



Harvard Law Record

America's Oldest Law School Newspaper

VOL. 23, NO. 10

CAMBRIDGE, MASS., THURSDAY, NOVEMBER 29, 1956

PRICE TEN CENTS

Broad Scope of Activities Open to Foreign Students

The program of international studies at the Law School continues to flourish. In the current academic year, sixty-six scholars from abroad are engaged in graduate work here, according to John A. King, Jr., Secretary of International Legal Studies and advisor to foreign students.

Of this group, which includes two women, fifty are candidates for LL.M. and S.J.D. degrees, or are special graduate students. Twelve are participating in the International Program in Taxation. These are tax officials from various countries, and have been sent by the United Nations or by their own governments. Four are taking special programs.

All these students, representing twenty-three different nations, have had some legal experience, ranging from recent law school study to service on the bench, at the bar, on the lecture platform, and in the diplomatic field.

Most foreign students at the Law School could not study here without some financial assistance. This is forthcoming from Harvard scholarships, grants under the Fulbright program of the United States Government, the Commonwealth Fund, and other private funds. Also, some students are sponsored by their own governments.

Not a New Program

Students from abroad have been attending the Law School since World War I, although an official program for international studies has crystallized only within the past decade. The influx of students from civil law countries began in the nineteen-thirties, but temporarily slowed up due to World War II. In the post-war period, the number of students from these countries has greatly increased.

Most of this group, having little or no experience with the common law, enroll in the course "Introduction to American Law." Under the direction of Professor John P. Dawson, a background in the common law is superimposed upon the regular work each student is pursuing. Other professors are invited from time to time to lecture on specific topics.

This fall, as an exercise in case research, the members of the course have prepared a

University to Stay, Vellucci Declares

City Council member Alfred E. Vellucci of Cambridge explained his recent criticisms of Harvard at a talk before the Coffee Hour last week.

It was Mr. Vellucci who suggested that, instead of routing a proposed highway through East Cambridge, the state highway commission build a scenic route through Harvard Yard with adjacent picnic areas.

Mr. Vellucci's differences with the University began last spring when he became aware of the parking difficulties in the Harvard area. The problem prompted him to suggest that since Harvard really did not pay the costs of the Cambridge services it received, the University should secede into a Vatican-type status.

A more serious suggestion by Mr. Vellucci was that Harvard be forced to surrender its two valuable liquor licenses.

However, Mr. Vellucci conceded that "the Constitution of the Commonwealth requires that there be a University in Cambridge called Harvard," and in any case, "Harvard isn't so bad."

Mr. Vellucci asserted that his recommendations had smoked out at least a few of those responsible in both City and University administrations for the many problems common to Cambridge and Harvard. "Parking is one of the more thorny situations," he said. To prove that not only suons were being ticketed, Mr. Vellucci produced a packet of fifty tickets received by his constituents in the past two weeks.



John A. King, Jr.

memorandum on a hypothetical situation involving a South American lawyer injured at a baseball game. This exercise enabled the student from abroad to delve into the intricacies of the key number system, as well as puzzle over the significance of home plate and the third base line.

The foreign student also plays an important role in some of the courses and seminars in international legal studies. For example, in the course "Legal Problems of Doing Business Abroad," where discussions center upon transactions taking place in several foreign countries as well as the United States, students from those countries are often present who supply an air of realism. This is especially so because one of the main problems in the conduct of business abroad is that of communicating among lawyers with different legal backgrounds.

One difficulty which occasionally arises concerns the few foreign students who find that their command of the English language is somewhat inadequate. There are several devices to remedy this situation. (See STUDENTS on page three)

Modern Music

Two composers and a critic will discuss modern music on the evening of December 6th at the Law School Forum. The composers are Aaron Copland, who was Charles Eliot Norton Professor of Poetry at Harvard in 1951-52, and Otto Luening, a professor of music at Columbia University. The third speaker will be Irving Fine, an author and critic who now teaches at Brandeis University.

The program will begin at 8 p.m. in the New Lecture Hall, at Kirkland and Oxford Streets.

Tax Court Judge to Preside At Second Ames Semi-final

Judge Clarence V. Opper of the United States Tax Court will preside at the second semi-final argument of the Ames competition on Wednesday, December 12th at 8 p.m. in the James Barr Ames Courtroom. Other members of the tribunal will be Haskell Cohn, LL.B. '25, and Harry K. Mansfield, LL.B. '43, both of the Boston bar.

Judge Opper, a 1921 graduate of the Columbia Law School, was assistant general counsel for the Farm Credit Administration from 1931 to 1933. In 1934 he joined the United States Treasury Department in the same capacity, where he served until 1938, when he was appointed to the Tax Court, formerly the United States Board of Tax Appeals.

The case to be heard by the court, *Ames Hotels, Inc., v. Commissioner of Internal Revenue*, presents for decision a tax question arising under the 1934 and 1939 Internal Revenue provisions.

Ames Hotels, Inc., represented by the Blackstone Club, is petitioning the United States Court of Appeals for the Ames Circuit to redetermine the deficiencies set forth by the Commissioner of Internal Revenue, represented by the Griswold Club. Whether the deficiencies were fixed properly by the Commissioner depends upon the basis of the property for depreciation computation.

Depreciation an Issue

On stipulated facts, the Tax Court in its decision below had one question to answer: "the basis properly to be ascribed to the Hotel Greenleaf in the hands of petitioner for depreciation purposes." In answering the question, the court had to consider whether a transaction in 1934 was a reorganization under section 112 (g) of the 1934 Act and, concerning deficiencies for a later year, under section 112 (b) (10) of the 1939 Code.

The Tax Court held that there was no reorganization under the 1934 Act, since Ames Hotels, Inc., did not acquire substantially all the assets of another corporation which had gone into receivership.

Looking to the legislative history behind the 1939 Code, the court determined that there was no such "continuity of interest" as to give the new corporation the basis of the old for the determination of depreciation.

Christian Vocation Group to Organize

The Committee on Christian Vocation and the Legal Profession will hold an organizational meeting on Wednesday evening, December 5th, at 8 p.m. in the Gray Room in Holmes Hall. Professor Joseph F. Fletcher of the Episcopal Theological School, author of *Morals and Medicine* and *Christianity and Property*, will speak to the group.

The committee, an informal group of law students interested in the discussion of the relationships between Christianity and the law, is now in its fourth year. Among topics dealt with in the past have been an analysis of the field of divorce to determine how a Christian point of view affects the legislators, judges and lawyers dealing with the problem; the relationship between the Christian doctrine of the nature of man and that found in the common law; and an analysis of various systems of jurisprudence from the Christian point of view.

Hart Advises

Professor Herbert L. A. Hart, Visiting Professor of Jurisprudence, is serving as advisor to the group this year, in place of Professor Harold J. Berman of the Law School faculty, presently on leave of absence.

Interested students are cordially invited to attend the December 5 meeting. Further information may be obtained from Henry B. Shepard, Jr., 3L of West Newton (TR 6-2616), or George J. McCormack, 3L of New York City (KI 7-3042).

Circuit Courts in Conflict Over Competition Clauses

Two United States Courts of Appeals recently reached opposite conclusions in interpreting a federal statute. The enactment in question was 15 U.S.C. §13(a), which declares unlawful discrimination in rebates, discounts, advertising services, or underselling in particular localities. The section provides a criminal sanction, but does not expressly provide a civil remedy.

15 U.S.C. §15 grants treble damages to those injured in business or property

"by reason of anything forbidden in the antitrust laws." 15 U.S.C. §12 declares that "Antitrust laws" . . . includes sections 1-27 of this article." The question facing the courts was whether §13 (a), formerly section 3 of the Robinson-Patman Act, was intended by Congress as an amendment to section 2 of the Clayton Act; if not, §13 (a) was erroneously included by the codifier in 15 U.S.C. §§ 1-27.

In each case, plaintiff sought treble damages for violation of §13 (a), claiming that the section came with the meaning of "antitrust laws."

Tenth Circuit Decision

On November 6th the Court of Appeals for the Tenth Circuit in *Vance v. Safeway Stores* (25 U.S.L.W. 2207) held that treble damages were available to the plaintiff. Circuit Judge John C. Pickett wrote, "To be an amendment to an existing law, the statute need not be so labelled . . . The title to the [Robinson-Patman] Act states that it is an act to amend section 2 of the Clayton Act . . . but the enacting clause recites only that section 2 'is amended to read as follows:' and the entire Robinson-Patman Act follows, although the first section . . . is in quotation marks, while [section 3 is] not."

The court continued by saying that it did not feel that the omission of the quotation marks meant that section 3 was any less an amendment to the Clayton Act than section 1; therefore it was properly codified in 15 U.S.C. §§ 1-27, and came within the meaning of "antitrust laws."

Opposite Result

But only five days earlier the Court of Appeals for the Seventh Circuit, considering *Nashville Milk Co. v. Carnation Co.*, (25 U.S.L.W. 2207), held that treble damages were not available to the plaintiff.

Chief Judge F. Ryan Duffy believed that the codifiers had erred in their work. "A close examination of the text of the Robinson-Patman Act and of its legislative history," he wrote, "convinces us that section 3 is not an amendment of the Clayton Act."

Judge Duffy noted the missing quotation marks in the original act, and turned to a consideration of legislative history.

Concluding that Congress did not intend section 3, now 15 U.S.C. §13 (a), to be part of the "antitrust laws" defined by §12, for which §15 provides treble damages, the court denied recovery to the plaintiff.

Criteria for Refusing Passports Scored; More Liberal Procedures Recommended

By LOUIS L. JAFFE

On April 15, 1820, the Secretary of State, John Quincy Adams, issued a passport to one Luther Bradish certifying that he was about to visit foreign countries "with the view of gratifying a commendable curiosity." In 1817 there had issued the first of the passport forms to bear at the top the American arms but, we are told, the eagle was portrayed "with the head turned in the wrong direction." In that brave new world there was a relaxed yet vigorous self-assurance. Today the Passport Division does not find curiosity commendable and the eagle's scream must issue from the right side of his beak. But it is not enough to take counsel of nostalgia or even of the righteous indignation aroused by ludicrous expressions of bureaucratic zeal.

We must begin by identifying our passport problem. The passport is a document issued by a country to its nationals to identify the bearer traveling to foreign countries, a number of which will not permit entry without one. But until 1941 an American traveler, at least in time of peace, would not have needed a passport to leave. Since 1941, however, the Presi-



Louis L. Jaffe

dents exercising statutory "emergency" powers have proclaimed the existence of a "national emergency"; exit without a passport is a crime.

In the last few years it has not been easy to keep disentangled the legal and political threads of these two situations: the passport as an indispensable condition

of travel abroad; the passport as a condition of leaving the country (the "right to travel"). Official doctrine sidles from one track to the other: a denial of passport, though security motivated, is justified on the ground that the passport is "really" (as indeed it once was) a kind of good "reference" to our sister states abroad: no one, the argument runs, has a "right" to be recommended whose character or intentions are questionable. From this the conclusion would follow that he can go, but without our blessing. But, of course, he can't go.

The traditional status in Anglo-American law of "right to travel" is obscure. Magna Carta itself in its 42nd chapter granted the right to leave the kingdom and return. This grant, however, was omitted from the second version of Magna Carta which is the version appearing in the statute book. But later statutes did set limits to travel and required royal authorization. Certain statutes in particular were directed against voyages abroad for purposes of Catholic conferences, training or instruction. The Papacy to Englishmen of those days was no less the arch-enemy

(See PASSPORTS on page four)

Harvard Law Record

RALPH NADER President
ROBERT W. OLIVER Editorial Manager
WILLIAM A. DAY, JR. Business Manager
WILLIAM L. BLAINE News Editor
JOSEPH A. PAGE Copy Editor
JAMES C. PARAS Advertising Manager

Jay S. Dushoff, Harry R. Schumacher, *Contributing Editors*; Frederick J. Pagnani, *Current Case*; Irving S. K. Chin, *Photography*.

STAFF: Roger Baskes, David Benkin, Tim Bornstein, David F. Binder, John E. Corcoran, Jr., William F. Cottrell, Jerrold K. Footlick, Daniel M. Hall, Bennet B. Harvey, Jr., Jay M. Hollander, William J. Lawlor, III, Edward M. Levin, Jr., Sander M. Levin, James B. Moran, John J. Moss, Michael Mulroney, David Shayne, Howard L. Siegel, Wilton S. Sogg, Robert M. Spevack, Herbert L. Spira, Berton B. Subrin, Tom Tavenner, Philip Wells, Frederick J. Wethly, Allen Wood.

CANDIDATES: Michael Bell, Morris Gurley, Donald King, Jacob Todd.

Published weekly on Thursday for twelve weeks of each term by *The Harvard Law School Record Corporation*, 23 Everett St., Cambridge 38, Massachusetts. Subscription price: \$2.00 per term, \$4.00 per year (24 issues) mailed; student subscription \$1.50 per term mailed, \$1.00 per term distributed at the Law School. Individual copies 10c each at the Law School, 20c each mailed. Business and Editorial Offices, 23 Everett St., Cambridge 38, Massachusetts. Telephone, Kirkland 7-7600, extension 447.

Entered as second-class matter November 19, 1946, at the post office in Boston, Massachusetts, under the Act of March 3, 1879.

Piercing the Veil

Since June, 1955, Representative John E. Moss, Democrat of California and Chairman of the House Special Subcommittee on Government Information, has been fighting a noiseless and determined battle to free governmental machinery from a thirty-year growth of bureaucratic secrecy. The report of his group, *Availability of Information from Federal Departments and Agencies*, puts the case well: "Slowly, almost imperceptibly, a paper curtain has descended over the Federal Government. Behind this curtain lies an attitude novel to democratic government—an attitude which says that we, the officials, not you, the people, will determine how much you are to be told about your own Government."

Findings Confirm Apprehensions

The subcommittee has been holding hearings, carrying on extensive correspondence, and getting the facts. Those facts, according to the subcommittee, are:

1. That the executive departments and agencies are classifying material not only to protect the national interest, but to save themselves from ordinary embarrassments;

2. That they often classify information simply to save themselves from being accused of underzealousness in protecting real secrets, whether or not such accusations would have any basis in fact;

3. That millions of people now have power to classify, or simply to withhold information from the public, without these officials themselves clearly knowing whether the material they withhold ought not be made public. Their policy has been, in effect, "Withhold unless there is reason for release."

The Moss subcommittee believes this attitude should be turned around to read "Release unless the reason for withholding will stand public scrutiny." It believes that the Office of Strategic Information, in the Department of Commerce, which has been charged with establishing informational policy for the Government, and with facilitating the international exchange of unclassified information, has not done, is not doing, and apparently does not want to do either job. The subcommittee further believes that OSI should be abolished, and those of its functions which are desirable be taken over by the Library of Congress.

Congressional Action Sought

The subcommittee asks that Congress establish a clearly defined policy of classifying and disseminating information in the Executive Branch. The present situation is chaotic. No official can know whether his superior's announcement of a liberalization of informational policy, issued in accordance with the subcommittee's recommendations, is really meant to be followed.

The subcommittee also believes that Congress should act to remove from the realm of doubt those sections of its previous statutes which the agencies rely on (erroneously, the subcommittee believes) to support their self-assumed *droit administratif* against what the subcommittee calls "The Right to Know." It believes that any system in which millions of people can have access to information in order to classify it can result in "protecting" it only

from those from whom it should least be kept secret.

The issues in this investigation are clear enough to any American who wants to know that his right to hold his government to account for its actions and policies is above administrative sabotage. But there is a rather special and important point involved in the methods of this particular investigation which we feel must be noted and defended, because it has, astonishingly enough, evoked the criticism of *The New York Times*.

The *Times* (Friday, November 16, p. 16, cols. 4-5) chides the Moss subcommittee for having "so far failed to arouse that public support—or even public attention—without which few legislators can accomplish much in Washington. . . . Instead of seizing a few dramatic incidents of news suppression and playing them to the hilt, the subcommittee has spent wearisome hours going over exhaustive fine points in somebody's directive or somebody's memorandum."

"Instead of dramatizing the hearings for what they are—the only real attempt in some years to break through the smokescreen that surrounds the operations of the Executive Branch—they have let bureau officials drone along about directives and lull the people to sleep."

Confused Functions

We remember a day not so long ago when the style of Congressional investigating was not so responsible as to "lull the public to sleep." We also remember investigators who were not very strong candidates for the title of "nicest and most diligent . . . on the Hill," as the *Times* calls Mr. Moss. We seem to recall only too clearly how "effectively" American democracy was strengthened at home and respect for it was created abroad by Congressional investigators who, unlike "grave, quiet, hardworking . . . undramatic" Mr. Moss, knew perfectly how to seize "on a few dramatic incidents," how to "arouse . . . public attention," how to avoid spending "wearisome hours going over exhaustive fine points in somebody's directive or somebody's memorandum." The Moss subcommittee technique may not make sensational news that will sell newspapers. But it will make good government. Let us not confuse the functions of representative and journalist.

If the *Times* believes that Mr. Moss' work deserves attention and the support of the public, let it publicize his committee in its news coverage and campaign for it in its editorial columns. Although it may be sound politics for Mr. Moss to be more dramatic in his probe, we do not believe that he deserves criticism for his steady, competent legislative work.

Let us not encourage our Congressmen to spend more effort selling us policies than discovering the facts. Publicity creating a public awareness is the job of the press and other media. One hardly expects to find such an influential newspaper trying to push past us the idea that crusading in this area is not its job.

Cliques in Commons

Recently three members of the faculty gazed over the crowds in one of Harkness' dining rooms and deliberately chose to join a table occupied by two law students. This small episode is significant by its marked departure from the overwhelmingly cliquish attitude prevailing among those who dine in Commons.

One of the objectives which Harkness was designed to promote was the intermingling of graduate students in various fields with each other and with the faculty. Unfortunately, to even the most casual observer, Harkness remains a place where groups of students in similar departments congregate in exclusive and tightknit circles.

The basis for this ingroup pattern has become so narrow that, for example, one could always find last year certain law students from a certain *alma mater* in the identical place in Commons every noon. Many have noticed also with some humor the spectacle of an ever-growing circle of faculty around a particular table until every conceivable inch of space was occupied by the huddling professors.

We can only point out that continuance of such inhibitions frustrates the considerable educative function which a common dining place can perform. Human knowledge as well as the law is a seamless web. Likewise, the mutual enrichment of students and faculty of differing experiences and backgrounds can be a strong impetus toward acquiring a broader perspective of a Harvard education.

Gallery



HERBERT WECHSLER

Visiting Professor,
Harvard Law School

Herbert Wechsler, Visiting Professor of Law, on leave from Columbia University, decided early that his interest was not in private practice, but in "the public profession of the law." As a result, he is spending his life representing government officials in conflict with individuals, and individuals in conflict with the government.

Active Career

As milestones in an active career, he was law clerk to Chief Justice Harlan F. Stone (1932-33); counsel to the Democratic leader of the New York State Constitutional Convention (1938); Assistant Attorney General of New York State (1938-1940); executive secretary of the United States Board of Legal Examiners (1941-42); special assistant to the Attorney General of the United States (1940-44), and Assistant United States Attorney General in the War Division of the Department of Justice (1944-46).

In 1945, Professor Wechsler was technical adviser to the American members of the International Military Tribunal, and since 1941 has been

Current Cases

RECORD ON APPEAL

The right of indigent persons to appeal *in forma pauperis* has been more closely defined by a recent decision of the United States Court of Appeals for the Second Circuit. In *United States v. Johnson*, decided on November 9th, (25 U.S. Law Week 2213), a defendant charged with a federal offense claimed that the Fifth Amendment's Due Process clause guaranteed him leave to appeal *in forma pauperis*; that is, costs of his appeal to be borne by the Government in view of his poverty.

But 28 U.S.C. §1915 provides that "An appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith." In this case, the trial court certified that the appeal was being taken frivolously. Circuit Judge Carroll C. Hincks upheld the statute, saying, "Certainly the deprivation of aid to prosecute a frivolous appeal is not 'punishment'. And it laid well within the Congressional power to designate the trial judge as the authority to determine whether a given appeal is frivolous."

The same question as applied to state court proceedings was the subject of a decision by the United States Supreme Court earlier this year. In *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585 (1956), the defendants had been convicted of armed robbery. They moved to have a copy of the record of trial furnished to them without costs, on the ground of their poverty. This motion was denied, and the action of the trial court in so doing was not disturbed by the Illinois Supreme Court.

On appeal to the United States Supreme Court, the defendants asserted that the Illinois courts had violated their rights under the Due Process and Equal Protection clauses of the Fourteenth Amendment.

Illinois Court Reversed

The Court agreed with these contentions in a 5-4 decision. It assumed for purposes of the decision that errors had been committed at the trial which would merit reversal, and that the defendants in effect were unable to obtain appellate review solely because they were too poor to buy a stenographic transcript.

Associate Justice Hugo L. Black said for the majority, "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have enough to pay the costs in advance." (76 S.Ct. at 589).

Associate Justice Harold H. Burton, LL.B. '12, wrote a dissenting opinion, in which he was joined by Associate Justices Sherman Minton and Stanley F. Reed. Justice Burton remarked that "It is one thing for Congress and this Court to prescribe such procedure for the federal courts. It is quite another for this Court to hold that the Constitution of the United States had prescribed it for all state courts." (At 594).

a member of the Advisory Committee on Criminal Procedure of the United States Supreme Court. He is Chief Reporter for the American Law Institute's Model Penal Code. At the Law School, he teaches courses in Criminal Law and Constitutional Law. Next spring he will give a seminar in Legislative Problems.

Edited Review

Professor Wechsler is a native New Yorker. He received his A.B. from the City College of New York at the age of nineteen. At Columbia Law School, he was Editor-in-Chief of the *Law Review*. Upon his graduation in 1931, he was appointed an instructor in law at Columbia, served his clerkship for the year in accordance with the former New York custom, and went to Washington the next year for Chief Justice Stone. Mr. Wechsler returned to Columbia as an assistant professor in 1933, and was admitted to the New York bar. By the end of World War II he was a full professor.

Most of Professor Wechsler's work for the last five years has been in the field of criminal law. His text, *The Federal Courts and the Federal System*, written in collaboration with Professor Henry M. Hart, Jr., was published in 1953. A new edition of *Criminal Law and Its Administration*, originally written with the late Jerome Michael, also of Columbia, will appear shortly. But other aspects of public law, constitutional law, and federal jurisprudence have been the subject of his studies.

Comments on Party Ideology

Professor Wechsler believes that it is fortunate that the two major American political parties are not sharply split along conflicting lines of ideological uniformity. By containing most of the countervailing national forces within itself, each party can bring to the contest at the national level only a few large issues of national interest. This blunting of many tiny issues and extreme viewpoints, he feels, protects the government machinery from being captured and misused by ideological factions.

Mr. Wechsler is a lifelong Democrat, for, he says, "at the time I made my decision, there was no room for choice." He calls his successively deeper involvements with the public aspects of the law "a matter of accident and effort."

—Moss

CERTIORARI EXPLAINED

Last week the United States Supreme Court decided not to review *State v. Sheppard*, 165 Ohio St. 293, 135 N.E.2d 340 (1956). Nearly all laymen, and not a few members of the legal profession, will probably understand this to mean that the Court has approved the decision of the Ohio Supreme Court in affirming the murder conviction of Samuel Sheppard.

Sheppard was convicted at a trial which, in the words of Justice James F. Bell of the Ohio high court, was infested with "the atmosphere of a Roman Holiday." Coverage of a sensational nature was given the proceedings by newspapers, radio, and television, while reporters of those media crowded the courtroom. It was this notoriety which, Sheppard claimed, deprived him of due process of law guaranteed by the Fourteenth Amendment. Associate Justice Felix Frankfurter, LL.B. '06, explained the denial of certiorari.

Supreme Court Rule

"The truth that education demands reiteration," the Justice wrote, "bears on the understanding, and not only of the laity, of the meaning of the denial of a petition for certiorari. Despite the Court's frequent exposition, misconception recurrently manifests itself regarding the exercise of our discretion in not bringing a case here for review. Appropriate occasions may therefore be utilized to make explicit what ought to be assumed. This is one."

A few years ago Justice Frankfurter appended some remarks on another denial of a petition for certiorari. He then noted United States Supreme Court Rule 38, paragraph 5, which requires that at least four members of the Court concur in granting the writ, and said that the "sole significance" of the denial of a petition was that four members did not so concur. *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917, 70 S.Ct. 252, 254 (1950).

Justice Frankfurter emphasized this point again in his opinion of last week. "Such denial of [Sheppard's] petition in no wise implies that this Court approves the decision of the Supreme Court of Ohio," the Justice said. "It means and means only that for one reason or another this case did not commend itself to at least four members of the Court as falling within those considerations which should lead this Court to exercise its discretion in reviewing a lower court's decision."

The Justice mentioned the fact that more than 1,000 petitions for certiorari are filed each year, alluding to the immense labor that would be involved if the court were compelled to state its reasons even briefly on each denial.

Not even the positions of individual Justices are regularly recorded on certiorari decisions. Justice Frankfurter concluded by saying, "The rare cases in which an individual position is need leave unilluminated the functioning of the certiorari system, and do not reveal the position of all the members of the Court." 17 C.C.H. Sup. Ct. Bull. 05.

Use of Appellate Records and Briefs Necessary for Full Grasp of Cases

By BENJAMIN KAPLAN

(The following statement was written by Professor Benjamin Kaplan on behalf of the Faculty Library Committee.)

One of my students in a seminar on Copyright undertook to do a paper dealing with a narrow question on which there were at the time only a handful of relevant decisions, all in the Federal Courts. In early discussions with this student I found that although he had read the opinions of the courts with great care, he had not thought of consulting the records and briefs on appeal—those faithful accounts of what was actually put before the courts from start to finish. These materials were all readily available in our library. When finally the student did turn to the records, his views of the subject were rather thoroughly transformed, for he had succeeded in educating himself on the whole array of facts, not merely on the propositions of law and selected facts discussed in the opinions.

The other day one of our instructors remarked that in an Ames case he had just heard, neither side resorted to the record of a dubious principal decision which both sides cited and falteringly relied on. Again the record was complacently sitting on the library shelf. The instructor rightly took this as a curious omission.

That students rarely think of records and briefs is borne out by library statistics on the number of calls made for them. The trouble perhaps lies in our failing to advertise that the library is rich in appellate materials. I shrink from believing that students are not aware of the manifold important uses to which this documentation can be and is in fact put by lawyers in almost all branches of practice.

Close Scrutiny Needed

The value of conning the record should become clear at an early stage of the first year. In *Kerr S.S. Co., Inc. v. Radio Corporation of America*, 245 N.Y. 284, 157 N.E. 140 (1927), Fuller, *Basic Contract Law*, p. 16, there is a question of contract liability for failure to transmit a telegram. Chief Judge Cardozo says:

"The telegram on its face is an unintelligible cipher. It is written in Scott's code. Translated into English, it remains at best obscure, though some inkling of the transaction may be conveyed to an ingenious mind. Untranslated, it is jargon."

The plaintiff failed in the lawsuit; according to the court, he had not given the defendant adequate notice of the risk. Following the text of the opinion—a celebrated one—the learned casebook editor appends an interesting note: "From the

record of the case it appears that the code used by the plaintiff was Scott's Code, Tenth Edition, which was readily available to anyone; that the defendant had a copy of the code in its office for the convenience of customers wishing to decode messages received by them; and that 80 per cent of the messages transmitted by the defendant were in code."

Importance of the Records

I suggest that we understand the case better, we enhance our capacity to criticize it intelligently, when we draw on this part of the record. I suggest, too, that a man arguing the next case in the same field before the New York Court of Appeals, or even a court of the Commonwealth of Ames, concerned with the value of the *Kerr* case as precedent, with the question whether it can be satisfactorily "distinguished," and so on, would do well to know what was in the *Kerr* record. In certain imaginable events this knowledge could make the difference between success and failure on an appeal. And this is so, whether the jurisdiction is in the habit of saying that the words of the judges are to be read in the light of the entire record or only so much of it as is referred to in their opinions. Where a case is decided on short memorandum or without opinion (as so often happens in the New York Court of Appeals), use of the record becomes a duty. I have laid stress on the record as an instrument for searching out the meaning of decisions and hence their scope and binding force, but the same observation applies also to the briefs of the parties. For it makes a difference whether an opinion is written in response to one argument or another, whether a given argument was or was not addressed to the court.

Opinions Necessarily Narrow

Speaking more generally, the lawyer's method in most things is historical; he goes to old solutions in order to find the beginning of an answer to a new problem. Because time is limited, the historical inquiry must often be narrowly confined to judicial opinions. Commonly, perhaps necessarily, these opinions are stale affairs suppressing some considerable part of the

"life situations" from which they arose. If we do indeed hitch the past to the present, let the past be well understood, let the sortie into history be as deep as circumstances permit. The reading of records and briefs can be seen as one means of enlarging and humanizing that backward look which the lawyer customarily takes to prepare for the precise question before him.

Using Past Techniques

Some records hold the key to specific technical questions. If you want to know how to bind an author to an assignment of the renewal term of a copyright—to revert to a favorite subject—you might start with the instruments actually used in the first important case on the subject, *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943), although you may not want to stop there. If you are looking into a point of law resembling

of great value hard to obtain in any other way: data on industrial practices, texts of contracts, even reconduce material on social and economic conditions.

Finally, there is the practical task of developing skill in presenting a case on trial or appeal. What better means exists of building up this skill—short of handling cases on one's own—than examining how others have gone about the business? So we are back to records and briefs, from which a student can get a lively awareness of the technique and strategy of litigation. I hear that vicarious experience in the form of trial records is being plentifully supplied in Evidence for the particular purpose of that course. This is a fine thing; oldtimers will regret not having had such training at law school. And there are some seminars and courses where attention to records is the order of the day. But what is wanted is a steady consciousness that these sources are useful. The time factor is an unavoidable embarrassment, but I should hope that every student would be led sometime during his years here to a careful study of several appellate records in all their parts, procedural as well as substantive, just as they stood before the axe of decision fell.

Extent of Collection

As I am preaching to students who must already be committed to the doctrine if not the practice of utilizing appellate materials, I shall stop my harangue here, and append a summary of our library holdings in this important department. You will notice that we do not have everything, but we do have a great deal. The process of calling for a record and accompanying briefs, I remind you, is no more complicated than giving the library attendant the names of the parties, official citation and docket number. In the fullness of time you will have in your hand those pamphlets which in imagination's eye come close to being a live case, the sum of the contentious strivings of flesh-and-blood lawyers.

Harvard Law Library Holdings

Supreme Court of the United States:
From 105 U.S. (1881)

United States Courts of Appeals:

1st Cir.—from 1926 7th Cir.—from 1926
2d Cir.—from 1926 8th Cir.—from 1927
3rd Cir.—from 1925 9th Cir.—1926-1944
4th Cir.—from 1926 10th Cir.—from 1929
5th Cir.—from 1925 D.C. Cir.—from 1926
6th Cir.—from 1926

STUDENTS

(Continued from page one)

One is a tape-recorder, whereby self-help can be applied. Extension courses in English are offered by the University. Many foreign students room with Americans in the dormitories. Others have been known to give lessons in their own tongue in exchange for lessons in English.

Reactions Vary

It would be impossible to generalize about the foreign student's reaction to life in the Harvard community. Most are greatly impressed by the research facilities of Langdell Library, where large amounts of legal material from almost every country may be found. Those accustomed to a less pressurized approach to the study of law find the rigorous curriculum of the Law School amazing. To some, regular attendance at classes is novel. And, of course, the social mores of America always prove to be interesting to many students from abroad. These students receive numerous invitations to American homes, and find native hospitality most gratifying. Indeed, after the initial adjustment is made, most foreign students report their stay in Cambridge most rewarding.

—Page

Massachusetts Supreme Judicial Court:

97 Mass. (1867); 100-114 Mass. (1868-1874); from 186 Mass. (1904)

Minnesota Supreme Court: 1881-1894

New York Court of Appeals: from 231 N.Y. (1921)

Pennsylvania Supreme Court: from 1933

Miscellaneous: Besides printed trial records series, such as Howell's State Trials, the Library has various separate records of famous trials and of receiverships. These materials are listed alphabetically in the card catalog under plaintiff's name in a civil case, defendant's name in a criminal case, and company's name in a receivership.

Note: Records and briefs of American appellate cases outside the foregoing lists can normally be procured through the Inter-Library Loan Service of the Harvard Law Library.

SQUASH RACKETS

Largest Variety in New England

Tennis & Squash Shop

67A Mt. AUBURN ST. CAMBRIDGE
Opp. Lowell House — TR 6-5417

Second Hand Lawbooks Law School Aids

HARVARD BOOK STORE
1248 Mass. Ave. Cambridge
Opp. Lamont Library TR 6-9069

CHERCHEZ LA FLAMME

BARBER SHOP
• EIGHT EXPERT BARBERS
21 DUNSTER ST. EST. 1898

Did You Get Yours?

If a little extra cash, at this time of year, will help . . . perhaps you have failed to pick up your Coop Patronage Refund Check.

Did You Get Yours?



HARVARD SQUARE

Subscription
Eight Issues
\$7.50

... Subscribe Now ...

Student
Subscription
\$4.00

HARVARD LAW REVIEW

In 1887 the editors of the first issue of the *Harvard Law Review* explained to their readers that it was "not intended to enter into competition with established law journals, which are managed by lawyers of experience, and have already a firm footing with the profession."* In 1956 the "established law journals" have long been forgotten, and the *Harvard Law Review*, renowned for the quality of its analysis and the accuracy of its citations, has become "the New York Times of the legal magazines."†

The *Review* can help you keep abreast of the law, as it has helped other lawyers and law students for sixty-nine years. A subscription to volume 70 will bring you many valuable articles and Notes, as well as comments (about a dozen each month) on recent decisions and reviews of books which are of particular interest to the legal profession.

IN THE DECEMBER ISSUE

Kenneth Culp Davis, *The Requirement of a Trial-Type Hearing*
Donald F. Turner, *Antitrust Policy and the Cellophane Case*
Note, *Metropolitan Criminal Courts of First Instance*
Note, *The Comptroller General of the United States*

IN FUTURE ISSUES

ARTICLES: Paul Freund on Mr. Justice Brandeis; Sedgwick Green on the effect of labor disputes on the administration of government contracts; David Herwitz on accounting for long-term construction contracts; Mark DeWolfe Howe on Mr. Justice Holmes; Irving Kaufman on ethical problems of the former government attorney; Samuel Pizar on Soviet conflict of laws; J. C. Smith on criminal attempts.

NOTES: Nationalization of the Suez Canal Company; exclusive jurisdiction of the federal courts in private civil actions; private pension plans; judicial review of military discharge classifications; exemplary damages; local actions in the federal courts; the federal Assimilative Crimes Act; judicial review of administrative adjudicatory action taken without a hearing; proposal of federal constitutional amendments by convention; the power of Congress to investigate; misrepresentation in elections; the Status of Forces Agreement; statutes regulating relations between automobile manufacturers and dealers; enjoining mergers under the Clayton Act; limitation of liability in carrier tariffs; validity of local laws requiring registration of labor organizers.

DEVELOPMENTS IN THE LAW: Remedies against the United States.

* 1 HARV. L. REV. 35 (1887).
† 33 A.B.A.J. 869 (1947).

PASSPORTS

(Continued from page one)

than the Communist International today. These statutes were repealed in 1606 and from that time on the Englishman was in fact free to travel. As Blackstone said, "Everybody has, or at least assumes, the liberty of going abroad when he pleases," but Blackstone cautiously acknowledged a prerogative power to prevent exit from the realm.

The American constitutional position is very uncertain. The Court of Appeals of the District of Columbia has flatly rejected the argument that the passport being a "political" document the Government has absolute discretion as to its issue. "The right to travel * * * is a natural right subject to the rights of others and to reasonable regulation under law," and since a passport may be necessary for travel it cannot be denied without a hearing, but the Court has yet to decide whether a denial might rest on undisclosed information. Reasons for the denial must be given which are consistent with the purposes of the granted power. We have, however, as yet no important decision as to the rationale of this power. The only case to date in which reasons have been held insufficient was one in which the applicant was impecunious and somewhat irresponsible so that his presence abroad might "embarrass" the consuls.

Puzzling Policy

It is nearly impossible to determine the Department of State's present passport policy. The Secretary is authorized by statute to deny a passport which would "prejudice the orderly conduct of foreign relations" or "otherwise be prejudicial to the interests of the United States" and it is in these very general terms that passports are denied. One suspects, for example, that the denials to Corliss Lamont, Rockwell Kent, Arthur Miller, etc., were based on a suspicion or information that they once were Communists and, perhaps still are, but whether the latter fact is thought to be necessary we do not know.

If the applicant puts up a fight or undertakes costly litigation, or if he can see his way clear to marry Marilyn Monroe, he may wring from the Department a six-month honeymoon abroad. A court order requiring the giving of reasons may force the grant because the Department may be unwilling or unable to be more explicit. A Congressman has been denied a passport to aid Greek rebels, a purpose stated to be contrary to our policy; a respected clergyman, because his "political activities" were disapproved. It is intolerable that we are absolutely in the dark as to the criteria upon which this important power is being exercised.

Travel Is a Right

What restrictions on the right to leave the country can be justified? There is no doubt where departure is part of a scheme to evade taxes, conscription, payment of debt, crime or fraud. But even here administrative process justifies only provisional detention until the underlying obligation is established by due process of law.

Can detention, then, ever be justified where no crime or evasion of obligation can be presently demonstrated? It is often

asserted that travel abroad is as much a "natural" right as the right to move or speak freely within the country or to practice one's religion: that it cannot, therefore, be subjected to any different restrictions. Like these other rights, it nourishes the self-determining creative character of the individual not simply by the mere enlarging of his freedom of action, but by expanding the scope of his experience. It attests to the community of nations; brings its peoples together; promotes familiarity and understanding; enriches and diversifies our science and culture. Even where the object of the visit is criticism, it promotes that continuous human dialogue whose aim is mutual adjustment and toleration. We must remember, too, that however we value the citizen's interest in travel, a passport denial based on vague suspicion impairs his reputation and leaves him worse off than had he never applied at all.

Society Is Market Place

Nevertheless, the right to travel is distinguished from the other great "rights" and interests, as they are indeed distinguished among themselves. All of them rely for their effective enforcement and their operative meaning on an organized society. If the society grants the right to move or speak freely within its territory, it is at the same time able to bring its force to bear against the improper uses of these freedoms. Even the legal use of freedom of speech supposes as a premise the total complex of a society: one which is appealed to, which listens, and which replies. This society is the "market place of ideas" which determines the worth of what is offered and so defends itself from error.

Military Necessities

In the time of war the United States has set up passport control. The criterion is the defense of the country from external enemies. It is asserted that the precedents of "war" have no relevance to "peace." But the critical consideration is defense against an external enemy; and communication abroad between our citizens and the enemy cannot by its nature be controlled by the usual criminal process. The facts are inevitably speculative: all is to be done after the bird has flown. Congress and the Administration have concluded that the Communist International is a foreign and domestic enemy. We deal with its domestic aspect by criminal process; there would seem to be constitutional warrant for dealing with its external aspect by exit control. If an avowed Communist is going abroad, it may be assumed that he will take counsel there with his fellows, will arrange for the steady and dependable flow of cash and information, and do his bit to promote the purposes of the "conspiracy."

There is still the rub that a great many of those denied passports stoutly protest that they are not Communists, and since the action rests on a secret dossier, its validity must be taken on faith. The risk of government regulation, particularly where applicable to a great number of cases, is the inexorable drift to routine, ultra-cautious standards and the reliance on narrow, frightened minor officials. These risks inherent in any passport program are among the most important considerations in de-

termining what risks we are prepared to run in not controlling travel. For we must never forget that in our system of government, indeed, in any system in which men are to be able to breathe and think freely, we must run some risks. The evil of the secret dossier would be somewhat mitigated if denials were limited to cases in which the Administration was prepared to make a specific finding of the Communist element; and it would be further mitigated if we could devise a procedure which would limit the use of secret evidence to cases of utmost urgency or real risk to the integrity of our intelligence system.

Sources Require Silence

But should we condemn the secret dossier absolutely and without exception? Shall we deny the urgency of the Government's argument that if it must reveal its sources of information, its sources may dry up? We might conclude that the risk of unjust accusation is greater than that which we should suffer from the occasional miscreant who takes the field abroad against us. This is the choice, of course, we make in our criminal law: no conviction may depend upon a secret dossier. The state must choose between revealing its evidence or letting the criminal go scot-free. But this appeal to our "tradition of fair play" is not conclusive; there have been and continue to be a number of consequences visited upon individuals short of imprisonment for crime which rest upon unrevealed evidence, e.g. exclusion of aliens. The use of secret evidence then is not unknown to us. Yet we may feel that it is wrong, and that the risks we should run from abandoning the practice do not exceed those of the criminal law. Nevertheless, I do not feel a sufficient assurance on the point to urge upon the reader the absolute rejection of the secret dossier.

Inherent Dangers

But it is at this point of danger to our security that I would draw the line. We may keep Communist "conspirators" at home because we have determined that the dangers are great and imminent. There may be other cases of a similar danger; the disclosure of top secrets suggests itself. But no lesser danger should suffice. No mere random anxiety that queer or "radical" persons may meet with others of their kind, that they may call current policies into question, or cause discomfiture to those at home or abroad, justifies the exercise of a power so likely, as the record shows, to be abused. It is intolerable, I think, that a bureau should thus trammel the individual on grounds no more palpable than "the interests of the United States." The right to go abroad may not be of so exalted a nature as the right to move about, to associate and to speak within one's country: thus to participate in the community's life is the paramount opportunity and duty of the citizen. But it is nevertheless a right of

Tests Given to Determine Law Applicants' Motivation

One hundred twenty-five members of the first year class participated last month in an experimental test conducted by the Educational Testing Service to measure the motivation of applicants to law schools, according to Admissions Director Louis A. Toepfer.

The experiment is being financed by the Law School Admissions Policy Committee which is composed of representatives from several law schools and is headed by Mr. Toepfer. The study seeks information on such questions as: "Why do people fail to fulfill the potential reflected in their test scores? Why do some do better than we expect? Why do some students withdraw? These are the things we want to find out," Mr. Toepfer explained.

Need for New Tests

"The capacity tests we have are pretty good," he stated. "We can accurately measure the student's potential, but we as yet have no means of measuring how that capacity will be used. This is buried in factors we do not understand."

Mr. Toepfer explained that the test results will be used in deciding whether these motivational factors can be measured. The results of the test will be compared with grades, withdrawals, and with performance in the early years of practice.

"If there is a meaningful correlation between the answers given in the test and performance of the student, we will know that the tests can be used in deciding on the admission of students."

"In attempting to measure these factors, we are working beyond the present. The experiment will take years and may have to be given up, but we are hopeful," he said.

Discussing present admission criteria, Mr. Toepfer said that the Law School Ad-

missions Test was the best single guide that the school has in selecting students. When coupled with the undergraduate record, the test has a statistically high correlation with academic performance.

Constant Improvement

"The test is being constantly improved," Mr. Toepfer stated. On the basis of the first 50,000 students to have taken it, we have changed it considerably this year. However, the big strides are behind us and from now on the improvements will be smaller and more difficult to achieve."

Mr. Toepfer emphasized two points: "First," he said, "the Law School Admission Test is not meaningful in any one case. It is statistically accurate and an invaluable aid in administering large numbers, but it is not good enough to indicate performance reliably in one instance. As an apt illustration of this, in a recent class the first man and the last to pass both had the same score on the Admission Test."

"Second, the experiments in student characteristics testing are not designed to disclose personality, but to measure motivation, interest and stability. There will be no individual results known; the test is expected only to show whether this testing will be successful or not."

"Faced with the increasing competition for places in the Law School, we are anxious to invest those places in the soundest people," he concluded.

Law Students Act To Aid Hungarians

A committee composed of interested law students as well as representatives from some student organizations will meet in the Wheeler Room at 1:30 p.m. tomorrow to plan a fund drive for the thousands of Hungarian refugees who have fled into Austria. "Many of these refugees are families of workers and students who are still resisting the Russians. We think the students should do something to help them," declared Arthur G. Harper, 3L of Andover, one of the committee members.

Mr. Harper hopes that the drive can be started sometime during the week of December 3. Funds will be collected in the dormitories. Members of both the Dormitory Council and the Phillips Brooks House Committee are expected to help the Law School drive.

HILLMAN MINX — 1951

good condition — one owner — teacher — winterized — ready to go — \$350 — Call TRowbridge 6-8083 evenings — Mon. thru Thurs.

Rackets Restrung

One Day Service
TENNIS & SQUASH SHOP
67a Mt. Auburn St. Cambridge
Opp. Lowell House — TR 6-5417

USED AND NEW Law Textbooks and Casebooks for Harvard Law School Students

- Outlines • Dictionaries • Quizzers • Supplementary Readings • Review Books

Sell Us Your Discarded Books Yes, even those discontinued at Harvard

Barnes & Noble — Books
AT HARVARD SQUARE — 28 BOYLSTON STREET

THE MISSES LITTLEFIELD HARVARD SQUARE

PROFESSIONAL TYPISTS
4 BRATTLE STREET TR 6-7495

CRONIN'S 30 DUNSTER ST.

Famous for Steaks
Chops & Sea Food

Porter House Steak for Two
\$4.45

SAMPLE DAILY SPECIALS —

Soup or Juice
Chicken Salad Sandwich
Pot. Chips — Chefs Salad 75c
Grilled Sirloin Flank Steak
Baked Pot. — Tossed Salad 95c
Rolls & Butter — Beverage
Dessert

BEERS — WINES — LIQUORS

Tel. EL 4-1366 Jim Cronin, Mgr.

JOSEPH KEEZER

Oldest 'Old Clothes Man' at Harvard — 57 Years

USED Clothes, Jewelry, Bric-a-Brac, Antiques, Luggage
Gold and Silver BOUGHT & SOLD

A Large Assortment of Tweed Sport Jackets, Blazers, Suits,
Chesterfield overcoats and Topcoats in excellent condition.

HARVARD COMMUNITY EXCHANGE
1094 MASS. AVE. KI 7-2455

The COOP OPTICAL DEPARTMENT



Offers you accurate and prompt service
on all prescriptions. Broken lenses and
frames replaced.

New Location
Third Floor
Take Elevator

Harvard Cooperative Society
1400 Mass. Ave., Cambridge TR 6-3000

Same day Dry Cleaning Service

CLEANING BY
MONACO

RITE-WAY
DRY CLEANERS, INC.

- Complete Laundry Service
- Tailor, Dressmaker on premises
- 24 hr. Pick up and Delivery Service

63 Church Street
Harvard Sq. UN 4-7996
and
4 Hudson Street
(off 1612 Mass. Ave.)
KI 7-8008