



Harvard Law Record

America's Oldest Law School Newspaper

Mr. Borgeson

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CAMBRIDGE, MASS., THURSDAY, MARCH 28, 1957

TEN CENTS

Dawson, Herwitz and Turner Scheduled to Stay Next Year

Numerous changes in teaching assignments and the addition of several new seminars will be announced early next week with the publication of the 1957-58 Law School Catalogue. The teaching program reveals no startling changes in first and second year courses as the Law School continues to follow the basic program developed in 1949.

Personnel changes continue in the required courses due to a rotation policy and temporary and permanent vacancies in the faculty.

Visiting Professor John P. Dawson will remain on the faculty for at least one more year. David R. Herwitz and Donald F. Turner, appointed as assistant professors three years ago, are also scheduled to teach here next year.

Professor Fleming James of Yale will give first year courses in Civil Procedure and Torts. Professor Harry Street of the University of Manchester will teach Torts as well as conduct new seminars in Comparative Administrative Law and Damages in Torts and Contracts. Professor Clark Byse of the University of Pennsylvania has been assigned to teach Contracts and Administrative Law.

Criminal Law

Professor Charles A. Fairman will preside over Criminal Law for the first time since his appointment several years ago. A substitution in Agency will be made as Professor James A. MacLachlan takes over one section as well as teaching his usual course in Property.

Changes in the second year find Professor Phil C. Neal of Stanford assuming two sections of Administrative Law for Professors Louis L. Jaffe and Albert M. Sacks. Constitutional Law will have Professors Arthur E. Sutherland and Mark DeWolfe Howe returning after an absence of one year in these courses. Professor Austin W. Scott will continue to give two sections of Trusts.

Evidence

Evidence will be given as semester courses in the fall and spring. Professor Richard H. Field will take over one section in place of his usual seminar in Judicial Administration. Professor John T. McNaughton will teach one section each semester as well as a seminar on the subject. The full year course has been eliminated.

Professor Archibald Cox will teach Unfair Competition during Professor Benjamin Kaplan's absence. The course will place less emphasis on Copyright law.

The Trial Practice course has been scheduled for four sections in the spring in anticipation of continued high interest in the subject. The normal level of two sections was increased to four this spring.

Professor Howe will give a seminar on Justice Oliver Wendell Holmes, Jr. The usual seminar on Constitutional

(See FACULTY on page three)

Student Insurance Can Be Extended

Applications to extend the Harvard Student Health Insurance for the summer months will be accepted until April 1, 1957. Students in attendance during the spring term, including those graduating in June, are eligible.

Coverage, the same as during the school year, is described in the Harvard Student Health and Insurance Plan Brochure.

A payment of five dollars will extend coverage from June 21 to September 9. Insurance benefits are applicable anywhere in the United States or abroad.

Application blanks and details of the plan may be obtained from Miss Martha Downey at the University Health Office at 15 Holyoke Street, telephone Kirkland 7-7600, extension 561.

M. P. Speaks

Patrick H. B. Wall, Conservative member of the British Parliament and a member of its Foreign Policy Committee, will speak in Room 1, Shannon Hall today at 11 a.m. Mr. Wall's address will be under the sponsorship of the Harvard Army ROTC Battalion. He will speak on "The Challenge of the Middle East."

Views on World Organization Are Subject of Final Forum

The final Law School Forum of the season brought together Socialist elder statesman Norman Thomas and Clarence Manion, former Dean of the Notre Dame Law School.

The two speakers, representing both ends of the political spectrum brought diametrically opposed views on the role of the United States in relation to the United Nations before their audience in the most lively Forum of the current season, at Rindge Technical High School and auditorium.



Norman Thomas

Mr. Manion is chairman of "For America," a right-wing party founded in 1954 with the avowed aim to "combat superinternationalism and communism." A supporter of "For America," the late Colonel Robert R. McCormick, had described the founding of "For America" as "the beginning of the end of the Republican party."

Mr. Manion also was chairman of the Hoover Commission on Intergovernmental Relations.

As first speaker, Mr. Manion lost no time in making his position clear. There is "an irreconcilable adversity of interest between the United States and the United Nations," he said.

Adversity of Interest

This irreconcilable element, in Mr. Manion's view, arises from the "anti-quarian, self-evident truths" that "freedom of the individual and limited self-government are counterparts."

The speaker objected to the insidious trend toward "oneworldliness" which he claimed is being tolerated and permitted without the advice or consent of the American public.

"The United Nations is a subterfuge through which and by which the United States is being drawn into world governments... and world government is the stopping place for American nationality," said Mr. Manion.

Norman Thomas took the rostrum to denounce "passionate hysteria over

(See FORUM on page four)

Senators Confirm New Appointments

William J. Brennan, Jr., LL.B. '31, and Charles Evans Whittaker were confirmed by the Senate as Associate Justices of the Supreme Court last week.

Justice Brennan takes the position vacated by Justice Sherman Minton who retired last October. Justice Whittaker replaces Justice Stanley F. Reed who retired in February.

The Senate approved the two nominations by a voice vote. Justice Whittaker's nomination passed without a negative vote.

Senator Joseph R. McCarthy dissented with a loud "NO!" when Justice Brennan's nomination was voted on. His was the only dissenting voice.

In a brief speech, Senator McCarthy charged that the Justice had used his former position on the New Jersey Supreme Court as a "private sanctuary" from which to harass Senate investigations and hearings on communism.

Commissions Signed

President Eisenhower's Bermuda trip postponed until Monday the issuance of the commissions. Justice Brennan held a temporary commission under an interim appointment which has allowed him to sit on the court since his appointment last year. His commission was renewed at the same time Justice Whittaker's was issued.

Justice Whittaker had to await the Presidential commission before he was permitted to take his seat on the bench.

The newly-appointed Justices face a court work load which averages about 1400 cases a term. Of these, approximately 200 get argument and written opinions.

Supreme Court Justices receive \$35,000 per year and retire on full pay after the age of 65 if they have served on the federal bench for fifteen years at the time of their retirement.

Top Military Representatives Trace Current NATO Plans

The role of member nations in the North Atlantic Treaty Organization was discussed last Saturday afternoon in Sanders Theatre by thirteen high-ranking officers representing NATO countries on the organization's Military Representatives Committee. This is a permanent military planning body, with headquarters in Washington.

Brigadier General W. Barton Leach, USAFR, Story Professor of Law, moderated the symposium. The discussion was part of a two-day program designed to inform the public about the NATO military mission and its associated problems. The Boston Regional Conference on NATO Affairs sponsored the program.

First Objective

The United States representative, Lieutenant General Leon W. Johnson, USAF, opened the program with an outline of the history and organization of NATO. He recalled the emergence of NATO as a countervailing force to the Soviet threat to a devastated Europe. No NATO territory ever fell under Soviet domination, he noted.

The first objective of NATO, according to General Johnson, is to make it clear that war would be unprofitable in the long run to any aggressor. The second NATO objective, he said, is to win the war if it does occur.

General Johnson likened NATO to the ancient sword and shield. The striking power of the Strategic Air Command is the sword, he explained, and the other NATO forces are the shield.

In depicting the economic power of NATO, he observed that NATO countries include 434 million people, produce 70% of the world's steel, 59% of its petroleum, 67% of its electric power, and control 80% of its shipping.

Historical Reason

Following General Johnson's address, each of the twelve other military representatives explained his country's historical reason for entering NATO, and its part in the present NATO organization.

The Canadian military representative outlined the operations of the warning systems strung throughout the sparsely populated region of his country.

The German delegate detailed the overall military strategy involved in the defense of Europe from the German point of view.

"It will be found not possible to



W. Barton Leach

limit the locus of battle," he declared. "An aggressor would strike at the Scandinavian ore mines to seize them and gain access to the Baltic in a single offensive. Success at the sources of war materials would seriously hamper NATO ability to retaliate."

"Germany's terrain is a break in the natural barriers dividing North and South Europe: the Alps and the Pyrenees. Hamburg is only two minutes from the Iron Curtain; the Rhine and the Ruhr, only ten minutes."

"It is on the soil of Germany that the protective shield forces of NATO must fight."

New Jersey Plan Stops Ticket "Fix"

Arthur T. Vanderbilt, Chief Justice of the New Jersey Supreme Court, outlined his state's approach to the problem of "fixing" traffic tickets at a recent meeting of the National Safety Conference in Boston.

He indicated that a "no fix" system has two distinct advantages. It improves public safety and promotes respect for the "little courts" in a state.

The New Jersey plan went into effect in 1948 throughout the state. It was not designed as a revenue measure, but the jurist pointed out that in the first year of its operation it netted \$2,280,000. Last year motorists paid \$7,000,000 in fines.

Quadruplicate Tickets

The non-fixable tickets are made out in quadruplicate. This makes it almost impossible for the offender to escape by intercession of a friendly official somewhere along the line.

The Chief Justice pointed out that under this system the violator would have to "fix" the arresting policeman, the chief of police and the judge. Tickets are consecutively numbered and must be accounted for.

Although the New Jersey plan has the approval of the American Bar Association, the Conference of Chief Justices, the Conference of Governors, and other organizations interested in the promotion of traffic safety, the non-fixable ticket has not been introduced extensively elsewhere.

New Jersey is the sole user on a mandatory basis, but Michigan, New York and a few scattered cities use it on a partial basis.

Justice Vanderbilt said that the introduction of the uniform system had been met by a storm of protest from police chiefs, politicians and responsible citizens.

Expanded Scope of Activities Aim of Voluntary Defenders

The Harvard Voluntary Defenders, now in their eighth year of existence, are planning an expansion of their activities in defending indigent persons accused of crime.

The twenty-six second and third year men who make up this organization expect to add appellate brief writing to their regular activities by next fall, according to officers of the Law School group.

Organized in 1949 by members of the Harvard Legal Aid Bureau, the Voluntary Defenders became an independent Law School organization the following year. Since then, they have worked in close cooperation with the Boston Voluntary Defenders Committee.

Free Assistance

The Boston group is a private organization supported by Community Chest funds. Under the direction of Wilbur G. Hollingsworth it gives free legal assistance to indigent persons accused of crime in the metropolitan Boston area.

In areas of the State where the Boston Voluntary Defenders do not operate, impecunious defendants frequently receive no benefit of counsel, either when tried or when attempting an appeal.

Under present practices, a defendant without funds who wishes to appeal a conviction by a Massachusetts Superior Court, may write a letter to

the Supreme Judicial Court stating his case. In other cases, his plight comes to the attention of a civic-minded group, which will write to the Supreme Judicial Court.

In either event, a hearing is held before a member of the Court, who decides if there is merit in the appeal. If he holds in the defendant's favor, the Court then assigns the case to a member of the Massachusetts Bar, usually a Boston attorney.

Under a newly proposed plan, the assigned attorney will be notified that the Harvard Voluntary Defenders will be available to write the brief. In most cases three members of the Voluntary Defenders will work on each brief. More will be assigned if speed is essential or if a great deal of research is required.

Fredric C. Tausend, 3L of New York City, chairman of the committee that has organized the program, anticipates that when the plan is in effect

(See DEFENDERS on page four)

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The Wrong Way

During the NATO Symposium held at Sanders Theatre last Saturday, between fifty and one hundred persons in the audience walked out. This reflection on the success of the symposium will bring little credit upon either the University or American audiences in general, although the distinguished representatives of thirteen NATO powers who were on stage did their best to salvage the afternoon's program. They succeeded in disclosing many illuminating national attitudes on the subject of national sovereignty and collective security. But such disclosures were to be gleaned from the demeanor of the speakers themselves and from chance phrases in their speeches, rather than from the prepared topics they were pursuing. The conference failed in this respect because it underestimated two elements: the caliber of its speakers and the caliber of its audience.

Before going on to what that conference might have been, it will be well to sum up what it was. Except for the ritual stimulation of seeing international figures and flags on stage, it did nothing to reinforce the high ideals which NATO must represent. Although admission to the conference was by reserved ticket only, the balcony was empty and the audience at the later stages of the afternoon numbered, by a gracious count, about two hundred fifty.

Better Planning Needed

The feeling of embarrassed gratitude to the members of the NATO Standing Group which should remain with us now may serve to guide future conference planners toward a more creative and educational use of their speakers' abilities, if they are again fortunate enough to have available such men as these. We present two suggestions for those who want people to become interested in NATO enough to inform themselves about it and support it:

First, throw away the muzzles. Last Saturday the speakers were restricted to answering two previously-prepared questions apiece. The audience was not allowed to ask any questions of its own. Was there any fear that these capable, experienced international military policy administrators did not have enough diplomatic experience to handle spontaneous questions? Or was the audience, which consisted largely of Harvard faculty and graduate students, not qualified to ask questions?

Second, discard the idea that every foreign speaker is somehow obligated to show us how his country contributed historical roots to ours, and how his country and ours share the same valiant dedication to high ideals, etc. It may be argued that we must not come to take each other for granted. True: but harping on the subject results in a ring of false idealism which is extremely dangerous to the success of the already difficult job of keeping public attention on international affairs, except for those moments when that attention is grasped by the demonstrative publicity given to foreign crises.

Some of the generals spoke in French or Italian, and their remarks were translated by an American colonel. Lieutenant General Humberto Delgado of Portugal dispensed with his own interpreter, and delivered a vigorous talk in English himself. He thus became a very popular speaker, since he saved time.

When the German delegate was called, the audience learned that Brigadier General H. G. von Tempelhoff, the scheduled representative, had been unable to attend, and that his deputy, Colonel Gernot J. H. Nagel, was to speak in his stead. It is fair to say that, as compared with all the other generals and ad-

mirals, Colonel Nagel was by far the most dynamic, the most precise, and the most informative figure present. He rose when called, executed a slight bow, and began to speak in perfect English, even throwing in a few well-fitting idioms of his own to spice his thoughts.

The German Success

In rapid-fire succession, he explained the military strategy of conducting battles in Germany. He described where its plains and mountains were, where breakthroughs were likely to occur, how many divisions and other military installations Germany would give to NATO this year, how many next year, where they should be moved about, and where maintained. In effect, he demonstrated a complete and minute comprehension of NATO strategy down to the last detail of immediate and planned physical possibilities. If one can judge the nation from its representative, then Germany is now the most rapidly-developing military and industrial power on the continent, and also the one with the greatest reserve of strength to give to NATO as demanded.

He alone of the speakers gave the specific logistical facts and important information which the audience expected to hear from such men, and which it did not expect to obtain elsewhere. All the others remained stilled in brave and circuitous attempts to answer, first, how their military histories have culminated in their present NATO membership, and second, how they were presently contributing to NATO. Most of the answers, accordingly, appeared in terms of general policy, rather than in terms of specific possibilities and accomplishments. It appeared very much as if everyone had been asked to justify his own country's right to membership in an American-sponsored alliance, an inaccurate and impertinent orientation.

To sum up: a solemn accord of thanks is due the military members of the NATO Standing Group for coming here. We wish they had been better used.

Article Describing Jurisprudence Opens Series on Second Year

With this issue the RECORD begins a series of articles in the second year "perspective" courses.

In 1949 the special committee on the curriculum outlined the goals of the "perspective" courses. The concept of the committee was that the student was to be introduced to a course in which ends of law and government were to be made an explicit object of study. In examining the premises underlying the legal system, the student should gain an overview of the system's aims and its relation to the whole life of man in society.

Eight courses will be offered in the fall. Professor Lon L. Fuller initiates the series with a discussion of his course in Jurisprudence.

By LON L. FULLER

Jurisprudence is generally thought of as a graduate course or as a subject to be taken at the very end of formal legal education. Our curriculum departs radically from this conception, and places the introductory course in Jurisprudence in the first semester of the second year.

As I conceive the course in Jurisprudence it is primarily an introduction to legal philosophy. I make no attempt to initiate the student into all the schools and sub-schools of legal theory, but seek instead to study closely and discuss with him a limited selection of representative writings in this field. At present we read extensive works or passages from Austin, Holmes, Gray, Maine, Bentham, J. S. Mill, Corbin and Cook (as expositors of the Hohfeldian analysis), and Aristotle (the chapter on Justice). In addition, I recommend that students taking the course read in advance Cardozo's *Nature of the Judicial Process* and Pound's *Introduction to Legal Philosophy*.

I can best convey the general aim of the course by a quotation from Holmes: "I sometimes tell students that the law schools pursue an inspirational combined with logical method, that is, the postulates are taken for granted upon authority without inquiry into their worth, and then logic is used as the only tool to develop the results." In Jurisprudence attention is directed precisely toward those postulates that tend elsewhere to be taken for granted. I mean not simply, or even chiefly, those postulates that underlie, say, the law of contracts and torts, but the more basic premises that underlie any legal order, or indeed, any organized society.

I try to relate the course as closely as I can to the work of the practicing attorney. I try to present the lawyer, not as one skilled in predicting which way judges will jump, or as the competent expounder of legislative fiat, but, to borrow a phrase from my colleague Milton Katz, as "an expert in structure." I try to uncover the common thread of insight

Gallery

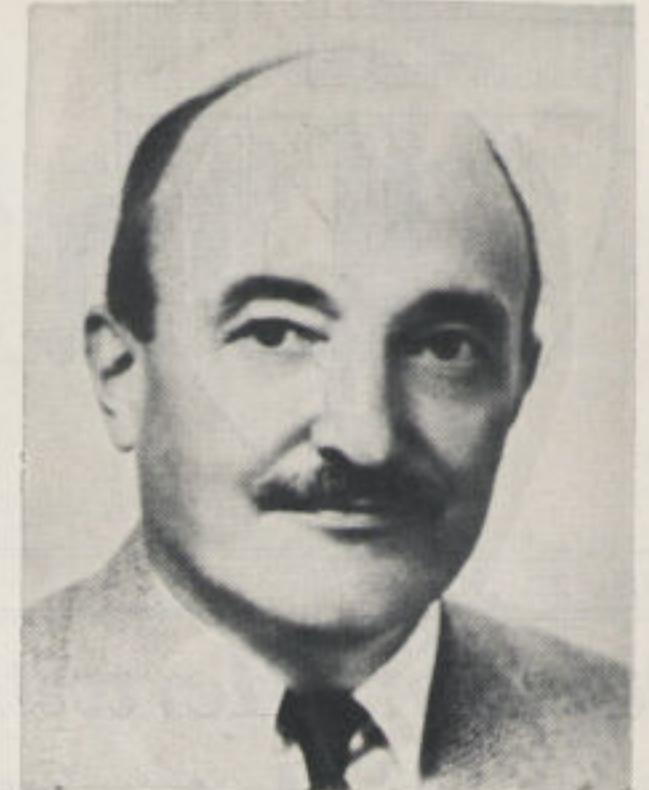
JOHN PHILIP DAWSON
VISITING PROFESSOR OF LAW

American and foreign students at the Law School were given an opportunity last fall to survey one another's legal systems through courses given by Visiting Professor John Philip Dawson. Professor Dawson, who is a member of the faculty at the University of Michigan Law School, taught courses on The Civil Law System and Introduction to American Law.

Mr. Dawson possesses unusual insight into the functioning of the civil law system, gained by his studies abroad and his work in Europe with the administration of United States economic aid. He was born in Detroit, and attended the University of Michigan, where he received his B.A. in 1922 and his LL.B. in 1924. He then went to Oxford for three years, and did extensive research in the comparative legal histories of England and France. Returning to this country, he joined the law faculty of the University of Michigan in 1927, and was made a full professor in 1936.

During the early years of World War II, Professor Dawson was on the legal staff of the rent division of the Office of Price Administration. In 1943 he was appointed chief of the Middle East Division of the Foreign Economic Administration, which controlled the civilian supply program of exports and lend-lease to the Middle East. Appointed director of American Economic Operations in the Middle East in 1945, he filled a position vacated by James M. Landis, formerly Dean of the Harvard Law School. Mr. Dawson maintained his headquarters in Cairo, and was in charge of the field staff for the civilian supply program.

From 1947 to 1948, Professor Dawson was in Greece, where he was director of the foreign trade administration of the Greek government. His position was somewhat unusual, since he was sworn into the Greek Civil Service. All regulations, licenses, and decisions involving exports or imports, especially those requiring expenditure of foreign exchange



John Philip Dawson

supplied by United States aid, required his concurrence with the Minister of National Economy.

"It was a touchy situation," he recalls, "but the civil war was going rather badly at the time. Were it not for American aid, the Greek government undoubtedly would have collapsed. They were so glad to get the assistance that they were willing to accept considerable intervention by Americans in their government."

"The arrangement in Greece was a try-out for later administrative procedures of the Marshall Plan," Mr. Dawson states. Under the Marshall Plan, Americans administered aid abroad in much the same manner, though as employees of the United States, and not of the nation where they served. Their approval was essential for any use of the "counterpart funds"—sums in the currency of the foreign nation which had been obtained through sale of Marshall Plan goods. "These administrators worked with leaders of the foreign governments in much the same way as we had done in Greece."

Mr. Dawson sought election to Congress in 1950 and 1952; "Running as a Democrat, I was decisively defeated each time." Michigan's Second District, where he campaigned lies in a predominantly agricultural and Republican area in the southern part of the state.

The visiting teacher has edited two casebooks. *Cases on Restitution* was prepared in collaboration with Professor Edgar N. Durfee of the Michigan Law School, while Professor William B. Harvey of Michigan co-edited *Cases on Contracts*.

This spring, Mr. Dawson is teaching Contracts and Restitution at the Law School. The courses which he conducted last fall are, he says, practically the same in substance as those he taught at Michigan. The Civil Law System is intended to be an introduction to "the methods and structures of those contemporary European legal systems which received the system of the Roman law." The course covers three main topics: a general historical and institutional introduction; a series of selected topics from the law of obligations and the law of damages; and the techniques and approaches of the legal process in these systems.

Introduction to American Law is "designed to introduce students not trained in the common law to the structure and procedure of the American legal system."

"This course deals with the working of the common law, and only incidentally with its substantive rules," Mr. Dawson says. "We put special emphasis on case law. European lawyers read reported court decisions, but there is very little emphasis on cases in the law schools here."

"Teaching methods differ, also," he continues. "Lectures involve little or no participation by the students. One of the objectives of this course is getting foreign students unaccustomed to our method to participate in class discussions. As with any group, this is difficult at first. But we have achieved considerable success along these lines in small groups."

Both courses are offered in conjunction with the Law School's International Legal Studies Program. "International Legal Studies represents a forward-looking step on the part of the Law School," Professor Dawson claims. "This field will be one of the main lines of progress in the teaching of law during the next ten years."

Professor Dawson and his wife, Emma McDonald Dawson, have three sons. The eldest, John Philip III, is a second year student in the Graduate School of Arts and Sciences, studying history. Another is an interne at the Peter Bent Brigham Hospital in Boston, while the youngest is an undergraduate at Oberlin College.

One of Mr. Dawson's great interests is legal history. "History explains much that can't be explained otherwise," he states. "I doubt whether it should be required as a major topic in a law school curriculum. There is so much modern law to learn, and extensive instruction in history might divert too much attention from that. But I recommend highly that more students study legal history either individually, or in the seminars currently offered here which deal with the subject."

—Oliver



Lon L. Fuller
Carter Professor of Jurisprudence

into the problems of human organization that run through all of the lawyer's work, whether he is acting as judge or arbitrator, arguing a case, drafting a statute, or negotiating a contract.

Teaching the course has been a difficult assignment for me. Students bring to Jurisprudence very different backgrounds and very different preconceptions. As I see it, the whole of legal philosophy should be animated by the desire to seek out those principles by which men's relations in society may be rightly and justly ordered. To some students, at least, this is a vain quest betokening a naive faith in the powers of the human mind. These students (fortunately a minority) have taken with all solemnity the dictum of William Graham Sumner, "The mores can make anything right and anything wrong."

Teaching the course has caused me to reflect a good deal upon American undergraduate instruction. I have the impression that many teachers in the general field of the social sciences take as their chief task overcoming a naive moral dogmatism which they assume their students will bring to social studies. I wonder if they are not often struggling against a ghost that has been laid to rest for at least a quarter of a century.

Teaching a course in Jurisprudence that takes as its central problem the meaning of justice is, therefore, an undertaking that runs against the grain of at least a portion of the average student's pre-legal training. Though this produces pedagogical difficulties, I would not have it otherwise. My principal concern is that the course shall not descend to the level of mere counter-indoctrination and that it shall remain a candid and uninhibited examination of the basic problems of law and government.

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Book Review

By ABRAM J. CHAYES

Assistant Professor of Law, Harvard Law School

HARLAN FISKE STONE: PILLAR OF THE LAW, by Alpheus Thomas Mason. 914 pp. Viking Press, New York, 1956. \$8.75.

Professor Mason's biography of Harlan Fiske Stone has been widely acclaimed as a uniquely revealing look behind the red velvet curtain which shrouds the operation of the Supreme Court from public view. And so, in a sense, it is. Professor Mason was given untrammelled access to the Stone papers, including not only the usual memorabilia and private correspondence, but as well "a formidable mass of Supreme Court documents — slip opinions in various stages of preparation, memoranda to and from members of the Court, and Stone's own record of the manner in which certain crucial decisions were hammered into shape." (p. xi). To add to this, Professor Mason has pursued his subject indefatigably through contemporaneous press accounts, the law reviews and numerous interviews with law clerks and others who could supply personal recollections of Stone and his Court.

Tenure Predominates

The resulting accumulation has been spread generously through the 810 pages of this biography, about three-fourths of which is devoted to a judicial tenure spanning one of the rare occasions when the Court stood close to the center of the political stage and public attention. From it, a searching and discriminating reader, if he is willing to spend time in weighing and comparing evidence and reaching independent conclusions, can indeed glean valuable insights into the workings of the Court. This reviewer, however, would not recommend less cautious reliance on Professor Mason's volume.

The lawyer-reader will be struck, if not jarred, by the frequent instances where Professor Mason reveals unfamiliarity with the professional mysteries. This occurs often in small matters.

One of Stone's Amherst professors writes: "Statute law, on the other hand, is a supplement to the common law which has grown up through many generations, and expresses the precedents and traditions of previous ages." In Professor Mason's paraphrase, this emerges: "Statute law, a supplement to the common law," Garman pointed out, had 'grown up' through many generations, expressing precedents and traditions of previous ages." (p. 69)

Again, Stone's son, an able lawyer, former honor student and *Law Review* editor at Columbia is assigned to participate in the attempt to get the Nazi saboteurs a judicial trial. "Within a day," the author tells us, "his researches led him to *Ex parte Milligan* . . ." (p. 654), and we are invited to infer achievement.

Mutuality Doctrine

Referring to the doctrine of mutuality of remedy in specific performance cases, against which Stone had levelled a scholarly lance, Professor Mason says: "Back in 1896, the court of [New York] had given an anomalous twist to the rules determining the right of an individual to have his contract enforced specifically, . . ." (p. 890)

Often enough, however, these lapses occur on issues of greater import. The consequences of *Swift v. Tyson* are thus summarized:

"Story believed this approach would make for uniformity, that states would defer to federal judges in evolving a consistent commercial code. While federal courts embraced Story's plan without reservation, states persisted in local peculiarities in their own courts. The result was separate versions of unwritten law as between state and federal court in the same area, often involving rights of action and claims." (p. 477)

The unfamiliarity with the going presuppositions of the lawyer's world, of which these examples are illustrative, reveals itself more subtly in the treatment of particular opinions. Professor Mason's method is to marshal in roughly chronological order, the

"great cases" in which Stone participated. The general positions of majority and dissent are summarized, often with an attempt to juxtapose the thrust of one with the parry of the other. His interest is excited by broad statements of semi-philosophical principle, and it is these that are most often quoted or paraphrased. The lawyer, who cuts his teeth on the notion that such propositions do not decide particular cases, will not be surprised at the frequency with which the issues before the Court and the bearing of its decision get lost among the sonorities.

Reaction Summary

The whole is usually followed by a summary of public reaction running heavily to next-morning's editorials, well wishing letters written shortly after reading the opinions, extrajudicial (and often ex post facto) remarks of Stone himself, and, less frequently, a digest of law review comment. While in most instances Professor Mason does not explicitly adopt these judgments as his own, he only occasionally disavows them.

The author shows less reserve in his evaluations of his dramatic personae. Any objection to Stone and his brethren being permitted to grunt,



Alpheus Thomas Mason

sputter, snort, thunder, mutter, snap or growl their opinions, may be dismissed as a personal idiosyncrasy of this reviewer. Professor Mason himself, however, suggests a scorn for "Little minds, trying to compress his [Stone's] meaning within the handy labels of 'conservative' or 'liberal,' . . ." (p. 809). Nevertheless, he is no mean hand with a tag. The Court's majority in the first decade of Stone's tenure are the reactionary "Four Horsemen" (p. 339), or, even more picturesquely the "battalion of death." (p. 424). There is little attempt to develop and assess the differences in background, training, intellectual and personal force, and view of the office which set off a VanDevanter from a McReynolds, with corresponding differences in their impact on the Court and the process of adjudication. If the liberal "Three Musketeers" (p. 254) fare somewhat better, their successors still hardly rise above their popular stereotypes — Frankfurter, the peppery, irritating professor; Black, the loose-thinking radical, and so on.

Opinions Assigned

Not the least significant example of this practice is a recurring implication that Chief Justice Hughes exercised the prerogative of assigning opinions and even voted, in some cases, with an eye largely to his reputation as a "liberal." Twice quoted is the judgment of Irving Brant "a close observer of the Court's work" that Hughes wrote himself when he was on the "liberal" side, assigning to others those cases in which he voted with the unenlightened. (p. 316-17; 459-60). (Cf. also pp. 361, 400-01, 488, 551). "Brant got support for this interpretation," Professor Mason says, "from Justice Stone." (p. 460 n.) It may be thought that here too the author is only recording the com-

ment of the press or casual remarks of Stone, not wholly meant. But if this is so, a cautionary word was warranted; and surely the record is not complete without such contrary testimony as that of Hughes' biographer or Justice Frankfurter's emphatic "No chief justice, I believe, equalled Chief Justice Hughes in the skill and the wisdom and the disinterestedness with which he made his assignments." FRANKFURTER, OF LAW AND MEN 137 (1956).

Unbalanced Judgment

A similar thrust for journalistic immediacy leads the author, I think, to an inadequately balanced judgment of the overall significance of Stone himself in both phases of his judicial career, as Associate Justice and as Chief. Though he spends considerable time in delineating the political attitudes and pressures which swirled around the Court in the '20's and '30's, he undervalues equally important pressures of pervasive movements in legal thought. Only deafness to the increasingly dominant note in a generation of legal scholarship could permit him to write that after the Senate debates on Hughes' confirmation in 1930: "At long last even professors of constitutional law were alerted to the fact that the business of judging involves lawmaking, even constitution-making." (p. 301)

Facade Bared

As a consequence, Stone is again and again portrayed as a kind of boy on the burning deck. "In various areas of constitutional interpretation he had in a single term stripped from judicial decisions the facade of impartiality — the guise of the logical imperative." (p. 426). "Finally, he exploded the fiction that judges do not make law, but only discover and declared existing law." (p. 435). "The great vice of Stone's disclosures [from Justice Sutherland's point of view] was that it lifted the veil from mystery, revealing behind judicial pageantry nine human beings, all participants in the governing process and no nearer the source of ultimate wisdom than are others. Stone had done the Court an incalculable disservice in letting the judicial cat out of the bag." (p. 778)

Stone's brethren in dissent, Brandeis, Holmes and later Cardozo are considered, but the treatment has for me the overtone that they played Lartius and Herminius to his Horatius. "Stone's ardently responsible road of judicial self-restraint" (p. 777) is repeatedly recalled with hardly a mention of Brandeis' consistent preoccupation with the problem, capped by his classic statement of the position in *Ashwander v. TVA*. After some paragraphs discussing Stone's influence on Holmes, we are told,

"Holmes gave as well as received." (p. 325)

To be sure, it is a biography of Stone, not of his fellows; but the reader is entitled to expect a just assessment of Stone's importance and contribution. That he played a significant part in preparing for and effectuating the great change in approach to constitutional adjudication of the late 1930's cannot be doubted; but that his was the only or even the dominant role surely can be.

When Professor Mason turns to examine Stone, the Chief Justice, he gives us little by way of explanation and nothing by way of preparation for what must be seen as an interlude of demoralization on the Court which coincided with Stone's tenure in the center chair. Summarizing the editorials and correspondence commenting on the appointment, the author concludes: "After all allowances are made for public disposition to lionize the 'successful' man, one thing stands out: Stone had long shown qualities of leadership." (p. 571)

Many Dissents

The continuing and even increasingly high production of dissenting and separate concurring opinions on Stone's Court do not belie this judgment, and Professor Mason properly dismisses criticism of the Chief Justice based on his inability to "mass" the Court. But Stone's time as Chief Justice was marked by quasi-public bickering among Justices and a kind of slackness in the Court. These, if not a great public scandal, were certainly trying for the Court itself and for its friends.

Professor Mason explains this phenomenon by emphasizing the lack of any intrinsic authority in the office of Chief Justice and the particular fractiousness of Stone's Associates. But surely there was more than that. (See MASON on page four)

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MASON

(Continued from page three)

Clues are provided in the detailed descriptions of two particularly unfortunate, though substantively insignificant incidents.

Portal-to-Portal Case

The first concerns the denial of rehearing in the portal-to-portal case. The ground urged was that Justice Black should have disqualified himself because a former law partner appeared for the prevailing party. Stone drafted an order denying the petition and suggested in conference the addition of a statement that no question of disqualification is ever open for consideration by the Court. In the context of the Court's practice of all but automatic denial *per curiam* of petitions for rehearing, such a statement was almost sure to offend Black as an adverse reflection on his conduct. Here, incidentally, is an interesting instance where Professor Mason's lack of technical background leads to errors of emphasis, for given the Court's usual practice, it is difficult to agree with his assumption that "Some explanation of the inability of the Court to act on such a motion [premised on Black's failure to disqualify himself] was obviously necessary." (p. 645)

Black Protested

In any event, Black protested and Stone persisted, precipitating heated argument among the Justices at conference and in correspondence, until passions were engaged and honors committed. At that point, Stone, in the author's words, "backtracked." (p. 645). Justice Jackson was left to write a sharp concurrence (joined by Frankfurter) embodying the position first taken by Stone, while the Court denied rehearing in a simple *per curiam* order.

The second incident concerns the attempt to draft a formal letter expressing the regret of the Court at Roberts' resignation. Stone's draft was sent first, by custom, to Black, then Senior Associate. Black objected to language referring to Roberts' "fidelity to principle" (the only laudatory words in the draft). Stone thereupon "told Black to redraft the letter and circulate it." (p. 766). But Stone let others on the Court know about his own draft, and in light of the excisions, they were not prepared to accept Black's. Again tempers were embroiled while "Stone jibbed about, tacking before this breeze and that, striving vainly for a clear course." (p. 768). In the end there was no agreement and no letter was written.

In neither of these instances can the unfortunate result be attributed solely to the irascibility or wilfulness

of the other justices, nor to the absence of the apparatus of command in the office of Chief. In each case Stone contributed something himself to the melee: He took positions which set events in train, and then drew back from the consequences. In fact, the pattern is reminiscent of other sequences which Professor Mason describes: Stone's stand on the court-packing fight, for example, or his administration as Dean of the Columbia Law School.

Speculation Induced

One is tempted to speculate whether this aspect of Stone's character does not shed light on the fact that his greatest performances on the Court were in dissent. Influenced, perhaps, by the dominating figures of Holmes and Brandeis, we tend to regard the dissenter as a stern and compelling guardian of truth and right reason. This shining conception diverts attention from the fact that the dissenter necessarily assumes no responsibility for immediate consequences. His views can be subjected to the leisurely process of professional and scholarly analysis and criticism. If they pass these tests they may ultimately prevail in the law; if not they are forgotten. But in either event, they do not debauch at once into the arena of action.

One suspects that Stone may have found comfort in this. But one's suspicions are neither confirmed nor denied by Professor Mason. He gives us discrete incidents, sometimes with his comments, but his overall picture of Stone loses dimension by its amiable generality.

Reflexive Protection

The professional, whether lawyer or constitutional scholar, will have, by his training, reflexive protection against these defects of emphasis and interpretation. For him this volume is a useful repository of information about the Court during Stone's tenure. But the book is not designed for him alone. The more casual reader is likely to come away unenlightened, or even misled, about the shaping forces of the judicial revolution in which Stone played so prominent a part. And as for Stone himself, it may be said with considerable confidence he has yet to find his Boswell.

A final reservation should be stated concerning Professor Mason's use of the unique source materials to which he has had access. As has already been said, these include comments of Justices still living about their fellows (some of them still living), or about issues only recently before the Court and which continue as centers of legal and public debate. Often these are printed verbatim in this volume, and



Owen J. Roberts

oftener still, they are paraphrased. One does not suggest, of course, that such use of these materials was unauthorized. Nor should an over-fastidious sense of the sanctity of the high Court be permitted to override valid claims of history and understanding.

Papers Withheld

But a self-denying custom of scholarship withholds from publication the papers of public men, even those in immediately political positions, until the personalities involved are dead and the ebb of years has eroded the bitterness of controversy. In the case of Justices of the Supreme Court, such a rule of self-restraint is more, perhaps, than a matter of taste. Constitutional adjudication requires a considerable degree of candor and freedom of interchange among its participants, who, as Professor Mason continuously reminds us, are only human. It may be doubted whether this necessary atmosphere can be maintained if the Justices come to think that their confidential expressions will be exposed not only to the scrutiny of history, but to a jury of contemporary peers. In this light, the wisdom of such extensive publication of these materials as Professor Mason has undertaken becomes doubtful, particularly as to those documents which add little more than the spice of gossip to the heavy stew of the decisional process.

Law Wives...

The Law Wives will sponsor a discussion on capital punishment, to be held Wednesday, April 3 at 8 p.m. in the large meeting room of Harkness Commons.

Law wives, their husbands, guests, and members of the Law School community have been invited to attend the meeting.

FORUM

(Continued from page one)

security," and characterized the United Nations as a "bridge to a far better understanding and cooperation among nations than in the past."

Mr. Thomas, after three decades as leader of a militant minority, advocated an active internationalist outlook.

"I could weep with the rest of you that our problems are so hard and our alternatives so weak. It is our hope, a painful yet not completely defeated hope . . . that all men will learn to live together by law."

Carl J. Friedrich, Professor of Government at Harvard College, was moderator for the evening.

DEFENDERS

(Continued from page one)

fect, each Voluntary Defender will work on approximately two briefs a year.

For several years a somewhat similar activity has been included in the functions of the Defenders. Writing memoranda in response to requests for legal assistance from prisoners in out-of-state penal institutions has formed a substantial part of their work.

Many of the requests are sent to the faculty of the Law School, who refer them to the Defenders.

Certiorari Sought

In a typical case, a prisoner sought a writ of certiorari from the Supreme Court of the United States, to review the denial of a writ of habeas corpus by the Court of Appeals of Maryland. The prisoner claimed that failure by the trial judge to instruct the jury on the law involved constituted a denial of his right of trial by jury.

In the vast majority of cases, the Voluntary Defenders are merely requested to send advice on the law. This is usually sent out in the form of a memorandum, under a cover letter by a member of the faculty or an attorney. The number of requests has increased steadily as the Voluntary Defenders' work has gradually become known to prisoners throughout the nation.

A high proportion of the Defenders' work consists of interviewing defendants at the Suffolk and Middlesex County jails. Immediately after their selection in October, second-year men are given an intensive two-week training period. Methods and procedure of interviewing, Massachusetts criminal procedure, and other phases of the work are covered. The new members are then placed on the regular schedule of interview assignments.

When an accused person is taken to jail, he is given a card which he may sign if he is indigent and wishes to request legal assistance. A Voluntary Defender is assigned to each of the two jails every day. He collects the cards from the warden and conducts interviews with the defendants. Reports of the interviews are typed daily and sent to the Boston Voluntary Defenders' Committee.

Varied Cases

The cases run the entire gamut of the Massachusetts Criminal Code, from murder to non-support. In a recent case, a man was accused of second-degree murder for stabbing and killing his wife. The interview revealed that the accused had found his wife as she was about to commit adultery. This fact, and her insulting behavior, had driven him to an ungovernable passion. The charge was later reduced to manslaughter, to which the accused pleaded guilty.

In addition to interviewing defendants, the Defenders frequently conduct investigations in order to sub-

stantiate an alibi, to find witnesses who can testify on behalf of the accused, or to prove mitigating circumstance. This work, which requires both tact and aggressiveness, takes members to points throughout the Boston area.

Recently, two Voluntary Defenders conducted an intensive investigation of a case in which the accused was charged with assault with an icepick. A dozen persons were interviewed, and it was revealed that the victim had on several occasions threatened the defendant and other persons, and had in fact provoked the fight that led to his injury. The defendant was acquitted on grounds of self-defense.

In cases where investigations are required, the Defenders work closely with a Boston Defender Committee attorney who has been assigned to the case. Frequently the student accompanies the lawyer to court and sits at the counsel table. There he is able to aid the attorney with his knowledge of the facts of the case and often offer suggestions on the conduct of the trial.

Visit Prisons

Duties of the Voluntary Defenders take them to almost all the correctional institutions of the state. Among these are the Massachusetts Mental Center, where once a member was locked in by mistake and had a hard time convincing the nurses that he was not an inmate; Deer Island House of Correction; the House of the Good Shepherd, a home for wayward girls; and the State Prison at Walpole.

To keep its members informed on the problems of criminal law, the Defenders conduct a series of informal luncheons, with addresses by speakers whose work is relevant to activities of the organization.

All Not Guilty

The Voluntary Defenders do not adhere to the theory that all the defendants whom they assist are innocent and should be acquitted. However, there are cases in which a defendant is completely innocent; then all efforts are applied toward acquittal.

The aim of the Law School's Voluntary Defenders is to make sure that the defendant is convicted or sentenced only for crimes that he has actually committed, and to find and present to the court all facts and circumstances that will tend to lighten the sentence.

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