



Harvard Law Record

America's Oldest Law School Newspaper

VOL. 26, NO. 1

CAMBRIDGE, MASS., THURSDAY, FEBRUARY 6, 1958

Copyright, 1958,
Harvard Law School Record, Inc.

TEN CENTS

'The Bill of Rights' Is Topic Of Learned Hand's Lectures

The third and final part of the Oliver Wendell Holmes Lecture for 1958 will be delivered tonight at 8 p.m. in the James Barr Ames Courtroom by Learned Hand, LL.B. '96, retired Judge of the U. S. Court of Appeals for the Second Circuit.

Judge Hand, whose topic is "The Bill of Rights," will conclude the Lecture by discussing the constitutional interpretation of the First Amendment and by considering when, if ever, the Supreme Court may invalidate legislation which it disapproves on the merits.

The text of the complete Lecture will be published by the Harvard University Press in the near future. In his opening presentation last Tuesday evening, Judge Hand examined

the Bill of Rights," will conclude the Lecture by discussing the constitutional interpretation of the First Amendment. Rights," that is the first eight and the fourteenth amendments to the Constitution.

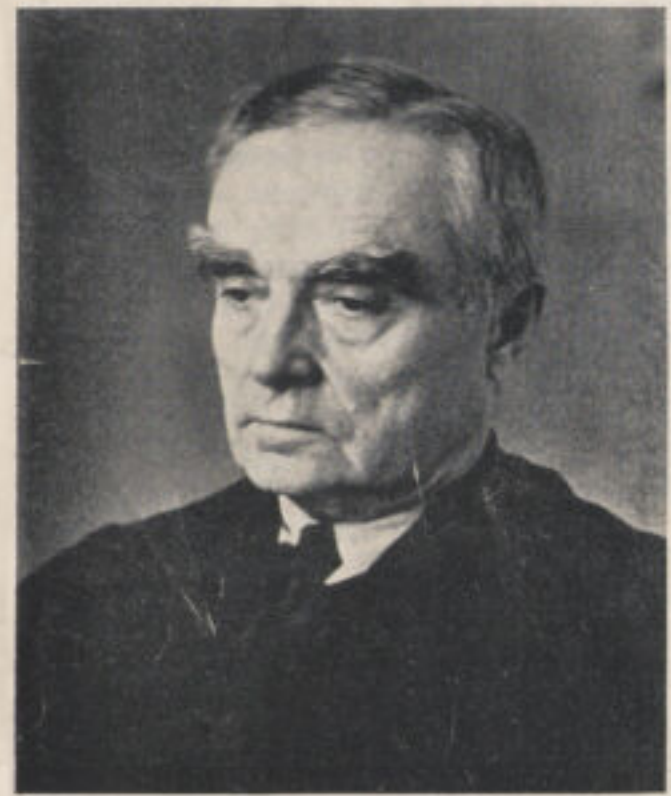
He began by making the assumption that neither the Constitution nor the Bill of Rights is an expression of the Divine Will, but rather both are very much founded upon the will of the state conventions which ratified them.

All political power being distributed among the three "Departments" of government, the problem then arises as to the resolution of conflicting exercises of these powers by the various "Departments." Judge Hand reached the conclusion that "[t]here was nothing in the United States Constitution that gave courts any authority to review the decisions of Congress; and it was a plausible — indeed to my mind an unanswerable — argument that it invaded that 'Separation of Powers' which, as so many then believed, was the condition of all free government."

Alternative Results

Judge Hand then considered what would have happened if the final resolution had been that the courts did not have such authority. He cited two alternative results, one that "the decision of the first 'Department' before which an issue arose should be conclusive whenever it arose later," the other to allow each "Department" to "decide constitutional issues as it thought right, regardless of any earlier decision of the others." Finding both results practically impossible, Judge Hand would read into the Constitution a grant of power to the Supreme Court to have the final word on matters of constitutional interpretation. His justification is that "in construing written documents it has always been thought proper to engraft upon the text such provisions as are necessary to prevent the failure of the undertaking." Otherwise effective government under the Constitution would have been impossible.

However he would limit this power to the "need that evoked it," for his conclusion here was that the distinction (See *LEARNED HAND* page four)



Learned Hand

ined when a United States court should invalidate federal or state statutes, or acts of the President, because they conflict with what has come to be known as the "Bill of

Casner Club Gets Dean Pound Prize

The Casner Law Club was judged the best club in the fall Ames Competition, Student Board Chairman John E. Merow, 3L of Little Valley, N. Y., reported today.

The Blackstone Law club's team of Alfred J. Dietsch, 2L of Montebello, Cal., and Winthrop D. Thies, 2L of Scarsdale, N. Y., earned the award for the best brief.

Jesse D. Miller, 2L of Los Angeles, received the prize for the best oral. Mr. Miller spoke for the Frankfurter Club.

The first year brief award went to John D. French of Excelsior, Minn., representing the Toepfer Club. The tie oral awards were won by James O. Freedman of Manchester, N. H., representing the Von Mehren Club, and Richard Bailin of Sioux City, Iowa, representing the Marshall Law Club.

Casner Law Club members who earned the Roscoe Pound Prize for the best club are: Charles R. Collins, 2L of Pittsburgh; Stanford L. Glass, 2L of Collinsville, Ill.; Robert C. McCartney, 2L of Pittsburgh; Ian R. McLeod, 2L of Erie, Pa.; James R. Modrall, 2L of Albuquerque; William M. Simmons, 2L of Chicago; James S. Simonson, 2L of Madison, Wis., and Richard E. Stewart, 2L of Morgantown, W. Va.

Each recipient will be allowed to select a book at the Coop as his prize.

Clerks Appointed

Two third-year members of the *Harvard Law Review* have been appointed clerks to Supreme Court Justices. Peter Fishbein of Mount Vernon, N. Y., will clerk for Justice William J. Brennan and Richard Goodwin of Brookline, Mass., for Justice Felix Frankfurter. Both men will assume their duties in August.



Ralph J. Baker

Baker Announces Retirement After 26 Years on Faculty

Ralph J. Baker, Weld Professor of Law, appointed to the Law School in 1932 after a distinguished career of practice in the field of public utilities, will retire at the close of the current academic year. He will be 70 years old.

Professor Baker plans to remain in Cambridge and assist in the publication of a new edition of *Cases and Materials on Corporations*, which first appeared in 1940. The late Professor E. Merrick Dodd was co-editor of this work. In his final year at the Law School, Mr. Baker is teaching Trusts and Corporations II. Although he will still be available for consultation, Professor Baker stated that he "regrets losing contact with the students after teaching for so many years."

A graduate of Swarthmore College in 1907, Professor Baker received his

LL.B. magna cum laude from the University of Pennsylvania Law School four years later. Besides his scholarly pursuits, he found time to win a letter in track at both Swarthmore and Pennsylvania, and he scored three years in the half mile in the IC-4A championships.

After teaching at the University of Pennsylvania Law School for three years, Professor Baker entered private practice in Harrisburg, where he remained for eighteen years. During the First World War, he served as Associate General Counsel for the Alien Property Custodian, and aided in the liquidation of some \$800,000,000 in German assets. During World War II he taught at the Harvard Business School.

N.Y. Stock Broker Sees Bull in '58

Henry Harris, senior partner of the Wall Street brokerage firm of Harris, Upham & Co., told the Bull & Bear Club last Friday that he foresaw an economic upturn in the last six months of 1958.

In view of the fact that the Harris, Upham & Co. predictions for the 1957 high and low industrial stock averages were amazingly accurate (520-420), it is interesting to note that their prediction for 1958 is 460-360. Currently the market average is near their predicted high. Mr. Harris suggests that a lightening of present holdings would be good advice.

But Mr. Harris is optimistic in regard to the long pull and emphasized the advisability of blue-chip investments. He said that companies like General Electric, larger chemicals, drugs and oils were likely to double in the next ten years. The reason Mr. Harris sees for this is the oncoming baby-boom of the 'sixties.

Mr. Harris also anticipates a dividend cut when the market drops to the predicted low of 360. As for buying in the blue-chips, however, he foresees good market opportunities opening when the average drops below 400.

The most essential factor in determining a good buy in a company, said Mr. Harris, is good management. He emphasized the importance in having a resourceful management that is able to change with the times.

Professor's Colleagues Pay Tribute

By Henry M. Hart, Jr.

By a perhaps unfortunate practice members of the Faculty of this School seldom visit each other's classes. And so it happens that I write these words of appreciation of Ralph Baker as a teacher without ever having heard him teach.

But the handicap is not as serious as might appear. Professor Baker and I joined the Faculty at the same time, I as a beginner two years out of the School and he with twenty busy years behind him at the bar. It did not take the beginner long to discover from an amplitude of student reports, coupled with simple observation outside of class, that this practitioner-scholar was proving to be a unique educational experience.

He was not at first quite unique in the threads he could spin out of one case; Professor Frankfurter's Case-of-the-Month Club, called also Public Utilities, provided compensation in that. But unique he certainly was, and has remained, in providing a working model of the mind of a meticulous legal craftsman painstakingly, even remorselessly, but always precisely and dispassionately dissecting every last bone and sinew and nerve of a legal problem. The looseness in handling cases which members of my classes must occasionally notice might not be there if I had been exposed for a year to the first-hand discipline of watching this model work.

One other thing can be said without taint of hearsay. He has been a model, too, as a sagacious and always dispassionate adviser in Faculty councils, and as a warm and always dependable friend.

By Austin W. Scott

I first ran across (or rather into) Mr. Baker in the early 1930's. I was presenting a tentative draft of the Restatement of Trusts to the members of the American Law Institute at a meeting in Washington. Several lawyers and judges offered objections to statements which I had made in the draft, but the objections seemed to me not well taken and I overruled them.

At that point a lawyer from Pennsylvania arose and made an objection which I saw at once, as did the members present, was clearly sound, and of course I accepted it at once. That man was Mr. Baker. I sought him out and induced him to become one of the Advisers on the Restatement of Trusts. I learned that he might be induced to give up his extensive practice and become a professor of law. The faculty of the Harvard Law School asked the Corporation to appoint him as Professor of Law, and to our great delight he accepted the appointment. And so he has been with us since 1932. He has been during more than a quarter of a century my colleague in the teaching of Trusts. I owe much of my thinking on this subject to his wise and informed counsel.

(More tributes on page four)

Qua Speaks

Stanley E. Qua, LL.B. '04, former Chief Justice of the Supreme Judicial Court of Massachusetts, will speak today at a luncheon meeting of the Student Bar Association. The meeting will be held in the Mallory Smith Room of Harkness Commons at 1 p.m. Justice Qua's topic will be "How to Conduct an Appeal." All members of the SBA have been invited to attend.

University Admissions Heads Defend Use of Photographs

Discrimination is not the purpose for the use of pictures of applicants at the Law School and the College, according to Louis A. Toepfer, director of Law School admissions, and Dean Wilbur J. Bender of the College.

The *Harvard Crimson* reported that the Massachusetts Commission Against Discrimination had issued a directive to the College to eliminate the present requirement of photos of

applicants. Officials of both the College and the Law School say that no

directive has been received from the Commission. The Commission, which was designated to administer the state Fair Educational Practices Law (Mass. Ann. Laws c. 151C) in 1956, has circulated a list of recommended policies for admissions officers. One of these policies was that admissions officers abandon the usual requirement that applicants send pictures.

Both Mr. Toepfer and Mr. Bender asserted that the pictures are not used for purposes of discrimination. Mr. Toepfer said that most admissions officers prefer pictures because they personalize applications. He also pointed to their usefulness in the publication of identification booklets for each first-year class.

Personal interviews with all College applicants preclude the use of (See *PHOTOS* on page three)



Louis A. Toepfer

applicants. Officials of both the College and the Law School say that no



Photo by Novick

Excavation for the foundation of the building for International Legal Studies is shown above in a photograph taken from the west wing of Langdell Hall. The new wing will run parallel to the north wing and perpendicular to the west wing. Harkness Commons is in the background to the right. Massachusetts Avenue is off to the left. The addition will cost about \$1,000,000.



David R. Herwitz



Louis Loss



Abram J. Chayes

Many Contributions of Ralph J. Baker Noted by Corporation Law Professors

By David R. Herwitz

It was my misfortune not to have had Professor Baker during my student days here. Fortunately for me, by virtue of Professor Baker's generosity, I have been able to remedy this defect since my return to Cambridge, both figuratively, in innumerable informal sessions in his office or the stacks, and literally, by actually sitting in on his justly famed Corporations II class this year. It has been a remarkable experience to see the depth and breadth of learning which he imparts to his students. It has also been a humbling experience, particularly on the occasions when I have been called on for an accounting view by the man whose learning in that field, as in so many others, dwarfs that of anyone else. So I particularly share the deep regret of both the students and the faculty at his decision to retire this year. It is truly unfortunate that future students will miss the opportunity to experience Professor Baker's superb teaching, as well as the shining example he has always set of his own, oft-repeated, although always gentle, advice to "go to the books" in the solution of legal problems.

For his colleagues, regret at his retirement may be somewhat tempered by the knowledge that we can look forward to many more years of his wise and generous guidance. In addition, Professor Baker is now engaged in revision of the materials in his Casebook used in the Corporations II course, materials which already constitute the most comprehensive analysis of the authorities in this — and probably any other — field of the law. So our students, too, should be able to enjoy at least indirectly the great benefits of Professor Baker's wisdom for many years to come.

By Louis Loss

To teach Corporation Law on the same faculty with Ralph Baker is an humbling experience. It is also calculated either to confirm a younger colleague's natural laziness or to develop his self-discipline. For it is so much easier to walk down the hall and chat with the genial Weld Professor than it is to go rummaging through the stacks, whether one wants to know the Tasmanian attitude toward business trusts or the valuation approach taken by counsel for a preferred stockholders' committee in a reorganization proceeding still pending before the California Commissioner of Corporations.

Others who have known Professor Baker longer can tell more about the many facets of this remarkable scholar. I have heard Scott recall his pleasant shock when he first encountered the incisive comments of the mild-mannered "country lawyer" at the American Law Institute meetings on the Restatement of Trusts almost thirty years ago. I have heard MacLachlan reel off the Baker record as a miler at Swarthmore. And I have heard several of the brethren describe some of the footnotes that did not get into the Dodd and Baker casebook. If I am slightly skeptical about the legend that the learned professor has read the records and briefs in every case which did get cited in that monumental work, let it be noted that I am the kind of sneering cynic who also doubts the story that Dean Pound knows the combination on every locker in the basement of Austin Hall.

I hope that my fellow native of Pennsylvania — indeed, of the "Garden Spot of America," Lancaster County — will be working with us for a long, long time. Not too many years ago I could not have imagined teaching Corporations with him. Today I find it hard to think of teaching Corporations without him.

By Abram J. Chayes

When the RECORD asked me to write on the occasion of Professor Baker's retirement, my first reaction was to protest "why me?" There were so many others obviously more qualified to appraise his work and whose accolade would be so much more meaningful.

The RECORD invoked policy to divert themselves of the painful necessity of choice. When a man retires, he is written about by his colleagues in the field in which he teaches. QED.

When advanced, this argument was sufficient to override protest, but upon reflection, I have concluded that, in this case at least, rigid adherence to policy has produced something like wisdom.

It is fitting that one of the newest arrivals on this faculty should be heard from as Mr. Baker leaves it. His learning and wisdom are likely to survive our poor power to add or detract. But he has a particular message for teachers of law. He testifies that law teaching is a calling, a vocation, which, though it may be deferred, cannot be denied. No one I know has followed that vocation with greater fidelity or purity.

More important, his teaching career is a reminder that the most valuable thing the teacher gives is not his learning but his example of faithful service in the law.

It remains only to thank him, for myself and for all his students — and anyone in the field of Corporations will always be a student of Ralph Baker's — for an unfailing courtesy and kindness, doubly rare when combined with an unfailing authority. I am sure he will continue to dispense all three for many years to come.

Surrey Travels . . .

Professor Stanley S. Surrey on January 20 testified before the House Ways and Means Committee, at its invitation, on foreign income and on January 29 on individual income tax revision. The Committee has been holding hearings on revision of current revenue laws.

Also on January 20 Professor Surrey spoke to the Cleveland Tax Club about current issues in taxation of corporate distribution.

The Commission and Harvard was on his own initiative after the *Crimson* article appeared on January 10. He and other school officials in Massachusetts hope to convince the Commission that admissions officers have a legitimate need for photographs.

Not all departments of the University require photographs. The Graduate School of Arts and Sciences does not require pictures. The Business School leaves it to the option of the applicants.

Neither the Law School nor the College has decided to change its policy. But both Mr. Toepfer and Mr. Bender admitted that either school might do so upon directions from the Harvard Corporation or by action of its respective admissions committee.

PHOTOS

(Continued from page one)

pictures for discrimination, according to Dean Bender.

The Fair Educational Practices Law was passed in 1949 and administered by the State Board of Education until late 1956 when the Commission took over. The Board had not objected to the use of pictures.

The Commission's job is to prevent racial or religious discrimination by the means of moral suasion and the use of public hearings. It can hold a hearing upon the complaint of a student or on its own initiative. If it finds that a school is discriminating, the Commission can issue a cease and desist order which is subject to judicial review, if appealed.

Dean Bender says that the first contact that has been made between

Joe the Barber
for 14 years of University Barber Shop
at 1268 Mass. Ave., Cambridge
is now working at
Gino's Barber Shop
1638 Mass. Ave., Cambridge
near the law school

Ski Equipment

Everything for the Skier
TENNIS & SQUASH SHOP
67A Mt. Auburn St. TR 6-5417

Save With Safety

SBLI Today, about 500,000 policyholders own over \$575,000,000 of low-cost Savings Bank Life Insurance. They save because they bought it DIRECT from their savings bank. Savings Bank Life Insurance operates under the same strict Massachusetts laws that apply to life insurance companies. Policyholders are protected by larger reserves than are required by law. The big difference is lower selling costs — and policyholders get the savings. For safe protection at lowest cost on every member of your family — look into Savings Bank Life Insurance today.

**CAMBRIDGE
SAVINGS BANK**
Right IN Harvard Square
Cor. Dunster St. & Mass. Ave.
Insurance Dept. — 1st Floor

Substantial Reductions

For Clearance

A special lot of
suits and overcoats

262 YORK STREET
NEW HAVEN341 MADISON AVENUE
NEW YORK82 MT. AUBURN STREET
CAMBRIDGE

Notice

CLUB CASABLANCA, INC.

in the Brattle Theatre Building
Harvard Square, Cambridge

will be accepting applications for membership
for TEN DAYS
starting Monday, February 3, 1958

All applicants are required to show OFFICIAL
proof of age

RITE-WAY CLEANERS, INC.

Box Storage - Laundry - Tailoring - Fur Storage

SAMEDAY DRY CLEANING SERVICE

4 Hudson St.
Cambridge
KI 7-8008

KI 7-8008

58 Myrtle St.
Boston
CA 7-2104

Dry Cleaning by Monaco

A fine selection of

VALENTINES

and
Valentines Gifts

Books
Candy
Gloves
Hosiery
Perfumes
Handkerchiefs
Jewel Boxes
Costume Jewelry

**THE
COOP**

OUR FINE SELECTION WILL ADD MUCH TO YOUR ENTERTAINMENTS

As the first and finest store in Harvard Square, we are stocked with the proper beverages to serve on all occasions

HARVARD PROVISION COMPANY

92-94 MOUNT AUBURN STREET

THE STORE WITH THE FRIENDLY SERVICE

FREE DELIVERY

BAG ICE

TELEPHONE: KIRKLAND 7-6684 - 5

OPEN MON.-FRI., 9 A.M. TO 9 P.M.; SAT. 9 A.M. TO 10 P.M.

49317

Faculty Publications

The following articles by members of the Law School faculty were published during the past month:

Ernest J. Brown — *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 YALE L.J. 219; Book Review: Konefsky, *The Legacy of Holmes and Brandeis*, 56 MICH. L. REV. 319.

Ernest J. Brown, Paul A. Freund and Mark DeWolfe Howe — *The Constitutional Law of the United States at the Middle of the Nineteenth Century*, El Constitucionalismo a Medios del Siglo XIX (Vol. I).

George K. Gardner — *Remedies for Personal Injuries to Seamen, Railroadmen, and Longshoremen*, 71 HARV. L. REV. 438.

Sheldon Glueck — *Further Comments on the Sentencing Problem*, FEDERAL PROBATION (Dec. issue).

Louis L. Jaffe — *The Right to Judicial Review I*, 71 HARV. L. REV. 401.

Louis Loss — *The Conflict of Laws and the Blue Sky Laws*, 71 HARV. L. REV. 209.

James A. MacLachlan — *A New Approach to Retail Price Maintenance*, 11 VAND. L. REV. 145.

Articles which will appear during February include:

Lon L. Fuller — *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630. (To be printed together with an article by H. L. A. Hart, *Positivism and the Separation of Law and Morals*.)

Fleming James, Jr. — *Some Reflections on the Bases of Strict Liability*, LA. L. REV.

Dance

The first dance of the spring series sponsored by the Harvard Law School Dormitory Association will be held this Saturday, February 8, at 8:30 p.m. in Harkness Commons. George Graham's Orchestra will play.

The Dormitory Association will also sponsor a mixer to be held Friday evening, Feb. 14, at 8:30 p.m. in Harkness Commons. Young ladies from various nearby colleges will be present.

COMMERCIAL and BOOK PRINTING
The Lexington Press, Inc.
7 Oakland Street, Lexington, Mass.

CHERCHEZ
LA FLAMME

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

SQUASH RACKETS
Largest Variety in New England
Tennis & Squash Shop
67A MT. AUBURN ST. CAMBRIDGE
Opp. Lowell House — TR 6-5417

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
\$4.60

— SAMPLE DAILY SPECIALS —

Soup or Juice
Chicken Salad Sandwich
Pot. Chips — Chfs Salad 80c
Roast Rump of Beef
French Fries — Tossed Salad 99c
Rolls & Butter — Beverage
Dessert

BEERS — WINES — LIQUORS

Tel. EL 4-1366

Jim Cronin, Mgr.

MacLachlan Calls
For New Statute

In a recently published article entitled *A New Approach to Resale Price Maintenance* (11 VAND. L. REV. 145), Professor James A. MacLachlan advocates Congressional adoption of a federal statute abandoning the "fair trade" label and the non-signer clause to give the proprietor of a trade-mark or trade name a federal substantive right to control the



James A. MacLachlan

price at which his merchandise is distributed by giving actual notice to distributors.

In his article Professor MacLachlan points out that with the Miller-Tydings Act of 1937 and the Maguire Act of 1952 the federal government, in the field of resale price maintenance, is "drifting in the wake of state law."

The federal statute drawn up by Professor MacLachlan would leave the manufacturer or brand owner free to embrace resale price maintenance or not. The statute could be availed of if a significant part of his goods are sold in interstate commerce.

The statute, if adopted, would accord the "small manufacturer or small wholesale distributor an opportunity to compete on more nearly equal terms with the large manufacturer or distributor who can afford to control the distribution of his products through his employees or consignees."

Professor MacLachlan has recently returned from Washington where he conferred with Congressional proponents of the bill.

NEWS IN BRIEF

NEW OFFICE

Dean Erwin N. Griswold has been named president of the Association of American Law Schools.

POUND AT CHICAGO BAR

Dean Emeritus Roscoe Pound on January 30 addressed the Chicago Bar Association, in Chicago, on the subject "Toward an Adequate Administration of Justice."

CHRISTIANITY & LAW

The next meeting in connection with the discussion group on Christianity and the Law will be held next Monday in the Wheeler Room of Holmes Hall at 8 p.m.

LINCOLN'S INN ELECTS

New officers of Lincoln's Inn are assuming their duties after the January election last week. The officers are William O. Summer, 2L of New Canaan, Conn., president; vice-president, Richard R. G. Hobson, 2L of Alexandria, Va.; secretary, Walter M. Noel, Jr., 2L of Nashville, Tenn.; and treasurer, Barry C. Phelps, 2L of Rochester, N. Y.

Members of the Board of Governors also chosen are John Hanna, Jr., 2L of New York City; Charles R. Ufford, Jr., 2L of Haverford, Pa.; Gordon A. Millsbaugh, Jr., 2L of Bay Head, N. J.; Harrison Gardner, Jr., 2L of Wenham, Mass.; Edwin P. Conquest, Jr., 1L of Richmond, Va.; and William D. Ruckelshaus, 1L of Indianapolis, Ind.

Alumni Notes

Morris R. Brownell, LL.B. '05, Allen Sherman, 1915-16, and Cecil H. Whittier, LL.B. '36, announce that their law partnership heretofore known as Cook, Brownell, Taber & Sherman will hereafter be known as Brownell, Sherman & Whittier. The firm is located at 558 Pleasant Street, New Bedford, Massachusetts.

LL.B. '08 — The following deaths in the class of 1908 have been reported: Francis R. Boyd in Boston, on November 15, 1957; John H. Lathrop in Kansas City, Missouri, on July 14, 1957; George W. Morgan in St. Paul, Minnesota, on December 3, 1957.

LL.B. '22 — Matthew M. Levy of the New York State Supreme Court has

LEARNED HAND

(Continued from page one)

tion between the Court's delineation of the bounds of the authority of another "Department", and the propriety of its actions within those bounds, must be maintained.

Second Part

Last night, Judge Hand considered the fifth and fourteenth amendments. He discounted the notion that they should be applied in the same manner as the Founding Fathers would have interpreted them either under the conditions of 1789 or the present. He also reiterated his previously postulated assumption that they did not stem from "Natural Law."

After tracing the development of procedural and substantive due process, he posed the problem that the courts cannot invalidate statutes on due process grounds without going through the "same mental process that produced the statute itself."

Here he drew a significant distinction between the actual framing of a statute, involving an appraisal of present conditions and a forecast as to the effect of the measure proposed on these conditions, and a determination of the actual gain to society to be derived from the measure, involving a balancing of the "values and sacrifices to which the contemplated action will give rise."

The measurement of legislative authority by means of the "Police Power" clause was then discussed. This too Judge Hand rejected, because the court still in effect would function as a "third legislative chamber." However he pointed out that this view is still in existence, and has even been applied to economic interests.

Liberty vs. Property

He criticized the current theory that there is a stricter interpretation of the "Due Process Clause" when liberty rather than property is involved. Under this view, the Court has a wider range to invalidate statutes when conflicting "personal" values are involved. "I can see no more persuasive reason for supposing that a legislature is *a priori* less qualified to choose between 'personal' than between economic values; and there have been strong protests, to me unanswerable, that there is no constitutional basis for asserting a larger measure of judicial supervision over the first than over the second."

In conclusion, Judge Hand acknowledged that he found himself unable to "frame any definition that will explain when the Court will assume the role of a third legislative chamber and when it will limit its authority to keeping Congress and the states within their accredited authority. Nevertheless, I am quite clear that it has abdicated its former function, as to which I hope that it may be regarded as permissible for me to say that I have never been able to understand on what basis it can or does rest except as a *coup de main*."

— Page

Second Hand Lawbooks
LAW SCHOOL AIDS

HARVARD BOOK STORE

1248 MASS. AVE. CAMBRIDGE
OPP. LAMONT LIBRARY TR 6-9069

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

been elected president of Phi Beta Kappa Alumni in New York. Justice Levy was an editor of the *Harvard Law Review* in 1922 and is currently a trustee of the Harvard Law School Association of New York City.

LL.B. '28 — Powell B. McHaney was killed in a traffic accident in Washington, D. C., on December 4, 1957. Mr. McHaney was the president of General American Life of St. Louis, and president of the American Life Convention at the time of his death.

LL.B. '34 — Frederick Reed Dickerson is presently Chairman, Ad Hoc Committee on Codification; Assistant to General Counsel (Codification); Deputy Assistant General Counsel (Manpower, Personnel and Reserve); in the Office of the General Counsel of the Department of Defense. His address is 3023-44th Street, N. W., Washington 16, D. C.

LL.B. '41 — Arnold D. Roseman has been elected a Supervisor from New Rochelle to the Westchester County Board of Supervisors — the first Democrat to be elected from that district in fifty years. Mr. Roseman is a partner in the law firm of Kennedy, Roseman & Gardner, of New Rochelle, New York.

LL.B. '43('47) — Irvin M. Kent was married to Florence M. Skarbnik on December 19, 1957 in Newark, New Jersey.

The law firm of Peabody, Koufman & Brewer has moved their offices from 50 State Street to 53 Beacon Street, Boston. The partners of the firm include: Endicott Peabody, LL.B. '48, Joseph M. Koufman, LL.B. '49, and William C. Brewer, Jr., LL.B. '49. Associates of the firm include: Thomas G. Taylor, LL.B. '57, and John M. Kahn, LL.B. '54.

LL.B. '48 — C. Gorham Phillips has become a member of the firm of Dewey, Ballantine, Bushby, Palmer & Wood, 40 Wall Street, New York 5, New York.

ANNA JANSEN DAVIS

Stenographic & Reporting Service
Legal & Medical
Theses Typing
HAncock 6-0916
(Browning 2-0387 — evenings)

Rackets Restrung

One Day Service

TENNIS & SQUASH SHOP

67a Mt. Auburn St. Cambridge
Opp. Lowell House — TR 6-5417

28 YEARS - "AT YOUR SERVICE"

ELBERRY MOTOR CO., Inc.

FRANK ELBERRY

Ford Sales - Service

Expert Body, Paint and Fender Work

GUARANTEED USED CARS

JUST 2 MINUTES VIA MEMORIAL DRIVE

360 RIVER STREET, CAMBRIDGE KI 7-3820 - 21

For Every Law Student . . .

SELECTED ESSAYS

IN YOUR COURSES

Reprinted from THE HARVARD LAW REVIEW

FIRST YEAR

INTRODUCTION TO LAW

\$2.95

1957 EDITION — 436 pages — 21 contributions to a basic understanding of the law by the leading judges and scholars of this century.

TORTS

\$1.75

1955 EDITION

SECOND YEAR

TRUSTS (Austin W. Scott)

\$2.00

1955 EDITION — 20 outstanding articles arranged in accordance with the organization of Professor Scott's Cases on Trusts (4th ed. 1951)

CONSTITUTIONAL LAW

\$2.25

1952 EDITION

THIRD YEAR

WILLS, FUTURE INTERESTS,
AND ESTATE PLANNING

\$2.95

1958 EDITION — A collection of outstanding articles by Professors Casner, Leach, Westfall, and others — ready soon

CONFLICT OF LAWS

\$1.75

1952 EDITION

HARVARD LAW REVIEW ASSOCIATION

Gannett House
Cambridge 38, Mass.

Harvard Law Record

DAVID F. BINDER, President
WILLIAM F. COTTELL, Editorial Manager
ROBERT W. OLIVER, Business Manager
RALPH NADER, Senior Editor
JOSEPH A. PAGE, Executive Editor
ROBERT E. MANLEY, News Editor

HARRY R. SCHUMACHER, Contributing Editor; ALAN S. NOVICK, Photographer; BENNET B. HARVEY, Jr., Cartoonist; MRS. TRUMAN S. CASNER, Secretary.

Staff: ROBERT M. BORDEN, Hartley J. Chazen, Andre R. H. Chognard, Frederick H. Condon, Donald S. Dowden, George F. Duke, Robert G. Finley, Jerrold K. Footlick, Daniel M. Hall, Alan K. Illig, Lambros J. Lambros, William J. Lawlor, III, Edward M. Levin, Jr., Laurence B. Orloff, David Shayne, Jacob Todd, Eleanor R. Voss.

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 Lexington, Massachusetts, under the Act of March 3, 1879.

The RECORD extends its deepest sympathy to the family and friends of Dean Vlahides, a third-year student whose untimely death took place early Friday morning, January 31.

Some of Mr. Vlahides' friends have announced that they will send a contribution to the heart fund in his name. Contributions are being accepted at the Board of Student Advisors' office.

Book Review

By John A. Ballard, LL.B. '55*

NUCLEAR WEAPONS AND FOREIGN POLICY. By Henry A. Kissinger. New York. Published for the Council on Foreign Relations by Harper & Brothers, 1957. 455 pp., \$5.00.

Dr. Henry A. Kissinger, Associate Director of Harvard's new Center for International Studies, has produced here a tour de force in logic and insight, the most thorough study to date on the relationship of force to policy in the nuclear age. This is not a volume of light reading, not an eclectic statement of programs to be undertaken; for the reader looking for this, there is the recent Rockefeller Brothers Fund report on United States military needs, a report edited by Dr. Kissinger.

Nuclear Weapons and Foreign Policy is on a plane — quite consciously so — with the theoretical works of Clausewitz, Mahan, and Douhet. Dr. Kissinger states that "A revolution cannot be mastered until it develops the mode of thinking appropriate to it." And he proceeds to explore in very full detail the strategic and diplomatic implications of the revolution brought in by nuclear weapons.

For a strategic doctrine to be feasible, it must link available power to desired objectives; and the test of a doctrine is its provision for the widest range of likely contingencies. Using these formulations, Kissinger dissects the doctrine of massive retaliation and finds it aimed only at the least likely contingency — a direct nuclear attack.

Massive Retaliation

The utility of massive retaliation in the face of more likely forms of aggression is no better than that of any threat which cannot be acted upon. Dr. Kissinger, looking to Korea, Indochina, and Suez, postulates that no nation will risk mutual suicide unless faced with a clear and unambiguous threat to its survival; and he credits the Russians and Chinese with skill in presenting only ambiguous threats.

Admitting the need for retaining a retaliatory capability as deterrent against all-out war, Dr. Kissinger sets out to define methods for dealing with less than all-out aggression. The core of his proposed answer — a capability for waging limited nuclear war — is deduced directly from the necessity for close interdependence between the size of an objective and the size of the force applied to reach or maintain it.

"The key to a successful policy of limited war is to keep the challenge to the opponent, whether diplomatic or military, below the threshold which would unleash an all-out war. The greater the risk in relation to the challenge, the less total the response is likely to be. The more the challenge approximates the risks posed by all-out war, the more difficult it will be to limit the conflict. A policy of limited war therefore presupposes three conditions: the ability to generate pressures other than the threat of all-out war; the ability to create a climate in which survival is not thought to be at stake in each issue; and the ability to keep control over public opinion in case a disagreement arises over whether national survival is at stake. The first condition depends to a considerable ex-

Gallery

Clark Byse, Visiting Professor from the University of Pennsylvania Law School, is a man who injects much humor into his classroom presentations, but who takes his responsibilities as a teacher and as a citizen very seriously. For in addition to his scholarly duties, Mr. Byse has played an active part in deliberations and actions directed toward the maintenance of civil liberties in general, and academic freedom in particular.

Although Mr. Byse has gained a good deal of prominence in his special field of administrative law, he is perhaps even better known to the public, especially in the Philadelphia area, for his work in behalf of freedom of expression.

Most conspicuous in the public eye may have been his debates with Justice Michael Musmanno of the Pennsylvania Supreme Court on the Pennsylvania Loyalty (Pechan) Act. Two debates, held at Temple University and at the University of Pennsylvania on the same day in December, 1951, attracted a sizable and vocal audience to hear Mr. Byse express his disapproval of the newly-enacted law.

Law School Association

But Mr. Byse himself takes greater pride in an undertaking receiving less public attention — his work with the Association of American Law Schools committee on academic freedom. Mr. Byse was chairman of a committee which made recommendations on the procedures that should be followed when a teacher refuses to answer Legislative questions in a report which Dean Ingraham of Wisconsin's College of Letters and Science has called "a magnificent document."

Although Mr. Byse has concerned himself with the larger problems in the area of ac-

ademic freedom, he also has considered views on some of its internal aspects. One of his pet interests is the role that a faculty should play in the government of a college or university. In this regard, he has been active in the University of Pennsylvania Senate, of which he was recently vice-chairman.

He is also interested in the problem of a fair hearing for students accused of infractions. "I sent Professor Seavey a note congratulating him on his article in last year's *Harvard Law Review* criticizing the denial of due process to a state university student dismissed for alleged cheating," Mr. Byse noted. "I told him I was glad that he had done something about it."

Similarly, Mr. Byse believes that the law professor should spend most of his time in academic pursuits rather than engaging in practice. And accordingly, with a few exceptions including a period with the Government and then the Navy during World War II, Mr. Byse has engaged in no outside practice since he began his teaching career as an Instructor at Iowa Law School following his graduation in 1938 from Wisconsin Law School, where he was Editor-in-Chief of the *Law Review*.

"It's our job to do the things that practicing lawyers can't do," he says. "This includes, as I told Justice Musmanno, reviewing the decisions of the courts. The teacher's responsibility in society is unique. That job is not the representation of people. The primary job is to teach and write. Outside activities should be undertaken not because they are rewarding monetarily, but because they are rewarding professionally, that is improving your ability to teach and write."

The slender, youngish-looking for his age (45) professor is best known to students here from his first-year course in contracts, and second-year class in administrative law, the latter having just begun. But already his socratic techniques, as spiced with his humorous observations, quips and repartee, are gaining for him a measure of the popularity which he enjoys among students at the University of Pennsylvania, where he has taught since the end of the war in 1946, and where he gained full professorship in 1948.

His work in the administrative law field included participation in a recent conference in New Delhi, India, at the founding last December of the Indian Law Institute, to which he is now designated as a consultant. In addition, he is co-author with Professor Walter Gellhorn of the casebook being used in the administrative law classes this year.

As a visiting professor is in a unique position to make comparative appraisals, Mr. Byse was asked for his views of Harvard Law School, and how it is different or similar to Penn. Despite a strong, and understandable, reluctance on the part of a visitor to be quoted

against which limited nuclear weapons might be directed; and by failing to set up hypothetical cases, he dodges altogether embarrassing questions on the applicability of limited nuclear war outside Europe and barely touches on the logistics and communications problems inherent in his program. At no point does he give fair recognition to the problem of selling to Americans and their allies a strategy whose essence is patience, persistence and subtlety.

These weaknesses should not obscure Dr. Kissinger's accomplishment. He has set a framework of doctrine within which or against which all future discussion must be pitched. And in doing so he has forged a unified approach to the ordinarily divorced problems of military strategy and organization, disarmament, civil defense, and alliances.

To support his arguments, he marshals impressively both Western and Soviet political and intellectual history. Two chapters on Sino-Soviet strategic doctrine provide a well-documented rationale of Communist behavior in the nuclear period and clear warning against any hope for a significant accommodation between the two worlds. And there are imaginative diagnoses of the difficulties in our relations with NATO and the uncommitted nations and in our national defense structure.

Heavy Reading

The volume is spiced with provocative comment on the American character and on the nature of revolution. But again, *Nuclear Weapons and Foreign Policy* is very heavy reading, at least in part because of continuous restatements on different levels of abstraction and concreteness of the several trains of argument.

It is unfortunate that Congressional hearings and debates and National Security Council and Pentagon discussions will continue to take place only on the level of tangible recommendations of the Rockefeller and other reports, not on the level of complexity and sophistication provided by Dr. Kissinger. It is the mark of his book that, despite its pre-Sputnik publication, technological and other advances have changed none of its import; it is the mark of United States defense planning that Sputnik rather than Dr. Kissinger has been the impulse for rethinking.

* Assistant Dean of Harvard College



Clark Byse

the representation of people. The primary job is to teach and write. Outside activities should be undertaken not because they are rewarding monetarily, but because they are rewarding professionally, that is improving your ability to teach and write."

The slender, youngish-looking for his age (45) professor is best known to students here from his first-year course in contracts, and second-year class in administrative law, the latter having just begun. But already his socratic techniques, as spiced with his humorous observations, quips and repartee, are gaining for him a measure of the popularity which he enjoys among students at the University of Pennsylvania, where he has taught since the end of the war in 1946, and where he gained full professorship in 1948.

His work in the administrative law field included participation in a recent conference in New Delhi, India, at the founding last December of the Indian Law Institute, to which he is now designated as a consultant. In addition, he is co-author with Professor Walter Gellhorn of the casebook being used in the administrative law classes this year.

As a visiting professor is in a unique position to make comparative appraisals, Mr. Byse was asked for his views of Harvard Law School, and how it is different or similar to Penn. Despite a strong, and understandable, reluctance on the part of a visitor to be quoted

Sub Judice

This proposed Recommendation of the New York City Bar Association Committee on State Legislation was submitted in the spring of 1957 by W. Bernard Richland author of "The Ready Constitutional Brief Writer," 13 NY County Bar Bulletin 112 (1955), and formerly Assistant Corporation Counsel of New York City, now with the firm of Baer, Marks, Friedman, Berliner & Klein. (The Committee was reluctantly persuaded not to print and forward the Recommendation to the Governor and Legislature.)

We disapprove this bill because it contains undefined terms, because it unreasonably discriminates against Indians and small boys, and because it might lead to war.

This bill, which would take effect July 1, 1957, proposes to amend the Conservation Law so as to prohibit the use of the long bow to shoot arrows across public highways or within five hundred feet of a residence.

There is exception from these provisions such use on target ranges regularly operated and maintained by police departments and other law enforcement agencies.

In the first place, the term, "long bow" is not defined. How long or short a bow has to be in order to be a long bow is a matter to which many scholars ancient and modern have addressed themselves without reaching agreement. In the second place, there is even

in a way that might cause ill-feeling in either school, it was possible to elicit these observations:

"I am very impressed with Harvard Law School, and particularly with the quality of the students," he said. "The school itself is an exceedingly well-run organization, and the students are attentive, well-prepared, imaginative and willing to discuss the issues. I find that I get more intelligent questions in and out of class."

Top Students

"I think," he added, "that the top students at the two schools are fungible. The difference is that there are more top students here, partly of course because Harvard has such a larger student body."

"My first year class at Penn last year numbered 80, and I don't find the differences between 80 and the 125 students I have here significant as far as my method of teaching is concerned."

Professor Byse tries to take a personal interest in the progress of his students. As one of his first year men put it, "He seems very concerned in seeing that first year students get along well. He is always glad to see you and talk to you after class if you have any problem."

This tendency is borne out by his answer to a query as to what incident in his career might qualify as having provided the "biggest thrill."

His reply: "I think my biggest excitement comes when a student in later years, whether mistakenly or not, suggests that he has learned something from me."

His concern for the welfare of students is perhaps part of his concern for individual well-being that prompts his activities in the area of freedom of expression. In addition to having written many law review articles and book reviews on these subjects, he was president last year, and is currently a member of the executive committee of the University of Pennsylvania chapter of the American Association of University Professors.

Mr. Byse has been an active member of the Philadelphia chapter of the American Civil Liberties Union since 1951, and was its president last year. In his ACLU capacity, he helped obtain representation for several Philadelphia public school teachers who were dismissed shortly after pleading the Fifth Amendment before a House Un-American Activities subcommittee in November, 1953. The United States Supreme Court has granted certiorari in the case, *Beilan v. Board of Public Education*, which is on the current calendar.

Academic Freedom

"Academic freedom is a special freedom that deserves particular protection," he feels. "One of the greatest things about Erwin Griswold is that he has spoken out on the Fifth Amendment. A law teacher has a responsibility to exercise whatever influence he has on the side of individual freedom. Griswold and [Jefferson B.] Fordham [of the University of Pennsylvania Law School] are two of the Deans who have spoken up, and I respect them for it. In one sense, this is what academic freedom and tenure are for. I think we should use it."

Professor Byse also pointed out the relation between freedom of expression and administrative law in the importance of "due procedure." "I don't think, for instance, that you should require a loyalty oath of people," he asserted, "but if you are going to and are going to fire people from their jobs on the basis of loyalty and security, then they should at least have the opportunity of notice and a fair hearing."

— Borden

dispute as to whether the term "long bow" refers to the size of the instrument at all. Such terms often do not mean what they appear to mean. For example, the 100-lb. long bow used at Agincourt shot an arrow called the cloth-yard; so named because it was 37 inches long, which shows how confusing things can get.

Assuming, as we do not for a moment concede, that the term "long bow" has a reasonably precise meaning, we nevertheless note the following additional objections to the bill: The United States and the State of New York stand in treaty relations with the Indian Tribes whose use of the bow and arrow antedates the constitutional preservation of the right to bear arms. While laws may be enacted for the control of the possession of concealed weapons as a reasonable limitation upon the constitutional guarantee, it is doubtful that a long bow long enough to be a long bow could properly be placed within the category of concealed weapons.

In any event, the imposition of such strictures as this bill would impose on the Friendly Tribes might well operate to limit their effectiveness as our allies, might make them unfriendly, and might lead to war. Moreover, the discrimination in favor of peace officers is unreasonable. If the Sheriff's men can have bows and arrows, it seems to us that so ought the Indians; otherwise, it's not fair.

For the foregoing reasons, the bill is disapproved.