola" in our culture. It is difficult to develop more constructive habits of thought and action in prisoners when they are very much aware that the "fast buck" so very largely sets the tone of morality for a significant part of our society. The prisoners read the papers, and perhaps more than most citizens they keep up on the news about payola, false advertising in television, influence peddling in high circles, kickbacks in industry and the many barely legal schemes that are devised to separate the unwary from his bank balance.

Morals Rationalized

The thought has been repeatedly and futilely expressed that we are going to have juvenile delinquency as long as parents do not set good examples for their children. To this should be added the observation that we are going to have crime as long as there is any indication that the supposedly more law-abiding elements of our society embrace payola and similar unethical practices. The moral line between payola and crime is thin, and the difference can be easily bridged and rationalized by someone who is looking for an excuse for crime.

Considering the many legal, financial and social handicaps under which it must operate, I think the prison does remarkably well in reshaping the lives of the offenders that are committed to it. While the prison deals only with a small part of the crime problem, it is perhaps doing better with that part than the other elements of society are doing with their share of the crime problem.

Every prison, regardless of the nature of its program, can of course recite cases of ex-prisoners who have gone on to earn fine records in the community. Some of these men — bank embezzlers and income tax offenders for example — can be expected to do so, whether or not they go to prison. Their

punishment and rehabilitation occurred simultaneously at the time they were caught and indicted.

But there are many examples of men who had to go to prison to find therein the insights, skills and moral habits that eventually permitted them to take their places as useful citizens in the outside world. I have a large file of success stories of this kind in my office, and they are only a sampling of the many more that take place. It is the stories of these men that convince me that the prison can be a place for rehabilitation and that help me to keep my faith in the resilience of decency in every man, no matter how deeply it becomes submerged and distorted at times.

Period of Observation

Recently I have come closer to the problems that face the courts in determining the disposition of offenders because the Congress in 1958 assigned me the new duty of diagnosing and making sentencing recommendations to the courts concerning convicted offenders committed to Federal institutions for this purpose. Technically this period of observation is made possible under the new law by permitting the courts to impose an initial sentence for the statutory maximum while retaining for a period up to six months the authority to modify or reduce the sentence.

This procedure is intended to be used in those cases where the court has some question regarding the physical or mental condition of the prisoner, where the court believes that a period of observation under control will produce pertinent information not otherwise available, or where the court wishes to pronounce sentence promptly but for some reason to keep the case under advisement.

In this manner the judge secures as full and complete data as we are able to provide concerning the defendant and his mental and emotional health, his physical condition, his social history and his vocational and educational needs. It gives the judge a good idea of the extent to which the defendant needs institutional treatment and how long might be required to bring about beneficial results. Also, it gives the court the benefit of the views of the people who must deal with the prisoner.

In illustration of the kind of cases we have been getting under this procedure, I recall one man who was convicted on a charge of

assaulting an Internal Revenue officer. Previously arrested on a charge of selling illicit liquor at an industrial plant, he had been placed on probation. Upon being notified by the Internal Revenue Service that he owed some \$2,000 in liquor taxes, he tried to work out a compromise for about half that amount. When his compromise was not accepted, he entered an Internal Revenue office and socked a collection officer.

Unpopular as Internal Revenue collection officers may be in this country, the government must look with disfavor on an act of this kind. In fact, considering the well-known inevitability of taxes, it is an irrational act, and the possibility of mental disease in this case had to be considered.

Committed to one of our institutions under the diagnostic procedure, he was found after a thorough psychiatric examination to have no sign of mental illness. He had no serious prior criminal record, and he had been a frugal, independent, hard-working person with 7 children. Apparently it was one of those instances in which a man was unable to resist an impulse to which I am sure many of us have given at least fleeting and furtive consideration over the years. In view of his previous history of stability, we recommended probation, and the court thereupon sentenced him to a two-year probation term.

Police Officers Observed

In another case, two police officers who had taken advantage of their positions to plan and execute a series of robberies were sent to us for observation and diagnosis. We diagnosed one as being mentally ill, and because his recovery was problematical, his offense was extremely serious, and the public had to be protected, we recommended a 25-year sentence.

The other man was found to have personality inadequacies and needed vocational training and intensive counselling. With the factor of deterrence of overriding importance in this case, we recommended a term of 15 years, and the judge complied. However, both men were sentenced under the indeterminate sentence provisions which were also incorporated in the new statute authorizing the diagnostic studies.

Under the old law, which had been in effect since 1910, offenders sentenced to prison

by the Federal courts did not become eligible for parole until they had served one-third of the sentence imposed by the court. This requirement was automatic and could not be reduced, regardless of how well the individual prisoner might respond to treatment. Needless to say, this rigidity in the parole law inevitably gave rise to disparities that affected the welfare and interest of both the community and the individual offender.

Rigidity Scored

For example, the largest category of offenders are sentenced to prison for auto theft, an offense carrying a five-year maximum in the Federal courts. If the judge imposed the maximum, the prisoner had to serve a minimum of nearly two years before he could be considered for parole, notwithstanding any progress he may have made in his rehabilitation. In many cases our experience tells us individuals improve sufficiently in a year or eighteen months to warrant parole. On the other hand, if the judge imposed a shorter term, say one or two years, the brevity of the sentence made virtually impossible the period of community supervision following release that so many of these offenders need.

The rigidity of this system was first modified to some extent by the Federal Youth Correction Act of 1950. Under this Act the court was given the discretion to commit offenders up to age 21 for a period of six years, with the individual offender eligible for parole at any time. In fact, the Act required that the youth be paroled no later than four years after he had been committed. If the court wished the offender to be under authoritarian control for a longer period, it could commit him under the Youth Act for a period up to the statutory maximum provided for the offense. But in any case the offender remained eligible for parole at any time.

The indeterminate procedure has several advantages over the old regular procedure. For one thing, with the prisoner's prospects for eventual release on parole dependent largely on his own efforts, the institutional staff can develop a realistic program for him, along with definite goals for him to achieve. It also reintroduces the offender to the community under controlled conditions. During this crucial initial period he still has the counsel, psychological support and, if necessary, the authoritarian control of an experi-

enced correctional worker, the probation officer.

It was the success of the Youth Act and its undeniable advantages that led to the new sentencing legislation of 1958. In addition to its provision for a period of diagnosis and observation, the new law equipped the judges with considerably greater discretion in imposing sentences. It extended the Youth Act itself to apply to potentially good candidates for rehabilitation up to and including age 25.

It also authorized the courts in disposing of convicted adult offenders to give a completely indeterminate sentence, setting only the maximum term and leaving the matter of parole eligibility up to the U. S. Board of Parole. It also gave the court the option of setting parole eligibility at any point less than one-third the maximum sentence imposed. Again borrowing slightly from the Youth Act, the new law permitted the Board of Parole to discharge from supervision any parolee who had fully demonstrated his ability to live responsibly in the community.

But while prisons, with their reformatory and detention purposes strengthened by the new sentencing law, can retire a substantial number of persons from criminal occupations, they can not alone reduce the crime problem to a level that would permit our society to rest easily.

New England Conscience

There are many other forces involved in this problem. The detection of crime and the apprehension of criminals must be made several times more efficient if deterrence is to be achieved by quick and sure penalties — and that is the only way that deterrence can be effective. The courts and the prosecutors must dispose of the offenders on the basis of the actual crimes they committed and the actual problems they present rather than, in the interests of expediency, some lesser compromise. The sentencing laws of our states and to a lesser extent those of the Federal government must be made more flexible, so

that men may be retained in prison so long as they represent a menace to society — and no longer.

Some of these ends lawyers can accomplish, but it is not by law alone that people can be made lawful, and that is where the New England conscience comes to the fore.

Above all our society must uplift its moral standards. A recent poll suggests that by and large our citizens feel that payola is a necessary if unfortunate part of a world in which life is still precarious and beset with practical hardships. The effect of our lax system of values is also seen in the violence and sensuality of the products of our communication media — television programs, magazines, books.

These and the many other reflections of the ascendancy of material over moral values in our society must somehow be swept away, and I am convinced that it cannot be done entirely by law. Possibly it may be done by a reinvigoration of such old-fashioned institutions as the family, the school and the church. Possibly it may be done by creating other social institutions that we do not now foresee. But it must be done.

Perhaps it sounds unrealistic to propose the moral refashioning of our culture. Perhaps. But if that proposal is unrealistic, it is then unrealistic to expect to solve the crime problem. A society rich in material things and filled with relentless pressures for each individual to get as many of these things as he can — regardless of the moral standards that mankind has taken so many thousands of years to achieve — must therefore expect to pay a price for its competitive opulence. That price is crime.

I. L. C. Dance

The International Law Club will hold its Annual Christmas Dance on Sunday evening, December 18, from 8 to 12 p.m., in Harkness Commons. Music will be provided by the Ken Hamilton band, and chilled wine will flow liberally.

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Basis of the Civil Law

The current exhibit in the Treasure Room of the library is entitled "The Historical Basis of the Civil Law of Continental Europe." Tracing the development of the civil law in rather broad outlines, the display succeeds in doing little more than focusing its wandering eye on a few points of interest here and there. Prepared by Karl Heinrich Friauf, who was a graduate student at the Law School a few years ago, and presented by Miss Edith G. Henderson, who is in charge of the Treasure Room, the display falters in its attempt to deal with a subject that is too broad in its scope to be squeezed into the limited space that is available. Nevertheless, the exhibit has, as it always does, things of significance to offer.

Not the least of these is the over-all perspective which it presents to the American law student who is unaware of the background of the civil law system. To common law-trained lawyers the civil law is an accepted fact, too often a fact going under the assumption that it is nothing more than a modern version of the Roman law. The exhibit demonstrates that this assumption is incorrect; in fact, it appears that in some ways the civil law had roots that were akin to those of the common law. For example, involved in the development of both were the customs of the community and the influence of legal teachers in formulating and perpetuating the "rules of law."

Perhaps because of the breadth

of its topic, the display over-generalizes the effect of academicians on the codes while merely paying lip-service to other factors such as the roles of central governments, royal courts and the demands of trade. In the end, the exhibit provides some information on the history of the German and French civil codes. Various manuscripts, photographs and books give excellent illumination to the highlights of that history on which the display touches.

Continental Law

The sources of the continental law, in contrast to the commonly-held belief that civil law is based on the law of the Roman Empire, are three: (1) the Roman law as it was developed in the first twelve centuries A.D., (2) the canon law of the Roman Catholic Church and (3) the customary law of the Germanic peoples who settled in various parts of Europe during the last centuries of the Roman Empire. Ultimately, no one of these sources was to have a completely supreme influence. But the strands which they represent are evident in the codes of France and Germany.

The Roman Law is represented by *Corpus Juris Civilis*, a part of

a compilation of the civil law which was done by the Eastern Roman Emperor Justinian in 528-534 A.D. *Corpus Juris Civilis* included the Institutions, which were a text for students but did not have the force of law; the Digest, which was a collection of excerpts from legal writings from 200 B.C. to Justinian's time, as well as a series of hypothetical cases; the Codex, which were the statutes; and the Novellae, which were the new statutes enacted after Justinian.

The Canon Law, the second source of modern civil law, is represented in the exhibit by a 15th century copy of the first part of *Decretum Gratiani*, which was a private collection of the early canon law done in 1150 A.D. by the monk Gratian of Bologna. This was a part of the customary law of the Church. The other parts of the work contained the official collections of the decrees of the Popes.

Own Law

As the power of the Roman Empire declined in the 3rd century A.D., many of the German tribes which had settled on the frontiers of the Empire began to lay down their own law. Codes of their pre-existing customary rules were en-

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acted between the 4th and the 8th centuries A.D. Since the tribes dealt with each other when they entered into trade, many of the codes had conflict of laws provisions included in them.

Between the 4th and the 8th centuries the law was personal rather than geographical as it is now. Rather than having all the people and acts in a geographical area subjected to the same law, it was held that the applicable law was determined by the origin of a tribe or people. Thus the saying, "A man's law is inherent in his bones." It is also evident that with a mixed population, a mixed law developed; it was not uncommon to have German rulers promulgate the Roman law in addition to the Germanic customary codes.

Taking one of these three basic sources of the civil law, the Roman law, the Glossatores of the 13th century studied its internal contradictions, especially those of the codes of Justinian. Centering their school of legal thought at Bologna, they studied Roman law scientifically and did abstract research while attempting to explain away these contradictions. With the excellent faculty at Bologna, Italy became the center of jurisprudence. At one time the school had 10,000 students; with the training they received there, it was obvious that they would carry the Roman law to the places where they practiced.

Adapted to Needs

In reaction to the Glossatores there developed the post-glossatores. This group, headed by Bartolus and his disciple Baldus, adapt-

ed the old Roman law to the practical needs of their time. Their opinions were authoritative and were presented on request to courts and litigating parties. Thus influencing the old Roman law with their practical-minded outlook, they passed this modified Roman law on to the Europe that received it in the Reception of the 16th century.

With this background, the display traces the influence it had on the development of the codes in France and Germany. Southern France had a continuous tradition of Roman law up until fairly recently. Naturally, the Roman law was written into a code. But the rest of France had no written law. It depended on local customary law from German sources. In the 13th to 15th centuries the kings of France at last began to take an interest in making the law uniform throughout all of France. Since they had achieved a centralized power, it was not as difficult a goal to attain as was the case in Germany.

The first step in achieving uniformity was the Ordinance of Montils-les-tours in 1454, by which order the customs of the provinces were collected. The effect of this collection was that France had a series of law from the provinces which made the proof of customs easy and which acted as a set of

rules so that foreign law had less chance to penetrate France.

Court of Justice

Sitting as the royal court of justice in Paris was the Parlement. It was the most important court of France and enacted the Custom of Paris. By the force given to the *Coutume de Paris* in this court, the Custom of Paris became the common law basis of the later uniform legislation of the entire country. By inheriting the German law in this manner, France managed to resist the Roman law of Bologna.

Germany, on the other hand, did not have the central organization of France, so it was thrown back much more onto the customary law. Only the Sachsenspiegel (a code of the customary law of Lower Saxony) and the Schwabenspiegel (the code of Swabia) were written and so preserved and strengthened the customs. Furthermore, the process of achieving uniformity was slowed by the statute *Bulla Aurea* of 1356 promulgated by the Holy Roman Emperor Charles IV, which exempted the courts of the Electors from the appellate jurisdiction of the Empire's courts. This meant

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My Epitaph — (Thru Sat.): 2:00,
5:50, 9:30. Lucky Jim — 3:45, 7:45.
(Starts Sun.) Carry On Nurse;
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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 — Nine Lives — 1:30, 3:30,
5:30, 7:30, 9:30. On Sun. 1st
show 11:30 a.m.
UPTOWN — Let No Man Write My
Epitaph — (Thru Tues.): 11:10,
2:40, 6:05, 9:30. Vagabond King
— 1:00, 4:30, 7:55.

that no law common to all of Germany could be developed.

With the law of Germany thus diversified, there was little resistance to the reception of the Roman law from Bologna, which worked its way into the German system when counsellors and judges who were trained there were employed. The imported law was accepted more readily because of the reasonableness of its system. Within two centuries of 1495, when the Holy Roman Emperor reformed his supreme court so that judges had to decide cases according to the common law of the Empire, *i.e.* the Roman law, the law which Germany had received from Bologna swept the country and became the law common to all of Germany.

Although one of the reasons for the ready receipt of the Roman law was its reasonableness, it was not until the 17th and 18th centuries that the belief in natural law received its full impetus. This was the belief that a system could be based on reason and reason alone. Leibnitz had some influence, as did Hugo Grotius' *Of the Law of War and Peace*. Then, toward the end of the Enlightenment, a demand for codification of private law developed.

The Enlightenment demanded equality of all men before the law; the continental emphasis on reason was a result of a demand for the equal treatment of all by the courts so that predictability could be achieved. So it was that Bentham's insistence for complete codification met with approval on the continent. Montesquieu's book on legislative policy *De l'Esprit des Lois*, written in 1748, added to the pressures for a code.

In response to these pressures

the first of the codes advocated by the natural law writers was enacted in the Bavarian Code of 1756. Any gaps in the code were to be filled by the Roman law. The next German territory to develop a code was Prussia, which enacted its very refined combination of natural, Roman and Germanic law in 1794. But as yet there was no national German code.

France, in contrast, passed its Constitution of 1791 in response to the Revolution. Title I of that document said, "There will be enacted a civil code common to the whole country." Internal political difficulties and external wars kept the enactment of a national code somewhat in the future, although a few uniform statutes were passed for the first time in France's history. These dealt mainly with civil marriage and divorce. Finally, in 1800, Napoleon as First Consul of France appointed a commission to prepare a general code. On March 3, 1804, the *Code Civil* was enacted. It was a compromise between Roman and German principles.

While France thus met with success, Germany had nearly 100 years to wait before it obtained a unified code, largely because of political reasons. The beginning of the movement occurred in the first half of the 19th century and resulted from a controversy between two German jurists — A. F. J. Thibaut, who was for the code, and Friedrich Carl von Savigny, who felt that German scholarship had not

yet reached a level where it could provide a firmly-based code. In addition to this controversy, the German Revolutionists of 1848 added some force to the argument for a code, although their successes were small.

When the demands of trade increased to a point where they required a uniform law on bills of exchange, statutes were passed. These were the General German Commercial Codes of 1861-1865 and were uniform acts adopted by the territories individually. The next step in the process was the establishment of the Second German Empire in 1871. The first amendment to the imperial constitution gave power to the legislative bodies, the Bundesrat and the Reichstag, to enact a general civil code. With the passage of the amendment in 1873, judges and professors went to work drafting the code. They needed twenty years to complete their work. Balancing Roman and German legal thinking, they produced the code that was enacted in 1896, which became effective on January 1, 1900, the beginning of a new century.

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Recent Books

By Charles H. Baron

THE COMPLEXITY OF LEGAL AND ETHICAL EXPERIENCE, by F. S. C. Northrop. Little, Brown and Co., Boston, 1959.

"If the leaders of the modern nations, and especially the modern free nations whose citizens comprise an overwhelming majority of mankind, will put a clear understanding and statement of the international implications of their own present national law in the foreground of what they are doing and will push their atomic bombs and pocketbooks into the background, where instrumental values, necessary though they may be, belong, there certainly is no *theoretical reason*, as Austin and Marx supposed, and in all probability there is no *practical reason* why disputes between nations cannot be brought under the rule of law rather than of war in this atomic age." This is prominent among the more important conclusions reached by Dr. F. S. C. Northrop, Sterling Professor of Philosophy and law in the Yale Law School, in his recent book *The Complexity of Legal and Ethical Experience*.

The book, which is basically a compilation of specially-revised articles published in the recent past in distinguished American and foreign journals of law and philosophy, has as its major theme the demonstration "that both legal and ethical experience are much more complex than any traditional theory of these subjects would lead one to suppose." Because of the tremendous scope of the theme, the coverage of the comments is amazingly wide ranging and includes observations on present-day social and political problems, physical theory and philosophy of science, and neurology and psychology as well as legal theory and practice.

Main Thread

But there is one main thread of exposition that moves through the book as a result of the logically progressive juxtaposition of the articles that make up most of the chapters. This thread is supported

at its ends by one introductory and two conclusory chapters which contain entirely new material. This theme deals with the problems posed by ethical and legal relativism and the diversity of legal and ethical beliefs exemplified in domestic law by the American South's reception of the decision in *Brown v. Board of Education*, and in international law by the Cold War.

Dr. Northrop notes early in his work that the need for concentration on legal philosophy arises only when traditional methods and theories of jurisprudence are no longer able to meet the legal needs of contemporary society. He feels that at least three facts of modern living make traditional jurisprudence unable to meet these needs in our society. The first is the release of atomic energy, which has made an effective international law a necessity if society is to continue.

The second is the shift of the political focus of the world from western Europe to Asia, which means that an effective jurisprudence must derive its method and theory from a study of Oriental as well as Occidental law. And the third fact is the ideological character of present domestic and international social problems, which means that an effective jurisprudence must be able to devise legal theory acceptable to differing ideologies.

Western Philosophy

The presently prevailing western legal philosophy, the Legal Positiv-

ism of Austin and Thayer, fails to meet any of these requirements. Of the three parts of the Law, positive law, living law and natural law, Positivism deals only with the first and, therefore, in a philosophy concerned only with the internal relationships of the codes, statutes and decisions of a particular legal system.

The only legal philosophy that will be able to meet the requirements of contemporary living will be one that makes it possible to *evaluate* the positive law. The answer to the Positivist's argument that the positive law *cannot* be evaluated because an "ought" is not derivable from the "is" of the law is that despite the fact that the "ought" is not derivable from the "is" of the positive law, it is derivable from the "is" of law on another level, *i.e.*, the living law. Thus the good positive law is that which corresponds with the living law of the society for which it is created.

The living law is a concept pop-

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ularized in the United States by Dean Emeritus Roscoe Pound and in Europe by Eugen Ehrlich, and it refers to "the underlying inner order of the behavior of people in society apart from the statutes, codes, and cases of the positive law." It is the same concept that anthropologists call the "pattern of a culture." The belief that the good law must be consonant with such underlying patterns of culture is the essential characteristic of Sociological Jurisprudence.

Difficult to Find

However, the problem with using the living law as a standard is that it is difficult to find. Experiments conducted by Underhill Moore at the Yale Law School observing the car-parking habits of individuals on a street in New Haven showed that objective definitive results were difficult to get, even when as objectively scientific a definition of "living law" as "the high-frequency portion of the objectively observed spatio-temporal total behavior of society" was used.

In answer to this problem Dr. Northrop creates out of contemporary psychology and cultural anthropology the method of philosophical anthropology. This method is based on the discovery that the mores of a people cannot be understood without a comprehension of the exact meaning of the concepts that the people use in dealing with their norms, *i.e.*, their philosophy.

Since these concepts determine the nature of the patterns of the culture, one need only master these concepts to know the living law of the people. When the discoveries of modern neurology as to the physical nature of concepts are injected into this system, "this reformulation introduces into sociological jurisprudence a much more simple, economical, and effective way of objectively determining the living law of a given people or culture." With the method of philosophical anthropology, Dr. Northrop is able to explain apparently paradoxical phases of recent world history, and to analyze present problems of domestic and international law and to note what chances

there are of solution of the problems.

Great Hope

In the field of international law, Dr. Northrop finds great hope for an effective international legal order stemming from the application of sociological jurisprudence. Although there are differences in the living law systems of the Orient and the Occident, these differences do not make the systems incompatible. At base both cultures have natural law philosophies, which means that they find the justification for law in its correspondence with the facts of nature. The differences stem merely from the different ways in which the cultures see nature.

Therefore, despite the fact that the Communist countries have not only different but incompatible living law systems, there is a common living law basis, accepted by a majority of the people of the world, on which an effective international legal order can be built. The basic reason why one has not as yet been constructed is that international law has thus far been responsive only to the living law needs of the West.

There is much the same situation in United States domestic law as

regards desegregation. The natural law philosophy of the majority of the American people is not only different from but incompatible with the Filmerian, patriarchal, theocratic law of the Old South. But because there is a majority in the United States embracing a natural law philosophy which denies the validity of segregation, there is living law support for positive law ordering desegregation.

Reconciled

Moreover, even the incompatible living law systems can be reconciled by an appeal to an "is" outside the living law which serves as the "ought" by which to judge the validity of such incompatible systems. Such an "is," Northrop suggests, is to be found in natural law, which requires "that the philosophy exemplified in the ethical and legal norms of man-made traditional culture is to be measured against the philosophy implicit in the em-

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pirically verified theories of God-made — that is non-man-made — nature." In other words, that living law system is good which is based on a true theory about the character of nature.

On the basis of such a natural law philosophy, Dr. Northrop is able to show that the Filmerian Living Law of the Old South and the Marxist materialistic Communism of Soviet Russia are bad systems because they are based on a naively realistic view of nature. And he shows that the Western normative theory is cognitively verifiable since it is based on a logically realistic view of nature which is accepted by modern science as true. And finally, he points out that although the Eastern normative theory is cognitively false, because it is based on radical empiricism, Eastern thinkers are beginning to accept the use of concepts by postulation, which is the only thing that separates their natural law from that of the West.

Thus logical realism is becoming the accepted view of nature of most of the people of the world, and for it "to be at once both the *is* of a significant part of the world's living law and the cognitively confirmable *ought* for the whole of it, is to be something of considerable domestic and international importance."

Main Message

This would seem to be the main message of the book, but there is much else to interest and edify the enterprising reader. There is analysis of many legal problems by the method of philosophical anthropology and criticism of legal positions in cases such as *Barenblatt v. U. S.* and *Uphaus v. Wyman* on the basis of the living and natural law systems.

And all this is just a sample of the great mass of things seized upon, analyzed and solved in this *tour de force* display of the tremendous complexity of legal and ethical experience.

CALENDAR

(Continued from Page 2)

CLUB will hold a meeting for all students interested in summer clerkships abroad under the auspices of the A.I.E.S.E.C., in Langdell North, at 4 p.m.

FUTURE EVENTS

Monday, December 12

The **YOUNG REPUBLICAN CLUB** will present Professor Richard R. Bowie, Director of the Center for International Affairs, at a luncheon meeting in the Mallory Smith Room, Harkness Commons, at 1 p.m.

Wednesday, December 14

The **BULL AND BEAR CLUB** will present Thomas F. O'Neil, president of R.K.O. General Inc., speaking on "Subscription Television," in the Meeting Room, Harkness Commons, at 8:30 p.m. The Club will hold its annual Christmas Cocktail Party after the talk. Wives and dates are invited.

Letters to the Editor

To the Editor:

I wrote an attemptedly facetious poem on the subject of hissing not long ago and sent it to the RECORD. Attached to the poem was an admittedly exaggerated passage written in a moment of fictive abandon which, because the editors thought the poem unworthy of publication, was printed in its place (Nov. 17).

In order to offset non-intended impressions given by the passage printed, which would not have resulted had the poem been printed, the following is explicitly asserted: (1) section 4 does not engage in animadvertical, inordinate hissing (they hiss occasionally, but they are as innocent of mal-intent as a new-born babe); (2) section 4 provides a permissive milieu (neither

Tyler nor Seed could feel more free to comment than I); (3) Professor Baxter's jokes (?) deserve hissing (especially that "difficult section" one); (4) this writer is neither prudishly captious nor timorous.

T. Mitchell, 1L

To the Editor:

In your October 13th issue, under the topic "Patent Law Club Meets," there appears the statement that the Club "is now in its second year of operation." This statement is not true, though I suspect that the error may not be yours but that of the present Club membership.

The Club was first organized in the winter of 1958-59 by David Maher '59, H. E. J. Finke '58 and myself. There were perhaps 10 persons at the organizational meet-

ing, and our first luncheon speaker was Mr. Robert Russell of the Boston Bar. Meetings were held sporadically during the remainder of that year and the following one.

During that period we were often confronted by the prevailing attitude among students that "of course, you will make a lot of money in the field — but is it law?" To Professor Benjamin Kaplan we were indebted for his brilliant demonstration, in his Copyright and Unfair Competition course, that what sounded like very prosaic stuff was as replete with "interesting legal questions" as any other field of the law and was, indeed, "law."

Your paper is always appreciated.

Robert C. Ely, LL.B. '59

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5	5.59	3.06	2.53	5	6.08	3.54	2.54	5	6.46	3.95	2.51
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