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TEN CENTS

State Chief Justices Wrong, Criticism Misguided - Freund



Paul A. Freund

"Today all criticism of the Court runs the risk of fanning the fires of lawlessness and cynicism that have been ignited in the wake of the school desegregation cases." This warning was sounded by Paul A. Freund, Carl M. Loeb University Professor, as he delivered the annual Louis Dembitz Brandeis Memorial Lecture at Brandeis University in Waltham, Mass., on November 12.

Professor Freund pointed out that for some time previous to the decision in *Brown v. Board of Education* the Supreme Court had been "applying the guarantee of equal protection of the laws to a series of issues: the right to serve on juries, the right to vote in primaries, the right to choose a place of residence without a legal color bar, the right to be considered for admission to a state professional school without discrimination because of race. . . . The school cases differ from these precedents primarily in the fact that escape from the school decisions is much more difficult; simply because attendance at the public schools is a pervasive and everyday activity, evasion of the mandate of equal protection of the laws cannot be achieved through half measures and occasional compliance as was possible with jury service and suffrage."

Defending the Supreme Court, Professor Freund asserted that:

(1) "... the Court did not inject itself into the issue of school desegregation; the issue was put before it inescapably. . . . Its choice was only how to decide . . ."

(2) "... the Court recognized the genuine problems of transition that would be encountered in some localities and for that reason rejected the urging of the petitioners and the Department of Justice that a definite time limit be fixed for plans of compliance. Instead, the Court took the more moderate course of setting the standard of deliberate speed, a standard that would surely allow adaptation to local conditions, provided always that a bona fide use of time is

(See FREUND on page 3)



Eleanor R. Voss

Eleanor Voss Dies in Accident

Eleanor R. Voss, 3L of New York City, was killed early last Thursday morning, November 13, when a taxicab collided with a motor scooter on which she was riding as a passenger. The driver of the scooter, Ira Rabkin, 3L of Camden, N. J., suffered multiple injuries and is now resting in Stillman Infirmary. His condition is not serious.

Miss Voss, 22, described as "one of the most enthusiastic and popular members of her class," resided at 101 Hammond Street, Cambridge. She is survived by her parents, Mr. and Mrs. Herman Voss, and a brother, Robert, all of 697 West End Avenue, New York City.

The tragedy occurred at the intersection of Broadway and Windsor streets in Cambridge about 2 a.m. The scooter, traveling along Broadway, proceeded through a blinking yellow light. The taxicab, traveling along Windsor, had a blinking red light. Miss Voss evidently died almost immediately after the crash of a broken neck. Both Miss Voss and Mr. Rabkin were taken to Cambridge City Hospital. Rabkin was later removed to Stillman Infirmary.

The driver of the taxi has been identified as Francis E. Langone, 27, of Cambridge, an employee of Regal

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Leach Wins Model Trial; Jury Awards for Libel

The jury returned a verdict for the plaintiff in the sum of \$13,750.80 in the case of *Marsh v. Fitch* argued last Thursday before an overflow audience in the James Barr Ames Courtroom.

The annual Model Trial opened with a general statement by W. Barton Leach, Story Professor of Law, counsel for plaintiff. The defendant was represented by Robert W. Meserve, Lecturer on Law. The case was a tort action for libel and interference with an advantageous relationship.

Robert Marsh, the plaintiff and the first witness, testified that he was the principal of Austin High School, and that he had been negotiating with Mr. Francis Chase about the possibility of becoming Headmaster of the Chase School, a school of high repute in Ames. When the negotiations had been brought very nearly to a close, the defendant, Lt. Col. Daniel Fitch, U.S.A. (retired), an alumnus of the school, wrote Mr. Chase a letter charging that the plaintiff had hit a young boy with his automobile and left the scene of the accident to avoid detection, although he was later

caught. It also stated that if the matter of hiring Marsh as Headmaster of the Chase School went any further toward consummation, he would be compelled to put the matter before the alumni association. This letter, Mr. Marsh testified, caused Mr. Chase to withdraw his offer of employment to him.

The letter did not state that the "young boy" was the defendant's 22 year-old nephew, Henry Fitch, nor that he was not on the paved portion of Hedgehollow Road, a rural road leading towards Austin.

The letter formed the basis for the plaintiff's action. He asserted that the defendant was motivated by malice in writing it, to "get even" with the plaintiff for hitting his nephew. He also charged that the facts stated were not true, because he had only left the scene to get help, and not to avoid detection. He admitted that he had hit Henry Fitch, but that he had been satisfied that it was better to leave him where he was and go for help, rather than move him, since he was on the shoulder of the road and did not appear to be bleeding.

He said that in seeking help he accidentally turned off on the wrong road where he met Miss Lucy Cooper, a bucolic apple picker, who helped him get to a phone. He then called the hospital, where he was told that the accident had already been reported and that an ambulance was on its way. On his way back to the accident he was stopped by a policeman who returned to the police station where he was booked for hit and run and reckless driving, although the charges were later dropped on motion of the district attorney.

When Col. Fitch learned that Mr. Marsh was the person who had hit

(See TRIAL on page 4)

Council Elects Hon. Members

Jerome J. Sussman, 3L of Brooklyn, Robert L. Brenner, 2L of Minneapolis, and Leslie A. Todd, 3L of New York City, were designated Honorary President, Honorary Secretary, and Honorary Treasurer, respectively, in recognition of their past service as officers, by the Dormitory Council at its third meeting of the academic year, held Monday evening, November 10th, at 10 p.m., in the Gray Room of Holmes Hall.

A straw vote indicated that ten of thirteen present voting members of the Council favored amending the Dormitory Association Constitution to confer full legal status as officers upon the three for the unexpired portions of the terms to which they were originally elected, notwithstanding that they no longer reside in the dormitories, which the present Constitution requires. A Constitutional amendment must obtain fifteen affirmative votes of the Council's total membership of twenty-two, and may be proposed at the next Council meeting, to be announced.

— Moss

Fuller Explains Polaroid Growth

It takes more than increased earnings and sales to become a growth company, Carlton P. Fuller, vice president and treasurer of Polaroid Corporation, told the Bull and Bear Club last Friday. To be classified as such by investment experts, a company must possess the ability to expand from within. In tracing the development of Polaroid from 1937 to the present, Mr. Fuller demonstrated the validity of this statement as it applied to his company.

Polaroid, he explained, began with the idea of one man and the support of others who believed in him. The idea was to use the unique light-controlling properties of polarizers in automobile headlights and thereby remove the familiar glare of oncoming cars at night. The man, a scientist named Dr. Edwin H. Land, was a pioneer in the development of polarization and its many applications in industry. It was through Dr. Land's extraordinary scientific abilities that Polaroid established itself as a leading scientific company prior to and during the Second World War.

Although the original idea did not achieve fruition, due in part to the hesitancy of automobile manufacturers to risk the added cost, Polaroid had considerable success as a research company. Yet, upon emerging from its war activities, it realized that to continue its growth, it could no longer rely upon research alone. It must develop a real money earning product which it could sell directly to the public. Again it was Dr. Land who developed the idea of "a picture a minute" camera. In 1946 he introduced his invention to the company. By 1949 the Polaroid Land Camera was on the market. Its success since then is apparent to all.

In emphasizing the "growth" ability of Polaroid, Mr. Fuller pointed with understandable pride to the fact that never have they used any blueprint or invention which was not a product of the company's own research department. Every idea which Polaroid distilled into a profit-making product was conceived within the

(See POLAROID on page 4)

Lewis to Talk

Anthony Lewis, Supreme Court reporter for the *New York Times*, will speak in the James Barr Ames Courtroom this evening at 8 p.m. Mr. Lewis received the Pulitzer Prize for national reporting in 1955, and later was a Nieman Fellow here. His address, "Inside the Supreme Court," is being sponsored by the Student Bar Association.

Professor Paul A. Freund will introduce Mr. Lewis.

Professor Byse Suggests Remedies To Curb Influence on Agencies

Professor Clark M. Byse, along with other law school professors, government representatives, and lawyers testified at public hearings held by the Special Subcommittee on Legislative Oversight of the Committee on Interstate and Foreign Commerce of the House of Representatives, headed by Oren Harris (D) of Arkansas, in Washington, D.C., on November 18 and 19. James M. Landis, former dean of the Harvard Law School, was also among those who appeared.

The subject of the hearings was the Administrative Process and Ethical Questions. Four topics were assigned for panel discussion. Professor Byse testified yesterday afternoon on the topic, "How can improper pressures be best dealt with?"

The following are excerpts from a paper prepared by Professor Byse and read by him to the Subcommittee:

The happiest solution to the problem of improper pressures in the administrative process is to have administrators of integrity and courage. . . . Government service must be made attractive to men of integrity and ability. I refer not only to compensation but to a factor of possibly greater importance. As it is now an idealistic and able young man who enters the government's legal service cannot reasonably expect to work his way up the



Clark M. Byse

ladder to the position of general counsel and to membership on the commission or board by which he is employed. He can reasonably expect to become a section or branch chief. He may become an assistant general counsel and possibly associate general counsel. Although there are exceptions, unlike comparable private employments in large corporations or law firms, the top positions of responsibility and power are foreclosed. The result is that many young men do

not enter government service and of those who do a sizeable percentage leave after a few years.

It is my impression . . . that neither the executive nor the Senate has been shown to be seriously concerned with the quality of the persons selected to serve on the various federal administrative agencies.

Improper pressures flourish where the range of discretion is great, where the administrative action relates to exceedingly valuable interests, and where the acts of the official in question are not subject to appropriate internal or external controls. If Congress wishes to prevent or reduce improper pressures, it might well consider whether many of the matters it has committed to the discretion of administrators might not more appropriately be controlled by the forces of competition. . . . If sound policy requires governmental largess, Congress should consider whether its objects and the amounts could not be determined by automatic criteria rather than by administrative application of an amorphous standard.

But certainly the goal should be to limit discretion to the narrowest legitimate limits, particularly when the legislation authorizes distribution of a bonanza or contemplates the substitution of an administrative decision

(See TESTIMONY on page 4)



Robert M. Segal

Labor Lawyer To Address SBA

Robert M. Segal, LL.B. '42, counsel for the Massachusetts Federation of Labor, will be the luncheon speaker before the Student Bar Association, at 1:30 p.m. Monday, November 24, in Harkness Commons. Mr. Segal's topic will be "The Lawyer's Role in Labor-Management Relations."

Mr. Segal is a partner in the Boston law firm of Segal and Flamm, a former chairman of the Labor Relations Law Section of the American Bar Association, and author of many articles on labor relations law and economics of the legal profession. He is chairman of the Alumni Committee on the RECORD, and a former member of the Council of the Law School Alumni Association.

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The RECORD extends its deepest sympathy to the family and friends of Eleanor Voss, 3L of New York City, whose untimely death took place last Thursday, November 13.

Family, friends, and classmates of Miss Voss have announced that a trust fund has been established to provide a scholarship in her name to a Goucher College student. Donations are being received at the RECORD office at 23 Everett Street, and by Robert Borden, 55 Hastings; Eric Osterweil, 77 Sacramento Street; and Flora Schnall, 49 Langdon Street. Checks should be made payable to the Eleanor Voss Trust Fund.

Added Clerkships Are Anachronistic

Almost 75 per cent of the lawyers in the United States today possess law school degrees. And the percentage is constantly increasing. Almost all states, however, still require some form of office apprenticeship to be substituted for law school training in order to qualify a person for admission to the bar.

But this system of legal training by means of office apprenticeship, like the outdoor circus, is rapidly disappearing from the American scene. Indeed, few young lawyers are aware that it even exists.

A good many lawyers and lawyers-to-be are aware, nonetheless, of a particularly viable branch of the dying tree of law office apprenticeship. Five states still require a special "clerkship" in a lawyer's office in addition to formal law school training as a condition of admission to the bar.

Old States

Four of these states (Delaware, New Jersey, Pennsylvania, and Rhode Island) were members of the original thirteen colonies. The fifth, Vermont, entered the Union shortly thereafter, in 1791.

The length of the clerkship required to be served in 4 of the 5 states is 6 months. New Jersey's requirement is even longer, 9 months, and an additional four months is added for each unsuccessful attempt at the state bar examination.

These compulsory clerkships have recently been subject to attack in both Pennsylvania and New Jersey. Hoary with age, extremely unpopular with those who must undergo them, and unrecognized in 43 states (including every state admitted to the Union since the 18th century), these compulsory clerkships might be expected to die out altogether in the near future, without undue fanfare. But they have found vociferous defenders in both states in which they have been attacked.

Necessity?

Compulsory clerkships are explained on the ground that they are a necessity because the average law school graduate is incapable of coping with the practical problems involved in the general practice of law. This viewpoint received wide publicity in 1952 when Arch M. Cantrall wrote a controversial article entitled "Law Schools and the Layman: Is Legal Education Doing Its Job?" 38 *A.B.A. Journal* 907.

Robert A. Kessler, after a lengthy study of the compulsory clerkship situation in New Jersey, recently wrote, in a two-part article which appeared in the *New Jersey Law Journal* on September 18 and 25: "Cantrall

THE LABOR POLICY FOR THE FREE SOCIETY

by Sylvester Petro
 Ronald Press, New York, 1957.

by
 CLYDE W. SUMMERS

Professor Petro has written a book which is out of this world. He describes the "free society" and sets forth basic principles on which it rests. Reasoning from these principles, he defines the labor policy appropriate to such a society. He writes with vigorous phrases, bold generalities, and zealous certitude. His provocative premises and proposals, unfortunately, suffer from the flaw of having been written about a world other than our own.

The "free society," as here described, is one unqualifiedly committed to the free market, which means that men shall be free to engage in normal, peaceable pursuits without fear of physical restraint from either their fellow men or agents of the state. Conflicting interests are resolved by free exchange in the market place where values are measured by the price men will pay. The state does not intervene to fix maximum interest rates, minimum wages, or non-discriminatory utility rates. The author sadly admits that "free market ideas have never in the known history of man had an opportunity to control completely the affairs in even one nation," and he repeatedly reminds us of the multitude of interventionist measures which now obstruct and undermine the free market. The validity of neo-classical theories of political economy is irrelevant. It may describe an ideal world, but it does not describe our present one, and our problem is to design a labor policy within the existing framework.

Not Realistic

This remoteness from reality follows logically from the author's making twin gods of private property and freedom of contract. "Private property," he says, "is not merely indispensable to the free society; it is the free society itself." Any reallocation of property rights by law "necessarily amounts to arbitrary action which reduces human freedom and social productivity." From this he reasons that "discriminatory taxation . . . is arbitrary in exactly the same sense that slavery is arbitrary." Freedom of contract is implicit in the right of private property; therefore any compulsory social security or unemployment insurance is an abandonment of freedom principles. Equally obnoxious are progressive

is correct: The law school graduate is not adequately equipped to handle the practical problems of a real client. It is further the author's opinion that the law schools cannot fill this need for practical training."

Some form of compulsory clerkship is, Mr. Kessler concluded, "a necessary addition to the requirements for practice in all those states of the Union where the interest of the public is placed above that of the practitioners."

Mr. Kessler believes that 43 out of 48 states do not place the interest of the "public" above that of the "practitioner." Might it not be conceivable, however, that 5 states place the interest of the old established practitioner above that of the young would-be practitioner?

Practicalities

Nobody questions the fact that there are certain practical things that the average law school graduate has to learn and certain adjustments that he has to make in starting to practice law. And nobody questions the fact that a young law school graduate generally benefits from the experience he gets while serving a clerkship.

The big injustice inherent in the compulsory clerkship is the economic hardship it visits upon many financially hard-pressed law school graduates. The Kessler article contains figures which reveal, rather shockingly, that 41% of those serving compulsory clerkships in New Jersey received no pay at all, and, indeed, that the median pay for those who were fortunate enough to receive any compensation was an average of \$60 per month. Sixty dollars a month, in the year 1958, could conceivably be considered a "starvation wage."

Wage Scale

It is interesting to note that the members of the bar in the five states which still require a compulsory clerkship pay their secretaries, on an average, more than five times as much as they pay their law clerks. Here, it seems, they have to meet the market price, or their secretaries will leave them. But the young law school graduate can't leave, not if he wants to practice law in the state. The august members of the bar have him, in common parlance, "over a barrel."

Bargaining conditions between members of the bar associations in these states and their

inheritance taxes, rent controls, farm subsidies, and the TVA.

It is for this unreal world that a labor policy is prescribed. To protect the free market he would prohibit all sympathetic action by unions and limit them to a simple strike in the bargaining unit. The employer, however, would be protected in enlisting aid by farming out struck work, and replacing strikers. All picketing would be outlawed as "an inherently fraudulent activity," and all appeals to customers or suppliers would



Clyde W. Summers
 Professor of Law
 Yale Law School

be lumped together as secondary boycotts. Property rights would be protected by abolishing the right of unions to solicit on company premises for this "compels employers to help employees in their organizational efforts." Freedom of contract requires that employers be allowed to make promises of benefits to employees to defeat unionization and to make unilateral increases during organizational campaigns. The employer's duty to bargain would end with meeting with the union, parroting "No" to each demand, and insisting on unlimited discretion as to every term and condition of employment. Of course, all union security provisions should be outlawed. To provide a "sensible juridical structure," the Norris La-Guardia Act should be repealed, the National Labor Relations Board should be abolished, and all labor cases should be decided by the "constitutional courts." After all, "the field with which we are concerned is law," and in this the judges are the true experts.

The author declares that "not one line of this book is designed as an attack upon the

young law clerks are roughly comparable to those that existed between employers and employees in industry during the post Civil War period. And the wage scales resulting are about the same, too.

The bar associations in these five states rationalize the compulsory clerkship requirement by declaring that one of its major purposes is to protect the young law school graduate himself. If he were to begin to practice law without benefit of experience gained by clerking for a member of the state bar, he might make some sort of mistake which could permanently damage his future career. Compulsory clerkships are then, in reality, for the young lawyer's own good.

Public Service

Bar associations in these five states are also in the habit of asserting that they are really doing an important public service by maintaining the compulsory clerkship requirements. For the public should be, indeed, must be, protected from the young inexperienced lawyer who has not served his clerkship. He seems to be considered by these bar associations as a sort of legal leper.

But why, it might be asked, has the public in those 43 states which do not require a compulsory clerkship raised no outcry against young, inexperienced lawyers? Could it be that some of these fears are a little exaggerated? Perhaps even more than a little exaggerated?

Perhaps it is time that the bar associations in Delaware, New Jersey, Pennsylvania, Rhode Island, and Vermont take a good, long, 20th century look at this compulsory clerkship that they are imposing on young law school graduates who wish to practice in their states; and perhaps it is time they more sympathetically considered the economic hardship it works on the less wealthy of them, many of whom, besides having trouble making ends meet to pay current expenses, owe a sizable interest-bearing sum to universities where tuition and other expenses are constantly rising, for the seven long years of schooling it has been necessary for them to undergo. Perhaps it is time that the members of the bar associations in these 5 states reconsider the possibility that their brethren in the other 43 states may not be the ones who are out of step.

— Binder

institution of trade unions as such." He simultaneously declares that "coercive conduct has been characteristic of trade unions," and that no other organization "has displayed as much corruption and arrogance as some trade unions have." Since unions can not properly raise wages above the free market price, their "creative role" is to "interpret the free society to the workers," spur production, encourage workers to save and invest, operate training schools, and provide information as to employment opportunities.

Abstract Propositions

The significance of this book lies not in its bold conclusions but in its stereotype method. It starkly reveals the kind of logical analysis and attitude toward facts which commonly plague discussion of national labor policy and obstruct the search for acceptable solutions. First, it attempts to solve concrete problems with abstract propositions. The author adopts certain basic values, converts them into exclusive premises, and marches them resolutely to destructive conclusions. The problem of developing a labor policy, unfortunately, requires more than mechanically drawing deductions from major premises, or even simply choosing between alternative premises. The values we seek are manifold and often conflicting; we do not choose between them but choose portions of all of them. The principle of free choice clashes with majority rule, and so in representation proceedings we provide for both in part and neither in full. The need for solidarity and uniformity competes with the demands of individualism, and we struggle for a workable, not logical, accommodation for individual grievances under the collective contract. The evils of disorder and disruption of production are weighed against the evils of state intervention and we endure a portion of both in our national emergency strike provisions.

The difficult problems of labor policy are difficult precisely because they encompass a complex of values. Organizational picketing can not be dismissed as a simple problem of economic coercion, for it may involve the need of the union to protect standards in competing union shops, the exercise by the union of self help to counteract employer hostility to unions, and the right of consumers to know the character of those whom they patronize. The problem of limiting union security can not be solved by deductions from freedom of contract—a rubbery and two-faced concept at best. Workers generally can not claim the benefits of a job without accepting its burdens. Whether requiring him to bear a share of the bargaining representative's expense is an appropriate burden raises conflicting values beyond the reach of deductive logic. Defining the scope of various forms of sympathetic action on the part of either unions or employers is not aided by appeals to a mythical free market. The solution will not be found through logic but through practical judgment and experimentation.

Deducing solutions from "basic principles," which are but question begging premises continuously redefined to reach preconceived results, may provide an intellectual euphoria but it can not meet society's real needs. It is this method of analysis which has produced appealing but diverting slogans such as "right to work," has generated vague single-minded proposals to make unions subject to the anti-trust law, and has written into the Kennedy-Ives Bill the requirement that employers file non-communist affidavits.

Ignores Facts

Resort to broad principles leads to ignoring hard facts and reaching conclusions which do not conform to reality. The author ignores the stubborn fact of intermittent if not chronic unemployment and its pervading implications for national labor policy. He correctly points to union disregard of the law but ignores employer violations—an ugly fact revealed daily in NLRB hearings and which must be faced in designing legislation. He asserts that employers are economically rational, choosing employees on the basis of their value to the enterprise. The history of employer discrimination on the basis of race, nationality, sex and union membership can not so easily be rewritten, nor ought the law be based on such make-believe. His "free market" assumes perfect competition and a fluid labor market which scarcely describe the actual workings of the labor market as revealed by scientific studies.

Such facts are always difficult to face, for they puncture our theories, and by their disorderliness destroy hope of simple solutions. Failure to face them, however, leads to such disruptive and revolutionary proposals as outlawing industry-wide bargaining, gives currency to easy generalizations that unions are now secure from employer attack, and creates a false trust in such worthless and uncivilized proposals as barring all persons who have been convicted of any felony from holding union office.

No one wholly escapes the temptation to select and warp facts to fit predetermined ends, and we all are lured by seductive but unfaithful premises. We must constantly discipline ourselves to resist the siren call. It is good to have a book such as this to dramatically remind us of the consequences, and thereby prod us to reexamine our own thinking for equally unreal assumptions, and stir ourselves from our own comfortable dreams.

FREUND

(Continued from page one)

made to bring about ultimate desegregation."

(3) "... the decisions were not an abrupt departure in constitutional law or a novel interpretation of the laws. The old doctrine of separate-but-equal, announced in 1898, had been steadily eroded for at least a generation before the school cases, in the way that precedents are whittled down until they finally collapse."

Observing that some quarters of the nation are finding it hard "to live physically" with the school integration decision, he asked, "would it not have proved even harder to live intellectually and morally with a contrary decision?"

Appeal to Federalism

Professor Freund described the Court's decree of school integration with all deliberate speed as "an appeal to the resources of federalism to work out a viable solution within the framework of the principle of desegregation. If the energy spent on resistance were to be expended on devising ways of compliance, and if the collaborative efforts of white citizens' councils were to be matched by collaboration with those who have successfully administered a change-over from segregated to desegregated schools, the problem would yield to reason, goodwill and practical sense."

"One thing is certain," he emphasized, "ignorant and disgraceful billingsgate will not bring about a change in judicial action. What it will do, if it is not met with the repugnance it deserves, is to stimulate a spirit of lawlessness and bigotry, evidences of which we are already seeing in more than one part of the country and in more than one area of American life."

Irresponsible attacks on the Court, Professor Freund declared, produce "other and subtler consequences... as we weaken the habit of respect for law and legal institutions, we disqualify ourselves for leadership in the movement — groping and fragile as it is — toward a common law of mankind. The atmosphere of cynicism and lawlessness is a radioactive fallout which not only contaminates our own lives, but by spreading a pall over our aspirations for a regime of world law, poisons our own and the world's future as well."

Paradox

"A final consequence of unbridled criticism is the paradox that all criticism may be inhibited, lest it be seized on and distorted into a weapon in the warfare being waged against

the Court. It would be a great disservice if it came to pass that the only alternatives open to observers of the Court were unbridled abuse or indiscriminate praise."

Taking sharp issue with the report of the Conference of State Chief Justices which criticized the Supreme Court for lacking judicial self-restraint and for expanding federal power and authority at the expense of the states, Professor Freund asserted:

"The areas of state authority with which state officials may be most legitimately concerned are really three: state regulation, state taxation, and political self-determination on the part of a state. In each of these fields the Supreme Court over the past twenty years has shown a marked degree of self-restraint. Indeed the greatest contrast between the modern Court and its immediate predecessors is in the deference which is now paid to social and economic measures enacted by the states. Similarly in the field of taxation, state measures which would have run afoul of the judicial veto a generation ago, because of doctrines of burden on interstate commerce or intergovernmental immunities, have now been sustained. And in the political realm, perhaps the most critical issue is the autonomy of the state with regard to its pattern of elected representatives, that is, its pattern of legislative districting. Here, despite vigorous protest both without the Court and from a minority within, the Court has declined to review the action of state legislatures in setting up grossly unequal local and congressional districts. Any balanced assessment of the Court's intervention in local affairs as against its exercise of self-restraint must surely give great weight to the abstention of the Court in all these central fields of state activity."

Human Liberties

"It is in the field of speech and assembly and free exercise of religion, together with procedural due process, that the modern Court has been most active in reviewing state determinations. Even here there is a marked difference from the practice of the old Court in holding statutes unconstitutional. Under the older practice, measures like minimum wage laws and price control laws were held to be outside the pale of legislative authority. Under the modern practice, decisions of unconstitutionality tend to revolve about defects in procedure which can be remedied by the legislature. The Court is reminding governments, in effect, that they must turn square corners when they deal with sensitive areas of human liberty. To put it another way, the Court is giving to the legislatures an opportunity for sober second thought, an opportunity in connection with a revision of the law to consider whether the law itself is really right and desirable. This is the purport of decisions which on their face seem technical, such as those constraining passport regulations or setting aside convictions in some cases for contempt of investigating committees."

"The thrust of the criticism by the state chief justices seems to me, in short, to have been misdirected. There has been no real invasion of state authority; on the contrary, there has

been growing acceptance of state legislation in the matters that really count. What the Court has done is to insist on procedural observances by both federal and state agencies, and on the standards of fair play which are implicit in the concept of due process of law. It is not particularly useful to count the number of times the Court has reversed lower federal courts or state courts. What is more important is to understand the basis for such reversals. In this light it will be seen that the action of the Court is characteristically different from that of its predecessors. In the past whole areas of state activity were ruled out of bounds under the supposed compulsion of substantive due process of law. Today the Court is concerned with method, procedures, and similar elements which go to the way in which legal authority is exercised against the individual, leaving it to the state or federal government to cure the defect by more careful procedures or perchance on taking a longer second look to reconsider the basic policy and objectives of its program.

"What gives concern is not, then, what seems to have chiefly troubled the state chief justices. It is rather a tendency to make broad principles do service for specific problems that call for differentiation, a tendency toward over-broadness that is not an augury of enduring work and that misses the opportunity to use the litigation process for the refinement and adaptation of principle to meet the variety of concrete issues as they are presented in a lawsuit."

Cautioning his audience against "judging the judges simply in terms of end-results," Professor Freund declared, "The law of the future is likely to be the law which earns its perduration by solidity and strength of workmanship no less than by its appeal to our ethical sense."

VOSS

(Continued from page one)

Cab of Watertown. He did not stop at the scene of the accident, but appeared later at a local police station. The license plate from the taxi was found at the scene of the collision. At last reports the accident was still being investigated and no charges had been placed against Mr. Langone.

Miss Voss and Mr. Rabkin had attended the policeman's ball at the Hotel Continental in Cambridge the evening of the accident. The motor scooter upon which they were riding, a new Vespa, had just been purchased by Mr. Rabkin and had been registered the afternoon of November 12.

Miss Voss graduated with honors from Goucher College in Baltimore in 1956 where she majored in political science. She had entered Goucher from her sophomore year at the New York High School of Music and Art as a Ford Foundation experimental student. The foundation, at the time, was conducting an experiment to determine the desirability of having advanced students start their college program without completing high school.

Miss Voss and several girls who entered college with her were the subject of an article that appeared in the October, 1956, issue of *Readers Digest*, wherein she was described as "highly intelligent and vivacious."

While at Goucher, Miss Voss was Phi Beta Kappa and was named to *Who's Who Among Students in Amer-*

Death Penalty . . .

The State of Oregon, bucking a slowly developing trend, approved capital punishment in the November 4 election. A legislative referendum which would have eliminated the death penalty from the state constitution was defeated by more than 10,000 votes. About 300,000 votes were cast.

This was the second time in the past 3 decades that the people of Oregon have approved capital punishment. The death penalty, which had been abolished in Oregon in 1914, was voted in again in 1920, but by a much heavier proportion of a much smaller number of voters than this year.

Miss Voss was a member of the Maguire Club at Law School and was a member of a team which competed in the semi-finals of the Williston Competition. The results of this competition have not yet been announced.

While attending Goucher, Miss Voss appeared as a member, representing Goucher for 2 successive years, of a college quiz team that appeared on New York television stations.

The funeral for Miss Voss was held in New York last Sunday.

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4	5.59	2.66	2.93	6.46	3.39	3.07
5	5.59	2.78	2.81	6.46	3.59	2.87
6	6.46	2.42	4.04	7.81	3.32	4.49
7	6.46	3.07	3.39	7.81	4.06	3.75
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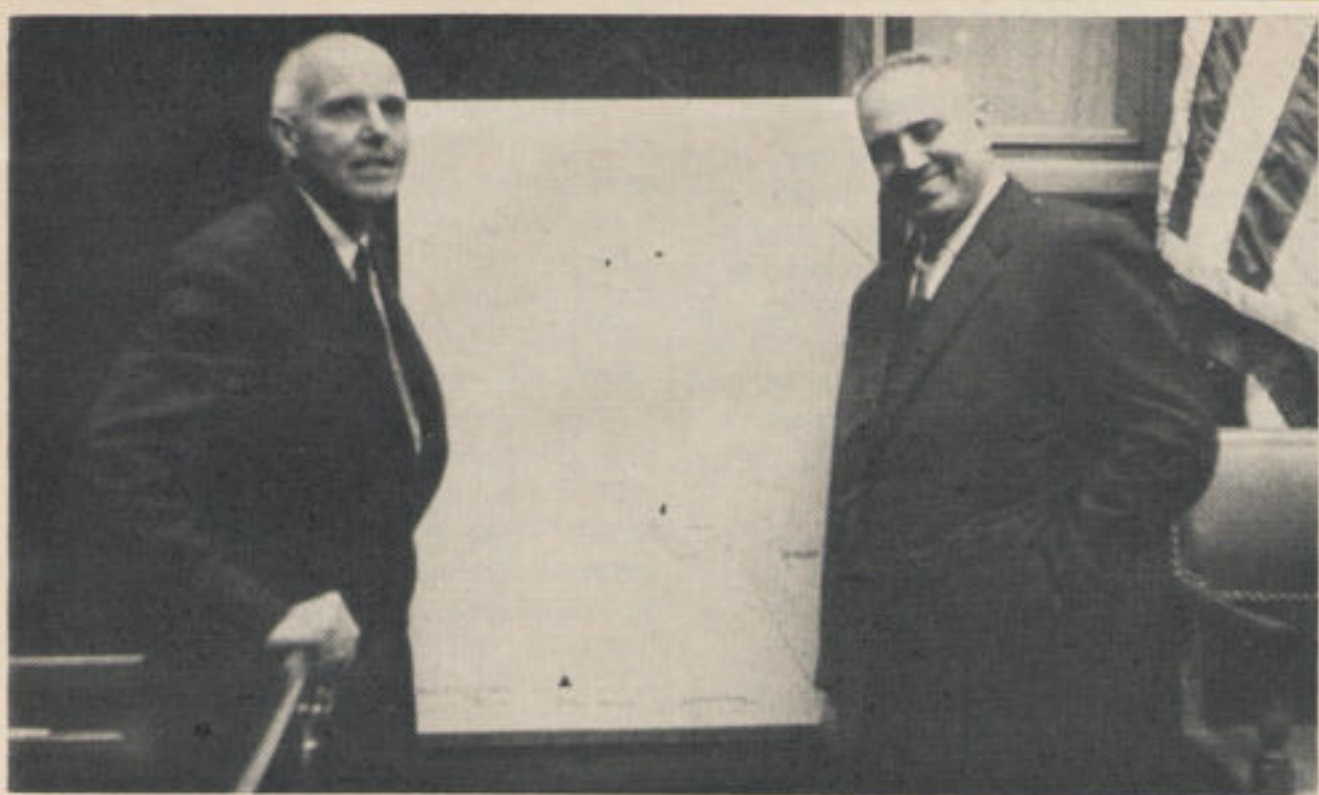
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Attorneys Leach (left) and Meserve (right) with chart of the scene of an accident involved in the Model Trial.

TRIAL

(Continued from page one)

his nephew, he was alleged to have said that he would see him "rot in jail." Colonel Fitch denied having said that, but he did admit that he had called the police station two or three times to ask whether Marsh was being prosecuted.

Mr. Chase was then called to the stand, and he substantially corroborated the plaintiff's testimony that there had been negotiations between them regarding the position of Headmaster at the Chase School, that it had been decided to offer Marsh the job, and that on receiving the defendant's letter and making a brief check into the matter, the offer was withdrawn.

Miss Cooper was the first witness for the defendant. She testified to meeting the plaintiff and taking him to her house, where he called the hospital. There were certain discrepancies between her testimony and that of the plaintiff as to how fast the plaintiff was going when he met her, how long it took him to stop, and the exact nature of the conversation between them.

The final witness was the defendant, Col. Fitch. He said that he and his nephew were returning from hunting, and that he had gone towards the top of a knoll while his nephew looked for his car, and that while he was climbing the knoll he heard tires screeching. When he got to the top, he saw someone bending over what appeared to be his nephew. The person almost immediately got into his car and drove off. He then ran down to his nephew, covered him with a hunting jacket, and ran to call help. Shortly after he returned, the plaintiff appeared with a policeman.

Mr. Leach cross-examined Col.

Fitch about his motive in writing to Mr. Chase. Col. Fitch said that he did not hold any grudge against Mr. Marsh, and that he had written the letter only with the purpose of aiding the Chase School. He also said that he believed the matters in the letter to be true.

After closing arguments by counsel, Judge Murray charged the jury that they could find that the letter written by the defendant to Mr. Chase was defamatory if they found that it imputed a crime, cowardice or heartlessness, and that the plaintiff had the burden of showing that the letter would have such an effect on a considerable portion of the community. He instructed them that for the plaintiff to recover more than nominal damages for libel, the libel would have to have caused his loss in employment.

Judge Murray then stated that truth would be a defense to the action for libel, and literal truth was not required. Actual truth, not what the defendant thought, was what mattered.

He also charged that even though the defendant's statements were not true, that if the letter was not motivated by malice, the defendant would be privileged to write it under the circumstances. He added that the plaintiff had the burden of showing malice.

The jury returned a sealed verdict in the stipulated sum of \$13,750.80, on the basis of the first count (libel).

— Todd

POLAROID

(Continued from page one)

company. Mr. Fuller felt this ability to sustain itself was the dominant characteristic of Polaroid, responsible for making it the great company it is today.

In terms of future products, Mr. Fuller spoke of a color film which is presently in the development stage, as well as several other major products not mentioned by name which the company plans to introduce to the public in the future. If, as Mr. Fuller said, the ability to expand from within is the trade-mark of a growth company, Polaroid has been its prototype in the past and gives all indications of continuing to be in the future.

— Longstreth

TESTIMONY

(Continued from page one)

for a decision which would otherwise be determined by the forces of competition. Unfortunately, Congress has not always conformed to this precept.

If, as may often be the case, it is impossible to draft reasonably definite standards when the legislation is first enacted, Congress might later survey the administrative experience and incorporate the criteria thus developed in amendatory legislation.

Where broad discretion concerning major economic matters must be conferred on the administrator, Congress should anticipate the danger of improper pressures and provide for appropriate internal or external controls. Judicial or administrative review, insistence on written explanations of actions taken, full publicity, definite allocations of responsibility and lines of authority, spot checks, rotation of field officers and similar measures can operate to limit improper pressures.

Congress Should Act

I believe that ethical standards in adjudication . . . should be required by Congressional action and that those standards should be enforced by requiring administrative officials who are approached off the record to make a full disclosure to the other parties to the proceedings, to enter the details of the off-the-record intercession in the administrative record, and to inform the Department of Justice and the appropriate professional disciplinary committee. There should also be provision for suspension or dismissal of any government official who failed so to report or who was a party to an off-the-record intercession.

Similarly strict sanctions should be imposed on the lawyer (or other representative) who committed the transgression and on the party on whose behalf he acted. The lawyer's privilege to practice before the agency should be suspended or revoked and the party should be disqualified from receiving the license, subsidy or other object sought from the agency.

Coping with improper practices in adjudicative proceedings thus should not be very difficult. Far more troublesome is the problem of improper pressures in non-adjudicative activities. Administrators make rules, conduct investigations, and engage in a host of managerial or administrative functions — granting subsidies, negotiating and renegotiating contracts, purchasing goods for stockpiling or other purposes, making loans, granting special permissions or exemptions. The "conflict of interest statutes" contained in Titles 5 and 18 of the United States Code deal with some of the more overt derelictions but "do not cover many of the subtle and dangerous sorts of 'influence' that fall short of actual bribery or real conflict of interest." The question thus is how shall these "subtle and dangerous sorts of influence" be handled?

I believe that the proposal that a Code of Ethical Properties be enacted is sound. I believe also that the ABA Canons of Professional Ethics should be revised to provide clearer guidance to lawyers, and that other professional groups such as accountants and engineers should, to the extent that they have not already done so, establish appropriate ethical standards to guide their members in their dealings with federal administrative agencies.

But I do not believe that integrity in the administrative process will be assured merely by enactment of an ethical code. Any ethical code will necessarily be couched in general terms and probably will deal primarily with abuses that have occurred in the past. There is also a danger that unless provision is made for enforce-

¹ McElwain and Vorenberg, "The Federal Conflict of Interest Statutes," 65 *Harvard Law Review* 955 (1952).

Canadians Resist Controls Accompanying U.S. Money

For reasons of political as well as of economic necessity, there is no likelihood that Canada will attempt legal restraint on American investment in the near future, if the sentiment of the McGill Conference on World Affairs, held November 12-15 in Montreal, is any guide, reported John J. Moss, 3L of New York City, who participated in the two opening days of the Conference, and was the sole American law student present.

The Harvard delegation included Gregory Harvey and William Sihler, '59, and Jane Holtz and Charlene R. Horn, both Radcliffe '60. Law students representing Dalhousie, McGill, and Ottawa Universities, and the Universities of Alberta, British Columbia, Manitoba, Montreal, and Saskat-

chewan also took part. The program consisted of round table discussions by the delegates of the political, economic, and military aspects of Canadian-American relations, and of addresses by leading Canadian and American political, journalistic, and educational figures.

"Some Canadians are still excited by three recent episodes they regard as scandalous examples of attempted control, by Americans, of their affairs," summarized Mr. Moss. "The greatest clamor seems to have been aroused by a U. S. Treasury effort of about a year ago to pressure American parents or arms of Canadian companies to prevent their Canadian connections from doing business with Soviet China; this culminated in the famous Ford Motor Company row, in which the American company actually did dictate that policy to its Canadian subsidiary, over protests that the order was contrary to the interests of Canadian stockholders or the Canadian economy. The Treasury subsequently withdrew the regulation which had caused the pressure."

Pipeline

"Then there was the case of the American-born Canadian Minister of Defence Production, the Rt. Hon. C. D. Howe, who, after approving an American bid for the construction of a pipeline, pushed a multi-million dollar governmental subsidy for it through the Canadian Parliament, which critics loudly cried was a reversal of the proper direction of capital flow, whose pendency should have been publicized earlier to attract more Canadian firms than actually bid. It was never proven that the Minister was himself interested in one firm involved in the deal, C. D. Howe & Co., consulting engineers, which he had founded forty years before."

"Finally, the American president of an international union has been trying to compel Canadian diesel railroads to continue the employment of firemen who formerly worked on steam locomotives, against the railroads' belief that they are no longer necessary. The Canadian Pacific is the railroad which is leading the opposition in this fight."

"Referring at least to the China affair, perhaps to these other incidents, Prof. Edgar McInnis, President of the Canadian Institute of International Affairs, expressed views, in opening the Conference, later assented to by most of the student roundtables: 'There are some grounds for complaint . . . but these are [nothing] compared to the immense positive benefits we have derived from American investments. It will take more than infiltration by American dollars to destroy Canadian sovereignty.'"



Louis L. Jaffe

ment, the code will soon become merely an expression of pious hope. I suggest, therefore, that the Department of Justice be given the responsibility of enforcing the code, and, further, that a Committee on Ethical Standards be established and directed to: (a) adjudicate alleged violations of the code, (b) render advisory opinions concerning ethical questions submitted to it, (c) promulgate interpretative rulings, and (d) recommend amendments and additions to the code.

. . . [I]ntegrity in the administrative process is but one facet of the larger problem of integrity in government. Legislators as well as administrators are part of the governmental process.

I can think of no more appropriate way of closing this statement than to invite your attention to the concluding paragraphs of a paper by one of the wisest and most perceptive of all the students of the administrative process, my colleague, Professor Louis L. Jaffe. The title of the paper is "The Scandal in TV Licensing." It appears in the September, 1957, issue of *Harper's Magazine*, and its concluding paragraphs are:

Though Congress has been notably weak during the past few years in providing policy guides, strong administration would have in some measure filled the void. But in our administrative, as in our legislative life, compromise, camaraderie, and trafficking are eating away at the fabric of the legal structure. This is a massive trend and can be fought only if there is a public opinion aware of this threat to effective government.

The challenge is a tremendous one. In our present context it will require an unwonted discipline and restraint in our quarters. We must re-establish the notion that commissioners when they have a case before them are quasi-judicial officers. Congressmen, high officials of the Administration, and party politicians must refuse to approach commissioners. The commissioners in their turn must close their doors and ears to everything except the record made openly before them. A litigant would not dare procure his Congressman to intercede with a judge. We must establish a tradition which makes the show of influence equally unthinkable in an administrative proceeding. It would be an important step in the building of such a tradition for Congress by statute to give authoritative expression to these principles.

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