

The Harvard Law School Record

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PRICE TEN CENTS

Record Smoker Today; 1st And 2nd Year Men Encouraged To Attend

Today at 4 p. m., the Harvard Law School RECORD will hold an organizational smoker and beer party at the RECORD offices, third floor, 23 Everett St.

There is a number of positions open on the editorial and business staffs of the paper. Time required for the activity can be as little or as much as the individual wishes to devote. Experience is not required, and people with ideas for new features, subjects for articles, or extended coverage will be especially welcome.

The RECORD, which is distributed to law school students, administration and faculty, and alumni, has the largest circulation of any Harvard student publication. It is a non-profit corporation organized under the laws of the Commonwealth of Massachusetts. Incorporated in 1946, the RECORD began publication in 1947. It is the oldest law-school weekly in the United States.

Should you wish to work on the RECORD but are unable to attend the smoker, please call our offices, Kirkland 7-7600, extension 447, and leave your name with the secretary.

Loss Of Citizenship Discussed By GOP

On Friday evening, Feb. 5, the Harvard Young Republican Club discussed the issues presented by President Dwight D. Eisenhower's recent proposal to deprive certain classes of persons of their United States citizenship.

The speaker was Ted McCabe, Teaching Fellow at the Law School; Professor Arthur E. Sutherland, LL.B. '25, originally scheduled to address the group, was called out of Cambridge shortly before the meeting. After being introduced by Roger Moore, LL of Sherborn, President of the Harvard Young Republican Club, McCabe prefaced his remarks on the controversial issue with the warning that whatever other qualifications he might have for addressing such a group, he was lacking in at least one—"I am a Democrat!"

McCabe explained that historically most cases involving loss of citizenship dealt with fraudulent representations made in the process of initial application. The case against Harry Bridges was based upon this ground. Other cases in which persons have lost their citizenship involved the right of a person to renounce his affiliation with the United States. Men who served in foreign forces during the last war were deemed to have renounced their citizenship.

The McCarran Immigration Act also provides for loss of citizenship as a penalty for certain acts, such as desertion from the armed forces, leaving the country to avoid the draft, and attempts to overthrow the government. The present plan would enlarge the class of persons affected by including persons guilty of "teaching or advocating" the violent overthrow of the government.

McCabe went on to point out that the whole area remains in a somewhat ill-defined state, since the Supreme Court has used very broad language in stating that citizenship can never be taken away, but nevertheless has held also that marrying an alien constitutes a sufficient renunciation of citizenship.

With regard to the ramifications of the proposed legislation, Teaching Fellow McCabe suggested that one possible objection to the plan was that it posed many legal problems without accomplishing any substantial result. If the citizenship rights of a person be taken away under the proposed act, he still has the right to use the courts; and is entitled to due process. To an extent, McCabe said, the proposal smacks of the ancient practice of "outlawry" where the individual lost all right to protection by the state.

Job Outlook Good For 1954 Graduates

Assistant Dean Russell H. Peck has announced that 54 members of the class of 1954 have accepted job offers. There are undoubtedly other third-year students who have found employment but have not yet reported their success to the placement office. Eleven of the men already employed have fathers who are affiliated with the law firms which hired them.

As was the case last year a sizable majority of the hiring firms are located



Russell H. Peck

in New York City. Of the 54 men selected 27 have joined firms in New York City. Nineteen of these have been employed by six of the largest of the City's firms.

Boston firms have taken four men. Four more will locate in New Jersey. Pennsylvania firms have thus far accounted for three men. Three more have accepted clerkships with judges.

(See PLACEMENT on page four)

Bricker Amendment 'Which' Clause Violates Traditional Treaty Rights

(The following article in two installments was written exclusively for the RECORD by John V. Duncan, LL.B. Columbia '28. Mr. Duncan was an editor of the Columbia Law Review, and is a member of the firm of Patterson, Belknap & Webb.)

The proponents of the Bricker amendment want to outlaw certain types of treaties, principally those involving States' rights. As pointed out last week in an article on executive agreements, the Bricker amendment would also impose a separate restraint on executive agreements, as well as outlaw them to the extent that treaties are outlawed.

The heart of the Bricker amendment, and the most destructive part of the proposal in regard to treaties, is Section 2, which reads as follows:

"A treaty shall become effective as internal law in the United States [A] only through legislation [B] which would be valid in the absence of treaty."

Notice the two parts [A] and [B]. [A] is cumbersome enough in requiring first action by the President and the Senate and second action by the Senate, the House of Representatives, and the President. But [B] is the emasculating provision. It would prohibit the United States from making treaties in the field where Congress cannot act in the absence of a treaty. This field is primarily the area where the States legislate, such as local business, real estate, inheritance taxes, wills, and duck hunting.

Once it is realized what the Bricker amendment will really do, its harmful effects become apparent. In order to appreciate what the amendment would do to the treaty making power and to the United States, it is necessary to remember that we are a country with two concurrent sovereign authorities, namely, the Federal government and the State governments. In the field of

Burton To Judge Ames Final; B. S. A. Confirms Acceptance

The Board of Student Advisers has confirmed the report that Harold H. Burton, Associate Justice of the United States Supreme Court, will preside at the final Ames argument on April 14.

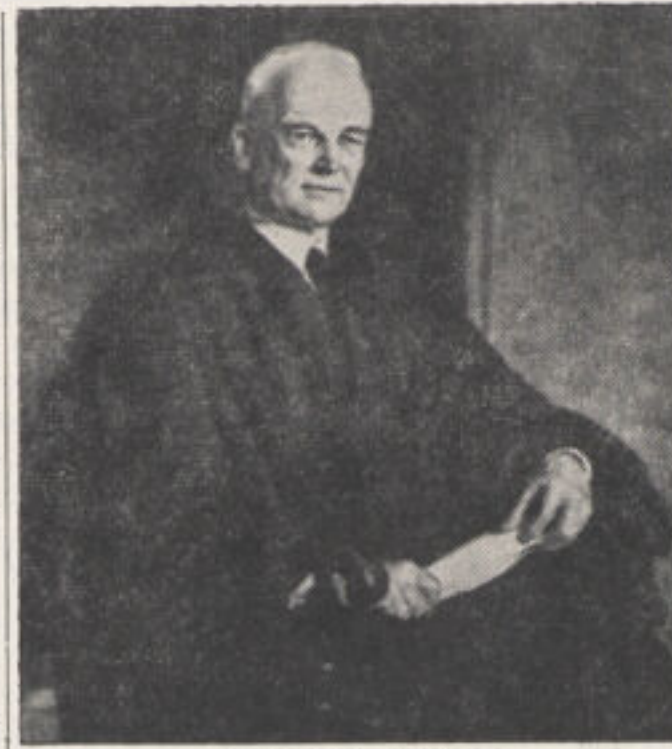
According to Charles H. Randall, Jr., Faculty Assistant in charge of the Ames competition, Justice Burton, LL.B. '12, has accepted the School's invitation to be chief justice on the Ames bench. Randall says that invitations to other prospective judges have not been sent out. The names of several candidates are still under consideration.

Justice Burton received his LL.B. from Harvard Law School in 1912, after doing his undergraduate work at Bowdoin College. Since then, he has practiced both private and corporation law, served in the U. S. Army during World War I, been Mayor of Cleveland, and was U. S. Senator from Ohio from 1941-1945. Since October 1, 1945, he has been an Associate Justice of the Supreme Court.

The Gardner Club will oppose the Story Club in the finals. Oralists for the latter are John W. Dickey and J. Lemoyne Ellicott. Oralists for the Gardner Club will be chosen from John A. Mitchell, William S. Ellis and Archibald C. Spencer. The subject of the case will not be revealed until the facts are issued on February 25.

REBROADCAST FEB. 17

Dean Griswold's speech on "The Fifth Amendment" before the Massachusetts Bar Association in Springfield, Mass., last Friday night will be re-broadcast over WGBH-FM at 8:30 p. m. on Wednesday, Feb. 17.



Harold H. Burton

Bundy, At Coffee Hour, Advises Reappraisal Of U S Foreign Policy Goals

Professor McGeorge Bundy, Dean of Harvard College, speaking at the Coffee Hour on Tuesday, warned of the many complexities confronting the U. S. in the future conduct of its foreign affairs.

Bundy began with a brief discussion of the problems presented by the debate over the Bricker proposal and over our reaction to the intransigence of the Russians at the Berlin Conference. These were not so significant in themselves, he thought, as they were symptomatic of a more fundamental problem afflicting our society. The fundamental issue raised is that of the capacity of contemporary American society for self-government in a period of external danger. Assuming a foreseeable future in which there would be no war but rather a contest between the Soviet and non-Soviet systems for global predominance, Professor Bundy went on to say that this will present grave economic and political questions for America. Economically, it will impose upon us the responsibility to reconcile our historic obligation of individual fulfillment with the pressing realities of forestalling a Soviet industrial inundation of the free world.

'Vigilantes'

As for the political difficulties involved in reconciling our individual purposes with the "existence of a major hostile foreign force", we have already had a sample of that. Thus Bundy believes that the phenomenon of abusive Congressional investigations and self styled vigilantes is traceable to a desire to explain high taxes and other domestic difficulties not in terms of external pressures on us, but rather in terms of villains. Being unaccustomed to external difficulties, we prefer to explain our troubles by saying that "someone is tampering with the works."

Although Professor Bundy did not spell out any detailed solution, he did suggest broad courses of conduct in the sphere of economics; we and the West will have to continue to regulate our rate of growth so as to effectively counter Soviet developments and thus maintain a global balance in the future. In the arena of politics, we will also have to think in long range terms and try to achieve a bi-partisan ideal in the conduct of foreign affairs so as to get these delicate matters out of the domestic arena of political ballyhoo and demagoguery.

LAW WIVES

The Harvard Law Wives will meet in the Wheeler Room of Holmes Hall on February 24 at 8 P. M. Mrs. Helen Orr Watson, lecturer, writer of children's books and national president of Pen Women of America will be the guest speaker. She will discuss writing as a hobby for the housewife.

State Party Leaders Address Democrats

John Carr, Chairman of the Massachusetts Democratic Committee, and Coleman Bornstein, Chairman of the Young Democratic Clubs of Massachusetts, spoke to the Harvard Young Democrats on Feb. 5 in the Wheeler Room.

Mr. Carr explained the workings of the pre-primary convention which both major Massachusetts parties will use this year. The delegates, chosen by local party committees, will endorse one candidate for each state post to be filled. Other candidates may also run in the primary, but the choice of the convention will appear first on the ballot. It will be indicated that this candidate is the regular party nominee.

Carr ridiculed stories that he can control this convention. He told the group that the State Committee had organized about 50 local committees, which in turn will name delegates to the convention. Carr said he was supposedly able to control these committees, but he pointed out that these committees will choose no more than 110 delegates. There will be 1,742 delegates at the convention.

'Districting'

Speaking of the proposed redistricting of Massachusetts, he said "They did a beautiful job" (referring to the Republican members of the General Court who have drafted a bill redistricting the Commonwealth. The bill has been attacked as gerrymandering). Such redistricting is all politics, he told the club, and added that when the Democrats regain control of Massachusetts, "I'll give 'em a districting like they never saw before."

Mr. Bornstein explained the relation of the Massachusetts Young Democratic Clubs to the national Democratic youth organization. After the 1952 elections the Massachusetts Democratic organization began to pick up the remnants of the youth organization, and put Bornstein in charge of the job. The Harvard groups, one in the college and one in the Law School, are among the first college groups in the Commonwealth, but Mr. Bornstein plans to put a Y. D. C. in every college in the state.

Bornstein also called for lawyers and law students to interest themselves in politics, and repeated Carr's attacks on political independents. Party regularity is important, he remarked, because over the long run it is the party's principles that count, rather than the character of any individual candidate.

Agricultural Tax Experts Address Harvard Group; UN Members Present

The Harvard Law School International Program in Taxation held a Conference on Agricultural Taxation and Economic Development here from January 28 to February 3.

The United Nations Secretariat took part in planning the conference and was officially represented at it by nine notable members including Henry S. Bloch, Director, Fiscal Division, and Roy Blough, Principal Director, Department of Economic Affairs. The Food and Agriculture Organization, the International Monetary Fund, and the International Bank for Reconstruction and Development were also represented.

The conference appraised the work already done in the field of agricultural and economic development and suggested guidelines for research projects which would be useful to underdeveloped countries.

During the conference prepared talks were given by Dr. Blough, Dr. Max Millikan, Director of the Center for International Studies at M. I. T., Dean Erwin N. Griswold of the Harvard Law School, and Stanley F. Teele, Assistant Dean of the Graduate School of Business Administration.



John V. Duncan

half in the United Nations. The Constitution furthermore specifically prohibits the States from entering into treaties. Why, therefore, deliberately create a partial vacuum in foreign affairs?

No One Could Act

For over 164 years we have adopted treaties through action of the Federal government (i. e. the President and a two-thirds vote of the Senate). There may be nothing sacred about having the President and Senate act for the United States (and other alternatives have been suggested in the past such as requiring

(See AMENDMENT on page four)

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A Timely Restatement

The Boston *Globe* commented that the speech of Dean Griswold to the Massachusetts Bar Association on the Fifth Amendment struck "an exposed nerve." We have no quarrel with the *Globe's* figure of speech. On the contrary, it is the very aptness of the phrase that should give us pause.

The Dean's analysis of the privilege against self-incrimination, and his evaluation of it as something which free men should value highly was essentially a restatement of traditional and basic values. If made in other times, the talk would scarcely have caused as much comment, one way or the other.

If this is so, it can only mean that these values no longer have the same meaning among segments of the American public that they once had. It would appear that this is but another of a long series of demonstrations showing that in our haste towards the goal of total security, we seem to be losing sight of those notions and those attitudes of mind which constituted our real strength the further we depart from these ideals the more urgent is the need for someone to stand and call the measure of our pace and to re-examine exactly that from which we flee.

For 45 minutes last week, the Dean did exactly just that. It is a measure of Dean Griswold's courage and integrity that he chose to speak in terms which squarely and honestly faced up to the basic issues. In the context of the times, it was hardly the "popular" thing to do. At the moment the American audience seems captured by the voices of demagoguery and those whose only answer to the pressing problems of our times is a violent irrationality.

Where such thinking prevails, it is not unnatural that the academic community, especially Harvard, has come under vicious and irresponsible attack. The attack must be answered and an accounting made of ourselves. We should carry with us the message of the Dean and of others like him, and finally, do the explaining ourselves.

Only when we have done the job well will the day come when a restatement of American liberties no longer strikes exposed nerves.

JOB HUNTING



"A good quality to display is restrained aggressiveness! Discouragement, lack of confidence, and insecurity should not be shown . . ." Placement and the 3rd year student.

Dean Griswold's Speech On Fifth Amendment

(The following speech was delivered by Dean Erwin N. Griswold at the Winter Meeting of the Massachusetts Bar Association held in Springfield, Massachusetts, on Friday, February 5, 1954.)

President Bodfish, Distinguished Guests, Ladies and Gentlemen:

Old friends are good friends. Yet even with the best of friends problems sometimes arise. I have the feeling that that is in a sense the situation we find ourselves in with respect to the Fifth Amendment. It has been with us a long time. It is rather comforting to have around. Yet in the past few years it has come to our consciousness as it rarely has before, and it has been troublesome to many members of the public. It has seemed to me worth while, therefore, to undertake a review of the Fifth Amendment with the thought that ordinarily the better we understand something in human experience, the less fearsome it becomes.

Before going further it may be well to introduce our old friend itself. The Fifth Amendment contains a number of provisions which are commonplace. It is the source of our constitutional rule that serious criminal charges must be made by indictment of a grand jury. It provides against double jeopardy, against the taking of property without due process of law, and against the taking of private property for public use without just compensation. Along with these other provisions is the phrase which has currently come to the fore: "No person . . . shall be compelled in any criminal case to be a witness against himself." In this connection, it is well to mention the fact that the Massachusetts Constitution has a corresponding provision, which antedates that in the Federal Constitution. Article XII of the Bill of Rights in the Massachusetts Constitution, adopted in 1780, provides that "No subject shall . . . be compelled to accuse, or furnish evidence against himself." We are not dealing with either an alien or a novel doctrine.

Historians can trace the origin of this privilege back to the twelfth century. Apparently it began in controversies between the king and the bishops. The bishops sought to examine people about a wide variety of alleged offenses, and the king sought to limit the bishops to purely ecclesiastical subjects. By the sixteenth century the idea had been reduced to a latin maxim which was rather frequently voiced, but which does not seem by any means to have reflected the practice of that period. This maxim is: *Nemo tenetur prodere se ipsum* — or, in English, No one should be required to accuse himself. As early as 1589, the young Coke apparently obtained a writ of prohibition against proceedings in the spiritual courts, on this ground. *Cullier and Cullier*, Cro. Eliz. 201 (1589). But the maxim was then little more than an idea. Over the next 50 years, it was apparently standard practice not only to make suspected persons give evidence against themselves, but also to use torture to make sure that the accused would speak. Indeed, it appears that Coke himself at times participated in the administration of torture for this purpose. As we think of the development of the privilege as it has continued to this day, we should not overlook the fact of its close connection with the struggle to eliminate torture as a governmental practice.

It seems quite clear that we owe the privilege of today primarily to Freeborn John Lilburn. He was a cantankerous person, the sort to whom we owe much for many of our basic rights. One of his contemporaries said that "if all the world was emptied of all but John Lilburn, Lilburn would quarrel with John and John with Lilburn." Like most contentious people, he was stubborn. In 1637, he was haled before the Star Chamber on a charge of having imported certain heretical and seditious books. He refused to take the oath to answer truly, and the Council of the Star Chamber condemned him to be whipped and pilloried, for his "boldness in refusing to take a legal oath," without which many offences might go "undiscovered and unpunished." And in 1638, the sentence was carried out.

But Lilburn persisted. He filed a petition with Parliament, and in 1641 the House of Commons voted that the sentence was "illegal and against the liberty of the subject." Later, the House of Lords concurred with this view, and ordered an indemnity paid to him in the amount of £3,000, which was a very large sum in those days.

This event seems to have been enough to establish the privilege against self-incrimination as a part of the common law. By the latter half of the seventeenth century, we find many occasions when the privilege was recognized by the English courts, and it has been recognized ever since. Indeed, it is still a matter of common law in England. But it is very deeply imbedded in the common law.

Thus, the privilege came to this continent as a part of the legal heritage of our early settlers. Some trace of the privilege is found in this Commonwealth as early as 1637, in the trial of Anne Hutchinson and John Wheelwright. It was also recognized in the other colonies, although the evidences are rather scarce.

Let me read to you a record which has come down to us from Pennsylvania in 1689. In that year, William Bradford was summoned before the Governor and Council of the Province of Pennsylvania. Bradford was the man who introduced the art of printing to the middle provinces of America. He was about twenty-six years old when this episode occurred.

At the instance of one of the citizens of Pennsylv-

vania, Bradford had printed the Charter of the Province so that people could see their rights. He had not put his name on the pamphlet, apparently anticipating some trouble. Here is the examination, chiefly by the Governor. You may want to consider whether you have ever heard anything like it before.

"Governor.—Why, sir, I would know by what power of authority you thus print? Here is the Charter printed!"

"Bradford.—It was by Governor Penn's encouragement I came to this Province, and by his license I print."

"Governor.—What, sir, had you license to print the Charter? I desire to know from you, whether you did print the Charter or not, and who set you to work?"

"Bradford.—Governor, it is an impracticable thing for any man to accuse himself; thou knows it very well."

"Governor.—Well, I shall not much press you to it, but if you were so ingenuous as to confess, it should go the better with you."

"Bradford.—Governor, I desire to know my accusers; I think it very hard to be put upon accusing myself."

"Governor.—Can you deny that you printed it? I do know you did print it, and by whose directions, and will prove it, and make you smart for it, too, since you are so stubborn."

"John Hill.—I am informed that one hundred and sixty were printed yesterday, and that Jos. Crowden saith he gave 20s for his part towards the printing it."

"Bradford.—It's nothing to me, what 'Jos. Crowden saith.' Let me know my accusers, and I shall know the better how to make my defence."

Little is heard about self-incrimination during the eighteenth century. This may well have been because the privilege was generally recognized in the colonies after it had become established as a part of the common law of England. Violation of the privilege did not figure as one of the major grievances of the colonists, although there are occasional references to "Inquisitorial Courts," and there was complaint about the roving jurisdiction of the admiralty courts during the controversy over the Stamp Acts. The Privilege was included in the Virginia Bill of Rights of 1776 drafted by George Mason, and, apparently largely because of its presence there, it made its way, in various forms, into the constitutions of six or seven of the original States. When the Federal Constitution was ratified, a number of the States proposed amendments, and the privilege against self-incrimination was specifically mentioned. Accordingly, it was included in the proposals made by Congress which became the Fifth Amendment in 1791, and it has been there unchanged ever since. It is truly an old friend, with an ancient and I believe useful history.

A good many efforts have been made to rationalize the privilege, to explain why it is a desirable or essential part of our basic law. These have been carefully reviewed by Wigmore, and he concludes that none of the explanations is wholly satisfactory. I am going to offer my own attempt to express the reason for the Fifth Amendment, and why I think it is a sound provision of our basic laws, both Federal and State.

I would like to venture the suggestion that the privilege against self-incrimination is one of the great landmarks in man's struggle to make himself civilized. As I have already pointed out, the establishment of the privilege is closely linked historically with the abolition of torture. Now we look upon torture with abhorrence. But torture was once used by honest and conscientious public servants as a means of obtaining information about crimes which could not otherwise be disclosed. We want none of that today, I am sure. For a very similar reason, we do not make even the most hardened criminal sign his own death warrant, or dig his grave, or pull the lever that springs the trap on which he stands. We have through the course of history developed a considerable feeling of the dignity and intrinsic importance of the individual man. Even the evil man is a human being.

If a man has done wrong, he should be punished. But the evidence against him should be produced, and evaluated by a proper court in a fair trial. Neither torture nor an oath nor the threat of punishment such as imprisonment for contempt should be used to compel him to provide the evidence to accuse or to convict himself. If his crime is a serious one careful and often laborious police work may be required to prove it by other evidence. Sometimes no other evidence can be found. But for about three centuries in the Anglo-American legal system, we have accepted the standard that even then we do not compel the accused to provide that evidence. I believe that is a good standard, and that it is an expression of one of the fundamental decencies in the relation we have developed between government and man.

As said by that old tartar, Mr. Justice Stephen J. Field, who was reared in western Massachusetts, "The essential and inherent cruelty of compelling a man to expose his own guilt is obvious to every one, and needs no illustration." And in words which he approved, it is the "result of the long struggle between the opposing forces of the spirit of individual liberty on the one hand and the collective power of the State on the other." *Brown v. Walker*, 161 U. S. 591, 637 (1896).

Where matters of a man's belief, or opinions or

political views are essential elements in the charge, it may be most difficult to get evidence from sources other than the suspected or accused person himself. Hence, the significance of the privilege over the years has perhaps been greatest in connection with resistance to prosecution for such offences as heresy or political crimes. In these areas the privilege against self-incrimination has been a protection for freedom of thought, and a hindrance to any government which might wish to prosecute for thoughts and opinions alone.

But the privilege is broader than that. It is applicable to any sort of crime, even the most sordid. Don't we go too far in giving this protection to criminals? Isn't the claim of the privilege the clearest sort of proof that the person who claims it is guilty of a crime? This has been asserted by high authority, but I do not believe it is true.

Apart from its expression of our view of civilized governmental conduct, another purpose of the Fifth Amendment is to protect the innocent. But how can a man claim the privilege if he is innocent? How can a man fear he will incriminate himself if he knows he has committed no crime? Judge Magruder of our own First Circuit Court of Appeals has recently given some illustrations of this in his illuminating opinion in the *Maffie* case, decided last month.

There is, for example, the case of the man who has killed another in self defense, or by accident, without design or fault. He has committed no crime, yet his answer to the question whether he killed the man may well incriminate him. At the very least it will in effect shift the burden of proof to him so that he will have to prove his own innocence. Indeed, the privilege against self-incrimination may well be thought of as a companion of our established rule that a man is innocent until he has been proven guilty.

In this connection let me quote from a Supreme Court decision written long before our present troubles. In *Burdick v. United States*, 236 U. S. 79 (1915, Mr. Justice McKenna wrote, "If it be objected that [Burdick's] refusal to answer was an implication of crime, we answer, not necessarily in fact, not at all in theory of law."

Now let us turn to an area which is closer to that which has recently been of concern. I am going to ask you to assume two sets of facts. You may think that both of the sets of facts are unlikely, and that they do not correspond with any case you have ever heard of. All I ask is that you assume the facts. I am simply putting a hypothetical case; and the facts are not the facts of any specific case.

Here is Case 1. A man is a college teacher. He is an idealist and perhaps slow to recognize realities as idealists sometimes are. He has a great urge for what he regards as social reform. He is native born, went to American schools, and loves his country despite what he regards as its imperfections. You may not agree with his ideas but you would respect his honesty and sincerity. He believes himself thoroughly attached to the country and the Constitution, and he abhors anything involving force and violence. He is a good teacher and works hard on his subjects. He has always believed that as a good citizen he should be interested in politics. Neither of the established political parties provided what he wanted. In the relatively calm period of the past middle 1930's, on the solicitation of a friend, he went to a communist meeting and soon joined the Communist Party. At that time the Communist Party was perfectly legal, and regularly appeared on our ballot. He thought he was simply joining a political party. One of the reasons that led him to join was because he regarded fascism as highly immoral and a great danger to the world, and he felt that the communists were fighting fascism in Spain at this time. His interest was not merely in protecting Spain, but because he thought that fighting fascism there was an important means of guarding against such a danger here.

Now you may say that this is all very unlikely. To this I reply that I am, for the moment, only assuming a hypothetical case, and I should be able to assume any hypothetical case I want. So these are the facts I put before you. You may feel that such a man must have been very naive or lacking in intelligence. To that I would make two replies: First, to say that involves the use of a large amount of hindsight. A man's actions at any time should be evaluated on the basis of the facts then available to him, and the state of his own mind on the basis of what he actually knew, and not by facts we learn later that were not known to him. And my second reply would be that the man may have been naive or obtuse. I would say that he was at least misguided and unwise. But I would point out that being obtuse or naive is a very different thing from being a traitor or a spy.

Let me add a few more facts, assumed by me as before. Our teacher was in a communist cell, with other teachers. The communists had great plans for this group. They wanted to use it to infiltrate American education. However, the communist command was canny. They knew that many or all of the members of this cell of teachers were politically innocent, and that they would recoil quickly from any proposals for sabotage or the use of force and violence. So they treated this group with great care. The group was never subjected to the rigors of communist discipline. It was a study group, and its discussions were kept on a high intellectual plane. The more sordid features of the Marxist doc-

trine were kept thoroughly in the background. Our teacher never engaged in espionage or sabotage or anything like that, and never saw or heard of any such activities by any member of his group. He would have been horrified by any such actions.

Nevertheless, there were things from time to time which he did not like. He rationalized them in various ways—nothing can be perfect; the thing to do is to stay inside and work against excesses; and so on. Besides he was a stubborn fellow. Once having started out on something he thought was good, he did not lightly give it up. But he became troubled; and after the war he slowly drifted away from the group. He never formally resigned. He just turned away. By the time of the Korean invasion in 1950, he was thoroughly disgusted and saw that he had been used as a dupe. But he was also convinced in his own heart of the rectitude of his actions, if not of their wisdom; and he did not doubt that many of the people who had been associated with him in the venture were just as innocent of wrong-doing as he was sure he was.

Remember I am doing the assuming. You may feel that these facts do not fit an actual case. But I am not trying to state an actual case. I am just assuming a hypothetical case, which is one of the ancient rights of any law teacher.

Now let me turn to Case 2. This man is also a college teacher. He never joined the Communist Party. He never thought of joining the Communist Party. He knew a good deal about the realities of communism, and he was thoroughly opposed to it. He was, however, a man who was interested in causes. His father had been a minister, who had dedicated his life to helping people. He himself had a great urge to participate in activities which he felt would help to alleviate suffering or contribute to social progress. In fact he was a sucker for almost any kind of an appeal. He contributed modest amounts to China Relief. He had always had a warm feeling for the Chinese. Sometimes he found himself on some of the letter-heads of some of these organizations as a sponsor. He was not sure that he remembered giving permission to use his name this way; but the cause, as indicated by the attractive name of the organization, was one that appealed to him, and he did not bother himself much about it. After a while he heard some rumblings that there might be some communist influence in these organizations, but he was slow to believe that that could true. In some of the organizations, he had been on committees with thoroughly respectable fellow citizens. He did not want to pull out, because he felt that this would let his friends down. Eventually he heard that some of these organizations had been ruled to be subversive by the Attorney General. But he, too, was a stubborn fellow. He believed in the stated objectives of these organizations. He was also a freeborn American, proud of his country's great traditions, and he allowed his name to be used by some of these organizations, as has been said in a recent article, "as a gesture of opposition to the procedure of proscribing organizations without giving them the right to be heard."

Well, that is the end of my assuming. Let us see what happens to these two individuals. Remember that both of these individuals feel that they are innocent of any wrongdoing. Each one is pure in heart, and perhaps a little too certain of his own rectitude. Each one may now regret some of the things he did, but he does not think that they were wrong. Each one is certain that he is morally innocent of any crime.

We can consider Case 1 first. He is the man who was a member of the Communist Party. He is summoned to appear before a Congressional committee, and is asked whether he is a communist. He answers truthfully: "No." Then he is asked whether he ever was a communist. He is now surely subjected to a substantial risk, even though he honestly believes that he has committed no crime. He knows that a number of communists have been convicted under the Smith Act of 1940, and more have been indicted. Our teacher perhaps magnifies his own predicament. He sees the jail doors opening up if he gives himself the evidence that he was once a communist. Interestingly enough, Section 4(f) of the Internal Security Act of 1950 (commonly known as the McCarran Act) provides specifically that "Neither the holding of office nor membership in any communist organization by any person shall constitute per se a violation of . . . this section or of any other criminal statute." But this was enacted after his period of Party membership. It has been declared to be a crime to be a communist in Massachusetts since 1951, but there may be some possible room to

question the effectiveness of this statute in view of the provision of the Federal Act. That the Federal statutes may displace State action is indicated by a decision of the Supreme Court of Pennsylvania just last week.

After much internal torment, the witness finally decides to claim the privilege of the Fifth Amendment with respect to the question of his past membership in the Communist Party. Putting aside the question of his wisdom in doing this, can there be any doubt that the claim is legally proper? Past membership in the Communist Party is not a crime in itself; but admitting such membership may well be a link in a chain of proof of a criminal charge against him. Persons have been prosecuted under the Smith Act for membership in the Communist Party plus something else. If he supplies the proof of his own membership in the Party, he does not know what other evidence may then be brought against him to show that he has committed a crime. Thus, an answer to the question will definitely incriminate him, that is, provide evidence which could be used in a prosecution against him. Yet, remember that he thoroughly believes that he is not guilty of any crime; and on the facts I have given he is not guilty of a crime.

There are other factors that influence his conclusion. His own experience is an ordeal. He does not want his friends to be subjected to it. He believes in their innocence of any crime. If he thought that they had committed crimes, he would promptly tell the proper officers of the government. By claiming the privilege against self-incrimination, he can refrain from naming any of his associates. He feels a strong sense of loyalty to them. He feels a strong sense of loyalty to his country, too; but since he is convinced that neither he nor his associates have in fact done anything wrong, his desire to protect them from having to experience his own predicament seems to him to have prevailing weight in the actual circumstances.

He claims the privilege. He cannot be prosecuted on the basis of any evidence he has provided. There can be no doubt, I believe, that his claim of privilege is legally justified. Yet, note that on the facts I have assumed he is not guilty of any crime. Of course his claim of privilege as to his membership in the Communist Party means that he must also claim the privilege as to all other questions which relate in any way to what he did, or to his associates in the activity. For if he answers any of those questions, it will clearly connote his own communist activity.

There is one small point which might be brought in here. It is sometimes said that the privilege may only be rightly claimed if the answer to the incriminating question would be "yes." I do not believe that is true. Our man in Case 1 has testified that he is not now a communist. He claims the privilege as to a question which asks him if he ever was a member of the Communist Party. He is then asked: "When did you cease to be a member?" He must claim the privilege as to this, or else his answer will disclose that he once was a member, as to which he has legitimately claimed the privilege. Then the examiner starts a new line. He says: "Were you a member of the Communist Party yesterday?" Now the answer is "No." But the witness who has taken this line cannot answer that question. For if he does, the questions will be continued: "Were you a member of the Party last year?—two years ago?—three years ago?" If he answers any of these accurately with a "no," he will come to the place where he must claim the privilege if he is to maintain his basic position. In this way, the date of his withdrawal could be pinpointed, thus giving valuable information for a possible prosecution. Moreover, he may not be sure just when he withdrew; it was a gradual process. And he may have legitimate fears that an honest answer he might give to a question relating to the transitional period might get him involved in a prosecution for perjury. At any rate, it seems clear that questions of this sort are an illustration of a type of question as to which the privilege may be legitimately claimed, as far as the law is concerned, even though the answer to the question would be "no."

Let us turn to Case 2, which we can dispose of briefly. You will remember that that was the man who had lent his name to causes, and had contributed money; and the causes have now turned out to be communist fronts, although they were attractively named, and many good Americans were, at one time or another, associated with them. But he was never a member of the Communist Party.

This man likewise is summoned before a Congressional investigating committee. The mere fact that he is summoned shows

that he is suspected of something rather serious, and he is badly worried. He is asked whether he is now a member of the Communist Party; and he answers "No." Then he is asked whether he ever was in the past. The answer is in fact "no," as we have seen. But he is now in great fear. If he says "No," then he may be subjecting himself to a real risk of a prosecution for perjury. He may rightly fear that proof of the fact of his joining and contributing to so many agencies which have turned out to be front organizations might lead a jury to believe that he actually was a communist.

Now it is probably true that fear of a prosecution for perjury for an answer given to a question is not a proper basis for a claim of the privilege. If it was, almost any witness could claim the privilege as to any question. But our man is in a somewhat different situation. If he says "No," to the question of communist membership, then in his own interest he may have to undertake to state and explain his membership and activities in the various front organizations. The net result may be that he will have to give much evidence which could be used against him in an attempt to prove that he was a member of the communist conspiracy. It would appear, therefore, that he can properly claim the privilege even though his answer to the question as to Communist Party membership at any time would honestly and rightly be "No."

In both of the cases I have put, the privilege may be claimed although the individual was guilty of no crime. In the second case it may be claimed although the person was never a member of the Communist Party. In each case, the inference which would be taken from the claim of the privilege would in fact be unwarranted. The claim of the privilege is surely a serious business, but it is equally surely not the equivalent of an admission of criminal conduct.

There are other reasons why a person may claim the privilege in a particular case. He might get bad advice; but I do not want to press that, as I think that in many of these cases the individual's troubles are caused in part by the fact that he chooses to make his own decisions and does not accept sound advice. But we should not forget that a person on the witness stand may be badly frightened, even though he is wholly innocent. For example, the Supreme Court of the United States has said, in *Wilson v. United States*, 149 U.S. 60, 66 (1893):

"It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand."

A witness lost in fear and confusion might turn to the privilege as a means of sanctuary from a situation which he feels himself incompetent to handle. Consider also how much the chance of a witness losing his calm and collected demeanor is enhanced by such things as television, radio microphones, movie cameras, flashing flash bulbs, and procedures which may not seem to him to be based upon the finest spirit of fairness. In connection with this I might mention the recent decision of the United States Court of Appeals for the Sixth Circuit in *Aiuppa v. United States*, 201 F.2d 287, 300 (1952), where we find the following language in the opinion:

"But, in concluding, we think it may not be amiss to say that, notwithstanding the pronouncements of the committee chairman as to intended fairness, the courts of the United States could not emulate the committee's example and maintain even a semblance of fair and dispassionate conduct of trials in criminal cases."

"Despite the enjoyment by millions of spectators and auditors of the exhibition by television of the confusion and writhings of widely known malefactors and criminals, when sharply questioned as to their nefarious activities, we are unable to give judicial sanction, in the teeth of the Fifth Amendment, to the employment by a committee of the United States Senate of methods of examination of witnesses constituting a triple threat: answer truly and you have given evidence leading to your conviction for a violation of federal law; answer falsely and you will be convicted of perjury; refuse to answer and you will be found guilty of criminal contempt and punished by fine and imprisonment. In our humble judgment, to place a person not even on trial for a specified crime in such predicament

is not only not a manifestation of fair play, but is in direct violation of the Fifth Amendment to our national Constitution."

Ordinarily when the privilege of the Fifth Amendment is exercised, it is in a criminal trial. There a specific charge has been made, and the prosecution has by evidence established a prima facie case of guilt of the particular crime charged in the complaint or indictment. Under such circumstances there is much more than the mere claim of the privilege on which to rest an inference of guilt.

In investigations, however, there are no carefully formulated charges. Evidence to support such charges has not been introduced and made known to the witness before he is called upon to answer. He has no opportunity for cross-examination of other witnesses, and often little or no opportunity to make explanations which might have a material bearing on the whole situation. In the setting of an investigation, therefore, the basis for the inference from a claim of privilege against self incrimination is much less than it is when the privilege is exercised in an ordinary criminal trial.

There are two more matters to which I should like to make brief reference. The first of these is the rather technical legal doctrine known as waiver of the privilege. A clear instance of waiver occurs when a defendant in a criminal case voluntarily takes the stand. He then becomes subject to cross-examination, and must answer relevant questions. So far as witnesses at investigations are concerned, our current learning on this is based largely on the Supreme Court's decision in *Rogers v. United States*, 340 U.S. 367 (1951). In that case, a witness testified that she had been treasurer of a local communist party, had had possession of the records, and had turned them over to another person. She then declined to name the person to whom she had given them, claiming the privilege under the Fifth Amendment. The Supreme Court held that by giving the testimony she did she had waived the privilege, and that she was guilty of contempt for refusing to answer the further questions. There was a dissenting opinion by Justices Black, Frankfurter, and Douglas.

My own view is that this decision was not soundly reasoned, and that it has led to unfortunate results. To me the analogy of an adversary proceeding is not apt when applied to an investigation. As a consequence of this case, witnesses who have legitimate fears of prosecution, but who might be willing to cooperate as far as they could, are induced (if not actually compelled) to refuse to answer any questions at all. For if they do answer a single question, it may be contended that they have waived the privilege so that thereafter they may be compelled to testify against themselves. This threat of waiver is not an imaginary matter. It may be found frequently in the transcripts of the proceedings of Congressional committees.

My guess as to the law is that the *Rogers* case applies only where the witness has given an incriminating answer to a prior question. I do not think it would apply if a witness was asked if he had been a member of the Communist Party in 1945, and he said "No." By the latter answer he has not opened up anything which he refuses to explain. Nevertheless, it will take a Supreme Court decision to provide this clarification of the *Rogers* case; and counsel advising a client may well hesitate to make his client bear the risk and expense of taking a case all the way to the Supreme Court. With the *Rogers* case on the books, the only safe advice may be to claim the privilege at the earliest possible moment, so as to be sure to avoid a charge of waiver.

This doctrine of waiver is, I believe, the true explanation of the refusal of some witnesses to answer such questions as "Have you ever taught communist doctrine in your classroom?" or "Have you ever solicited students to join the Communist Party?" These refusals have been deeply disturbing to the public. Yet, answers to these questions may be "No;" but the witness nevertheless fears that he cannot give that answer without its being said that he has waived the privilege as to questions about other sorts of communist activity. Here again we have a situation where the obvious inference from the refusal to answer the question may be completely unwarranted.

Finally, I would like to make reference to one more problem which is collateral to that of the Fifth Amendment. Suppose a witness is summoned before an investigating committee. He does not claim a privilege against self-incrimination, and talks freely about himself, answering all questions about his own activity. He takes the position, however, that he will not answer questions about others. Or suppose a

person first refuses to answer virtually all questions, claiming the Fifth Amendment privilege, but he later decides to waive the privilege as to himself. However, he refuses as a matter which he regards as one of principle to identify other people. What should be the situation with respect to such a person?

There have been a number of people who have been summoned before investigating committees and taken this position from the outset. They have answered all questions about themselves, and have refused to identify others. As far as I know, no academic person who has done this has been cited for contempt; nor has any such person lost his job. Should it be any different where the witness has first relied on the Fifth Amendment, but has later changed his position, waiving the privilege as to himself, but still refusing to answer as to others?

The problem is undeniably a difficult one. So long as the witness was claiming the privilege, it could be argued that he had done no wrong. If he had committed any crime, the evidence should be brought forth in the proper way and tried out in court. His refusal to answer was not evidence of any crime. This argument, however, is not available where he waives the privilege by refusing to answer questions relating to other persons. Then his Fifth Amendment privilege is wholly gone, and his situation presents new and rather different problems.

Whether he has committed a crime by his refusal to testify may be extremely difficult to tell. Even if he is cited by the legislative body, it will still be for the grand jury to decide whether to indict; it will remain to the courts to decide such questions as whether the committee was properly constituted, and whether the question asked was relevant to the inquiry. We should not forget that a prosecution for contempt was set aside within the past year by the Supreme Court on the ground that the questions asked the witness—as to the identity of his contributors—were not relevant to the particular inquiry. *United States v. Rumeley*, 345 U.S. 41 (1953).

However such questions go, though, would it not seem that such a person is at least in no worse a position morally than he was when he stood on the Fifth Amendment? He should not be worse off for being willing to speak fully and frankly about himself than he was when he would not talk at all. His refusal to tell on his friends may be both contrary to valid law and unwise. Nevertheless, it may be based on strong grounds of conscience.

Let me do a little more assuming: Let us assume that the witness feels positive in his own mind that the persons with whom he was associated did no wrong to our country. They did not engage in espionage or sabotage or anything like that. They were merely hopeful but misguided people, as he was. Let us assume, too, that this is all far in the past. The persons in question are in other work. They have families to support. If their names are disclosed, they will surely lose their jobs. He must then resolve for himself the question whether he will give their names and subject them to the same sort of ordeal he has been through in order to save himself from further difficulty and possible prosecution. He may be wrong if he decides that he should not protect himself by sacrificing them. I recognize the legal obligation to testify as to others, and the general importance of this both in trials and in investigations. But can it be said clearly that his action is always immoral?

Of course he may be wrong in his judgment of these other people. They may be worse than he thinks they are. But we all have to use judgment on such things. A man may honestly feel that he cannot bring suffering to others in order to save himself. To a considerable extent such questions can only be resolved in a man's own conscience. We are a society which has long depended on and applauded the virtues of the rugged individualist.

I do not justify the past or present conduct of anyone. I seek only to explain. Because of claims of privilege under the Fifth Amendment, and refusal to answer questions, many members of the general public have come to have fear of our educational institutions, and general mistrust of academic people. I firmly believe that these fears are unwarranted. I have tried tonight to show how some of the things that have happened could have happened without there being anything rotten in the universities. It may be a serious error of judgment for an academic person to claim the privilege of the Fifth Amendment, or to refuse to answer questions; but the conduct, regrettable as it is, does not show the

(Continued on page four)

(Continued from page three)

existence of treason, espionage, sabotage, or any other serious crime.

The great misfortune from all this, I believe, is that charges are made against our universities and other educational institutions, and more or less believed by some segments of our people. I think myself that it is easy to overestimate the extent of that belief, but it cannot be denied that there is disagreement, uneasiness and even fear in some quarters. As I have said, I think these fears are not soundly based. This is my twentieth year as a Faculty member at Harvard University, and I am thoroughly convinced that the University has acquitted itself well, and that it has been of great value to the country during that time. It is an injustice not only to the faculty members but to the country to allow any conclusion to stand that they are not good Americans or that they do not serve their country well. I think that the Harvard Law School with which I am intimately connected, is a great asset to the country and to the Commonwealth, and, in essence, one of the great conservative influences in our land. If there are any who think otherwise, let them examine the facts, carefully and thoughtfully.

As conservative a judge as Pierce Butler once wrote (*Sinclair v. United States*, 279 U.S. 135, 178 (1927)):

"It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs."

On this matter some final observations may be in order, based on our traditional practices and rules. In our criminal courts, we would never think of requiring an accused person to answer questions. He doesn't have to take the stand at all, and if he does so, he has the protection of an impartial judge, and the right to have his counsel speak in court in his behalf.

Why should it be so different in a legislative inquiry, when the information that is sought relates to the witness' own conduct? I recognize fully the power of the Senate and the House of Representatives,

the lineal descendants of the Houses of Parliament. These are deliberative bodies, and all points of view are usually represented among their members. Their actions are taken after debate, and represent the judgment of many people from all parts of the country.

I recognize also that these bodies have to operate through committees. A committee in the common acceptance of the term is a group of persons, usually appointed to represent various points of view. Its actions reflect collective judgment taken after consideration and deliberation. In this light, I ask a question: Should these broad investigative powers ever be held by a single person, even though he is formally clothed with the title of a sub-committee?

The more I think about this, the more it seems to me to be an unsound practice. There is nothing about the nature of membership in the Senate or the House of Representatives which should give each member a general commission to go through the length and breadth of the land, far from his own state or district, far from the seat of the general government, making inquiry about any subject, even on formal delegation to him from his House or one of its committees. Committees I am willing to accept. Sub-committees of one give me pause. It may well be that only the Houses of Congress can effectively deal with this problem, but I respectfully commend it to them for their consideration.

And so I come back where I started. The privilege against self incrimination embodied in the Fifth Amendment and in the Commonwealth's Bill of Rights has been a long time with us. It is, I believe, a good friend as well as an old friend. It embodies a sound value which we should preserve. As we increase our understanding of it, and the part it has long played in protecting the individual against the collective power of the state, we will have better appreciation of some of the basic problems of our time.

MILITARY LAW

Warren Fosket Farr, LL.B. '30, again will give the annual Lectures on Military Law this spring.

Mr. Farr's six lectures will be held in Langdell South at 5:10 p. m. on Thursdays. The first lecture will be given on March 11, and the series will run through April 15.

AMENDMENT—(Continued)

action also by the House of Representatives) but we should not by Constitutional amendment declare that no one can act.

Were Section 2 of the Bricker amendment in force, the Federal government could not have made the treaty ending the Revolutionary War; nor could it participate in international plans for the management and control of atomic facilities. Many rights under treaties of friendship, commerce, and navigation are essentially local and would cease to be proper subjects of treaties under Section 2. Instead of our being able to debate (in the Senate and in the executive branch of the government) the pros and cons of these specific treaties on their own merits, the Bricker proposal would prohibit the making of such treaties long before we know what the future might have in store for us. Our ancestors trusted us in this respect but we propose to make certain action by our children impossible without a further constitutional amendment.

Treaties made under the authority of the United States (if properly made and on subjects of proper international concern) are the supreme law of the land—but Acts of Congress made pursuant to the Constitution are also the supreme law of the land. Admittedly an unwise treaty might be made in the future but such an event is less likely than the adoption by Congress of an unwise law regulating taxes or interstate commerce. Furthermore a subsequent Act of Congress overrides in so far as domestic law is concerned either a treaty or a prior Congressional act. (Head Money Cases 112 U. S. 580 (1884) and subsequent cases.)

(Continued next week)

PLACEMENT—(Continued)

Only 150 members of the class of 1954 are draft-exempt either because of prior service, physical incapacity, or wives and children. On this select group 27 have reported jobs accepted.

Thus far approximately 100 law firms and business concerns have interviewed third-year students. This number compares favorably with last year's totals at the half-way mark. Dean Peck expects from past experience that one-half of the students seriously seeking employment will be placed by June, three-fourths by the following September, and the remainder by Christmas of '54.

Few Jobs

Few firms are expected to announce summer employment opportunities for first- and second-year students.

Lastly, summertime law clerks are notoriously low-paid. He says first- and second-year law students should think about beaches or mountain lakes next summer and rest up for the fall semester. The college employment service located in Weld Hall in Harvard Yard receives hundreds of summer job opportunities each year. It helps law students as well as college men find the type of job they desire.

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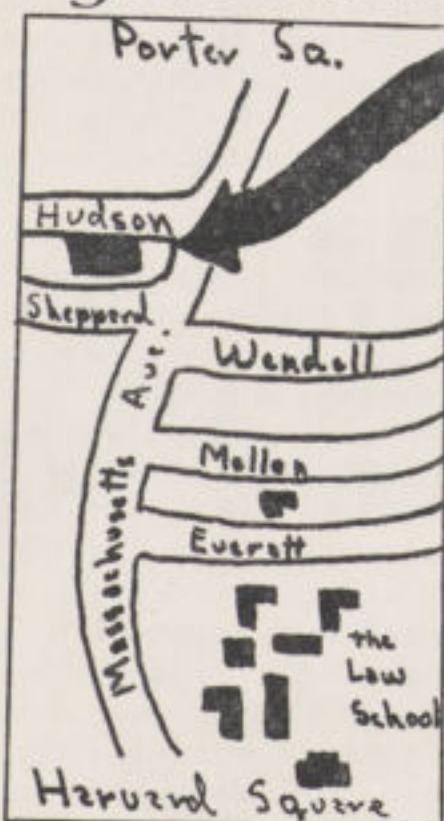
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