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By William Rehnquist: "The Making Of a Supreme Court Justice" - Page 8

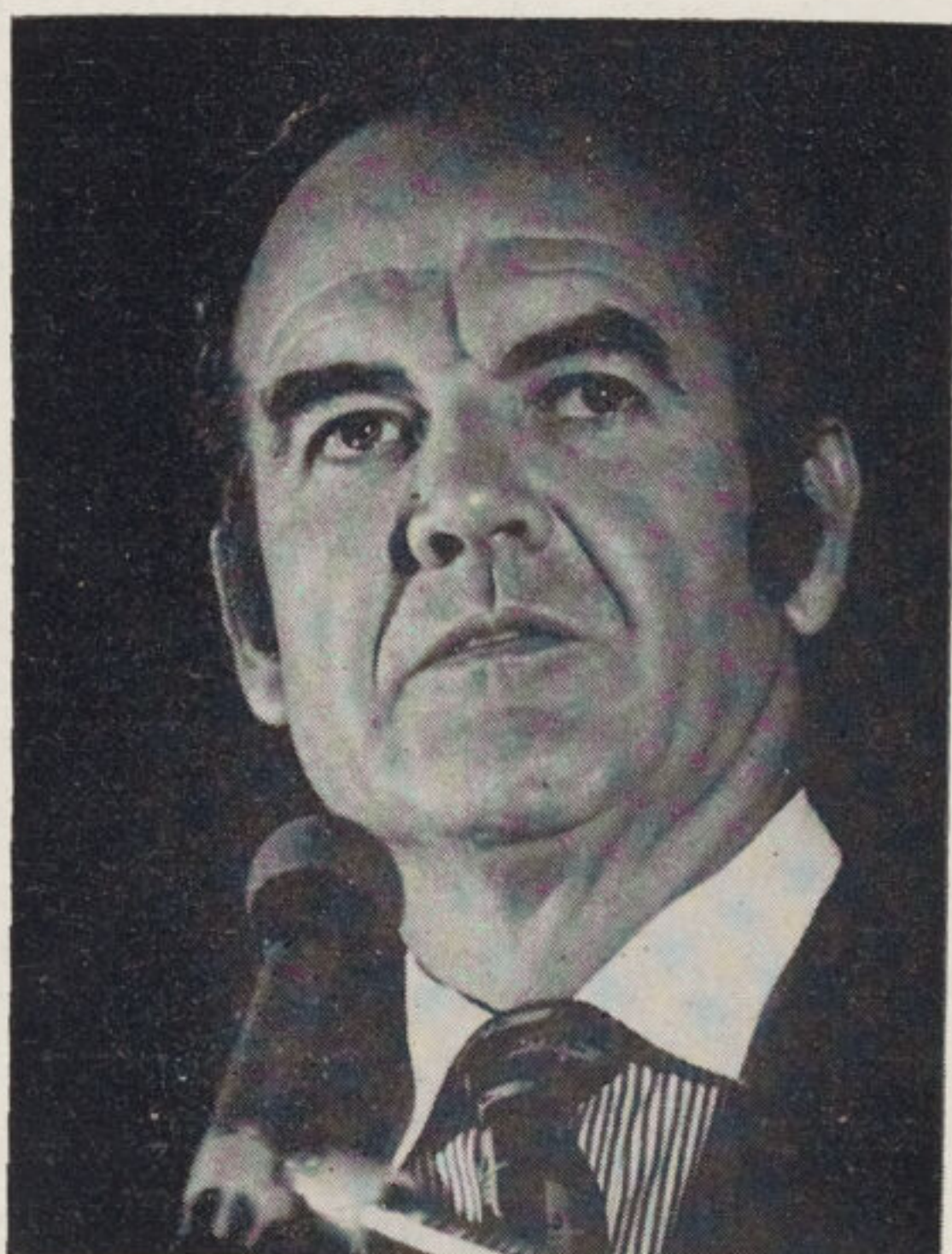
HARVARD LAW RECORD

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Peter Hlavacek

Senator George S. McGovern blasted no-issue candidates at the Law School Forum.

McGovern Speech Notes Need for Peace, Reforms

By Michelle Scott

Presidential aspirant Senator George S. McGovern presented himself to an overflow Harvard Law School Forum audience at Rindge Technical School last week as a proponent of peace and anti-militarism in international affairs and as a latter-day Robin Hood in domestic economic policy.

Deliberately addressing himself to "specifics, not rhetoric," the contender for the 1972 Democratic nomination acknowledged his reputation as a one issue, anti-war candidate. However, Mc-

Govern insisted that his opposition to the Vietnam conflict extended beyond the war itself to underlying American foreign policy assumptions and basic economic and social policies which he felt had been proven both outdated and unfair by the international and domestic dislocations of the war.

Senator McGovern claimed the war formed the basis for many current problems and had a direct connection with the present economic crisis.

"If inflation is a serious problem," McGovern stated, "how can one seriously divide that issue from the decision that was made five or six years ago to fight a war in Southeast Asia without calling on the American people to pay for it . . .? We cannot any longer separate the challenges of war and peace from any kind of society we are to build at home."

Questioning President Richard M. Nixon's 1968 campaign promise to end the war, McGovern pledged himself to set a fixed date for the total withdrawal of American troops from Vietnam.

Citing President Abraham Lincoln's grant of general amnesty after the Civil War as his model, Senator McGovern promised, "If I am elected president,

Married Students Housing May Be Confined to Needy

By Richard J. McManus

A change in Harvard University's married students' housing policy, leading to the allocation of housing on the basis of financial need rather than that of first-come first-served as at present, is currently under discussion at the highest levels of the University administration, according to Hale Champion, financial vice president and chairman of the University Planning Committee.

"We are looking over the whole housing situation at great length," he said in an interview in his Massachusetts Hall office last week, "and the relationship of financial housing to financial aid is, of course, one of the questions people are most interested in. We felt it is time for a review of our policies."

Champion called married student housing "the single greatest

(Continued on Page 4)

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Students Ruled Eligible for Vote

By Davis' Election-Eve Decision

By Daniel M. Taubman

Twenty-one Harvard students, including a first-year law student, were ruled eligible to vote in Tuesday's Cambridge elections in an election-eve decision handed down Monday by U. S. Magistrate Willie J. Davis. The court also ruled that three other students, including Richard D. Ellenberg, 3L, were ineligible to vote.

Most of the 24 students had previously received letters from the Cambridge Elections Board denying their voting applications because of lack of "continuous residence in Cambridge for six months prior to the November 2nd Election."

In supporting the 21 students' voting applications, Davis said, "I rule that it was not necessary for students to have any contractual right to live anywhere in Cambridge for the summer."

Nearly all the students lived in Harvard residences during the 1970-71 academic year, according to Stephen L. Black, the 1L whose voting application was accepted. Most were dormitory residents who had stored their possessions in dormitories and had signed room contracts last spring for the present academic year, he said. Black himself lived off campus last year and is currently living in an off-campus apartment.

During a hearing of the case last Saturday, Davis said he had reviewed the transcripts and found that while most of the plaintiffs had returned to their parents' homes during the summer, they had traveled or worked elsewhere as well. He said that this absence did not necessarily mean they had surrendered their Cambridge residency.

Harvey M. Burg, attorney for the Massachusetts Civil Liberties Union which defended the students, said Monday that Davis' decision established a precedent "of good value but limited effect" in Cambridge. The Civil Liberties

Union had brought a class action suit on the students' behalf and "on behalf of all others similarly situated."

Davis refused to grant a temporary restraining order on the students' behalf in response to the class action suit, but instead decided each student's case individually. In rejecting the applications of three students, Davis commented that "this court could not overrule the findings of the board so long as there is substantial evidence to support the findings of the board."

Class Action Suit Denied by Judge

Burg said that in the cases of the three students whose applications were rejected, each of them had tied himself by some act to another jurisdiction during the six months after claiming Cambridge as his home. Ellenberg, for example, had a New York State driver's license and had his car inspected there in August of this year, according to Burg.

The Civil Liberties Union had sought to enjoin the Cambridge Election Board from refusing to register the students. It had also sought a court order which would have required the board to register to vote "all members of the plaintiffs' class who, as of the date of an election next ensuing at the time an applicant seeks registration: (1) will be 18 years of age or over; (2) have resided in Cambridge six months or more, presently reside in Cambridge, and consider Cambridge their home; (3) swear at the time of registration that they have no present or definite intention to make any place other than Cambridge their home, intend to reside in Cambridge for the foreseeable future, and do not have any present definite intention to return to their former domicile;

and (4) are not registered to vote somewhere else . . ."

Burg criticized the court for deciding the students' cases individually and not on a class basis. He was also critical of the court's failure to specifically instruct the board on guidelines for voter applications. "It is clear that the Cambridge board has been obstreperous in its approach toward students," he commented.

Board attorneys were unable to show last Saturday that any of the 94 hearings since September 15 were for nonstudents, Burg contended. "We think that's special singling out of a class for burdensome treatment."

[According to an article in last Sunday's *Boston Globe*, Cambridge Elections Commissioner Francis Burns told the court that 2337 students and 1871 persons under 21 were registered for Tuesday's election.]

Burg said it was unclear whether Davis' decision was a final opinion on the merits of the case since the court ordered the students' ballots to be held in escrow pending an appeal by the Cambridge board. It is also expected that Burg will appeal in order to obtain a ruling on the specific injunctive relief sought under the class action suit.

Black said Monday that "I very seriously doubt he (Davis) would grant class relief, especially the day before an election, for practical reasons."

The twenty-one students who were allowed to vote all attend Harvard or Radcliffe and include Michael McCarthy, son of former Minnesota Senator Eugene McCarthy.

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Profs Order Casebook Sex Change

By Lisa Friedman

Ever since Langdell and Ames first began writing casebooks which purported to be more than a mere compilation of cases, this mainstay of legal education has undergone repeated facelifts to make it more attractive to students and to improve its effectiveness as a teaching tool. The so-called "pure" casebook has succumbed to rashes of footnotes, textnotes, and squibs. It has been Brandeised with socio-economic data. It has been Socraticized with in-text questions and hypotheticals. It has even been tattooed with cartoons. In the summer of 1971, however, the casebook — more specifically Vern Countryman and Andrew L. Kaufman's *Commercial Law* — underwent what can only be described as major surgery: it was "desexized."

For those who believe that no casebook is sufficiently risqué to justify removal of its meagre sexual content, it should be explained that "desexizing" a casebook involves the elimination of male sexual bias from textual materials.

Until the birth of *Commercial Law*, women who appeared in problems and questions were confined to traditional female roles to illustrate the legal problems faced by the everyday American widow, mother, and rape victim; or they were cast in sex-stereotype roles — the inattentive woman driver, the scatterbrained fe-

Revisions Will Correct Traditional Sex Roles

male shopper, the little old lady from Pasadena, and of course Uncle Louie's heroine of *Securities Regulation*, Aunt Minnie — all of which were presumably necessary for constructing the quintessential hypothetical; or references to the feminine gender were eliminated entirely.

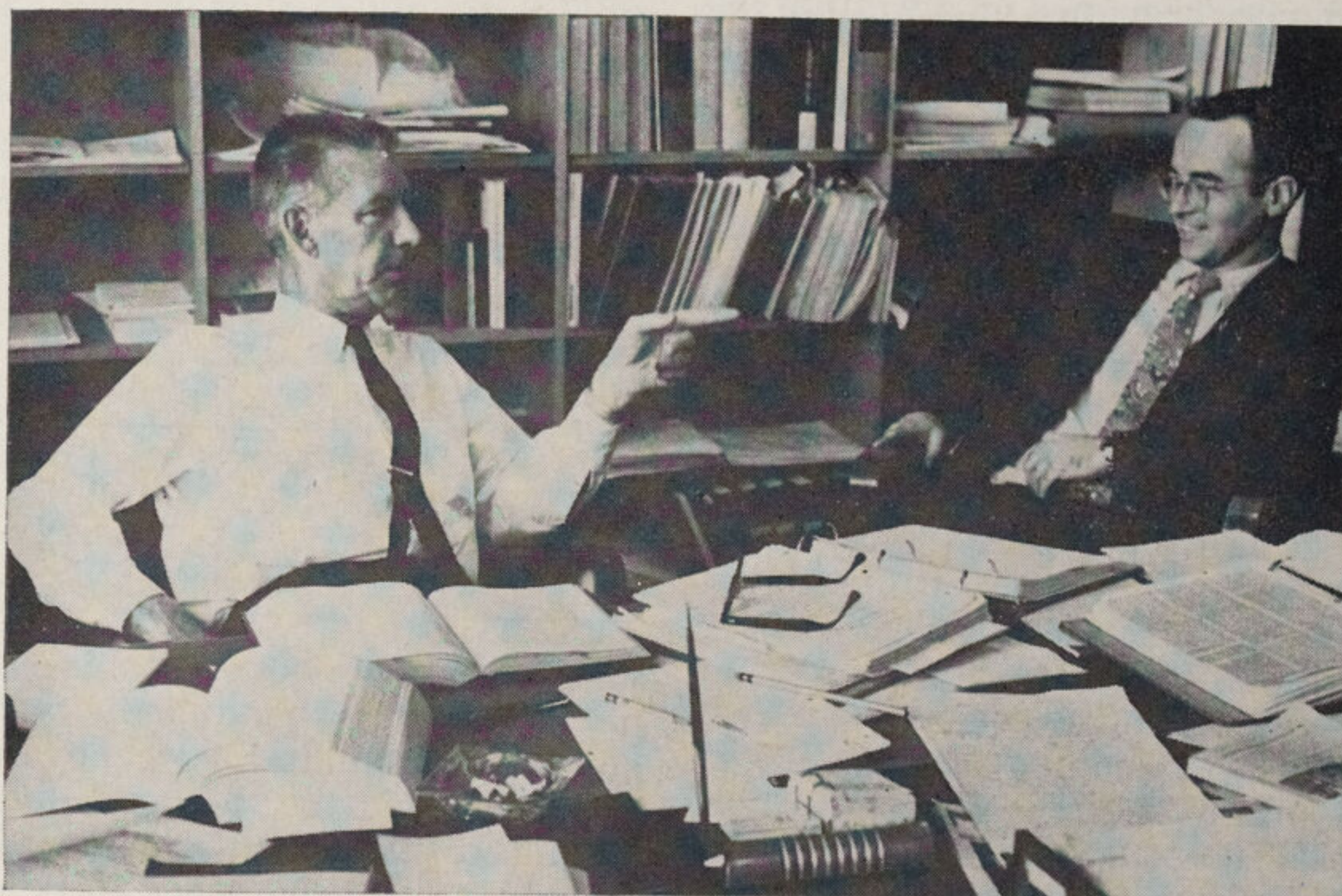
In contrast, women in *Commercial Law* appear in notes and problems as attorneys, golf pros

(in one set of problems, a woman, appropriately named Pro, and a man, appropriately named Divot, illustrate the intricacies of conditional sales contracts), shoppers, and mortgagors, to name but a few.

As Myra Karstadt, a 3L who aided Professor Countryman in the preparation of the casebook, remarked at a meeting of women law students: "The book includes

lishers Little, Brown and Company when an eleventh-hour switch changing "he's" to "she's" was made while the book was in galley proofs. Professor Countryman suggests that "the fact that the editor was a woman may have had something to do with it."

Although reactions to the book have ranged from enthusiastic acceptance to anguished cries of "Misprint!", both professors seem



Charles Soberman

Professors Vern Countryman and Andrew L. Kaufman discuss sexuality in the law.

women lawyers, sellers, and buyers. Not only that, women are forgers; they steal, they pass bad checks. This is progress!"

While Professor Countryman gallantly credits the liberation of *Commercial Law* to a "revelation" which dawned on Professor Kaufman, Professor Kaufman attributes the desexized format to his deep-seated philosophy that a casebook should be realistic. Although Professor Kaufman had experimented with the idea in some materials prepared for a first-year small section last year, neither author had desexized the multilith materials he used to teach *Commercial Transactions* prior to their publication as a textbook. "We were two male chauvinists," notes now-converted Professor Countryman belatedly.

Fortunately there were no complaints forthcoming from pub-

sufficiently pleased with their work-product to plan on employing the desexized format in any forthcoming casebooks.

Has publication liberated Countryman and Kaufman? Professor Kaufman can be heard to refer to a buyer as "he or she" during his *Commercial Transactions* section. Professor Countryman now philosophizes at length on the clumsiness of the English language and dreams of the day when there will be singular personal pronouns without gender. He bares his true feelings though when he comments on the proportion of women who appear in *Commercial Law*.

"We tried to make it about fifty-fifty," he notes soberly, and then adds, brightening, "looking forward to the day when half our lawyers are women."

Harvard's Housing Policies Under Review

(Continued from Page 1)

demand but the most difficult to deal with."

Harvard currently has 732 apartment units which are let to married students. They are located in four complexes — Peabody Terrace (497), Holden Green (105), Haskins Hall (80) and Shaler Lane (50).

As of late September, 1405 couples remained on a waiting list for these apartments after the Housing Office was able to place only 398 new tenants. The situation has remained more or less constant over the past several years.

The average waiting period is "about a year" for a one-bedroom apartment, according to the Housing Office, and a year-and-a-half for two-bedroom units.

However, the apartments are considered well worth the wait by most married couples because the rents are considerably cheaper — \$50 a month or more — than those of similar sized units in Cambridge or nearby Somerville and Boston. Since the financial aid offices of the various departments of the University do not, for the most part, take residence in a Harvard apartment into account in determining their awards, a married student in University housing receiving aid saves \$500-\$1,000 more than his off-campus counterpart.

This healthy subsidy goes to well-off and needy students alike under the present system. The only criterion for assignment of an apartment is position on the waiting list.

The argument that Harvard apartments should be allocated on a financial need basis is "put forth by every student who is hurt that he didn't get in," according to Director of Real Estate Henry H. Cutler.

Cutler noted that the University had more than just cheaper rents for students in mind when it built Peabody Terrace in the early '60s: "We didn't want to segregate the needy students. We tried to create a community of

married students, with shared problems and interests which would add to their educational life without regimentation and we think it has worked well."

Cutler also pointed out that even more expensive housing in the Boston area is not really comparable to that at Harvard. "Modern housing," he said, "tends to have one large room with small dining and kitchen alcoves. The thought in Peabody Terrace was to have less floor space but an extra room so the student could close the door on his wife and child and get the peace and quiet necessary for study."

Raising Harvard rents to the level of nearby private housing, the real estate director said,

increase in local taxes as well. Property taxes constitute a significant portion of the recurring annual expenses of University housing. According to Shepard Brown, director of the Housing Office, Harvard paid the City of Cambridge \$75,758 and the City of Somerville \$45,535 last year for Haskins Hall, Shaler Lane and Holden Green. This represents 20-25 per cent of gross rental income, the same rate at which private landlords are taxed (or at least those without connections at City Hall, according to recent news reports).

Peabody Terrace is treated specially by Cambridge. Harvard now pays "eleven and a fraction" per cent of gross rentals there,

398 Find Places in University Housing; 1405 on Waiting List

would create a more equitable situation between the students who don't get in and those who do. "There would be less howling from those who don't make it," he said. "We don't want to be a gouger, of course, but we should be closer to a reasonable level. We are as much as 50 per cent under market now. Students should go to the scholarship office to get subsidies."

Presumably, with 50 per cent increases, married student housing would become a money-making operation for Harvard. Such housing has operated somewhat in the red for the past few years despite the fact that rent levels were set for a small surplus.

Both Cutler and Champion emphasized that Harvard was now "just trying to break even on housing." The planned excess of gross rents over operating costs each year, Cutler explained, was to cover non-recurring expenses. Recent examples of these were installing a full intercom system, waterproofing Peabody Terrace ("It leaked like a sieve," he said) and putting new wiring in the older units.

Increased rents would mean an

or half of what otherwise would be due, on the condition that the apartments be let to students only.

Because of this, the University requires that if its tenants sublet, they do so to other students only. Furthermore, couples who sublet must be returning to Harvard within a year and must leave their furniture in the apartment. They may sublet only at the original rent, plus an additional charge for the furnishings. "We don't want a sublease to be a subterfuge to get around the waiting list," said Cutler in explanation of these requirements.

This summer Edward Cox, 3L, and his wife Tricia were able to find and sublet an apartment for the school year in Peabody Terrace on such conditions. "We documented every step in accordance with the usual procedures," said Cutler. "They must live up to the regulations as well as other students." The only special treatment, he said, was the renting of two penthouse apartments, which the University had not been able to rent to students, to Secret Service agents.

(Continued on Page 16)

CTOC Calls for Better Rent Control

By Lavell L. Jackson

In August of 1970, amid much publicity and optimism, rent control was an idea whose time had come in Cambridge. Following shortly upon the passage by the Massachusetts House and Senate of enabling legislation, both Somerville and Cambridge pushed through rent control ordinances that were to have finally provided some much needed relief for victims of the notoriously tight housing market in these communities. Boston had already passed a rent control ordinance under separate legislation the year before. Things were looking up.

Fifteen months later, it is apparent that rent control is not all that it was touted to be. Somewhere in the process of translating rent control from off the statute books into an operative reality its rationale as a remedy for victimized tenants and a malfunctioning housing market has been diluted and lost sight of. The Cambridge Tenants Organizing Committee (CTOC) is now leading a campaign to restore that rationale in the city of Cambridge.

CTOC is an off-shoot of the "Peace and Freedom" movement which had been active in making rent control an issue in late 1968 and early 1969. Intense publicity was generated by the radical Peace and Freedom campaign as well as that of the moderate-liberal Housing Convention. However, neither campaign seriously attempted to organize tenants into unions or political blocs. Consequently neither campaign left a great impression on the landlord-tenant situation.

CTOC organized during the summer of 1970, just in time to see passage and implementation of the enabling legislation. Members became suspicious of the Cambridge City Council's good faith in implementing rent control, according to Mark Goldowitz, 3L, president of CTOC, when Philip Cronin, who had earlier been a legal counsel for landlords, was appointed rent control adminis-

trator. Subsequently the job was assumed by William J. Corkery, whom Goldowitz describes as a former pro-landlord city manager.

Cronin's first act as administrator was to tell the landlords to ignore the six month rollback in rents, an action which the court later overruled. The administrator also defined the "fair net operating income," a statutory guarantee to landlords, in a manner that gave landlords a 56 to 60 per cent net profit on gross

Tenants' Progress: Housing Cure Now Political Football

annual income. This formula resulted in rent increases as high as 300 per cent. This short-term strategy opened the door to a defeat of the intent of rent control and turned it into a political football.

The CTOC confronted the rent control administrator and the Cambridge City Council several times over the meaning of rent control, but the situation most recently came to a head with the prospect of a new rent increase approval because of a tentative property tax hike.

According to Goldowitz, rents have doubled in the last ten years although cost increases to the landlord would justify only a one-third increase in rents. "The expected Cambridge property tax increase has been tentatively announced at \$23 per thousand," he said, "and as expected the rent control office is prepared to jack up rents again."

Corkery has announced that landlords may apply by coupon for an increase to cover the new tax, plus a two per cent "cost" increase if they haven't had an increase yet. Although the specific increase to be allowed for taxes has not yet been announced by Corkery, examiners in the rent office have said they thought it would be on the order of ten per cent. "This is far more than would be

required to make up taxes," Goldowitz asserted.

There should be no increase at all because of taxes, argue CTOC members, since rents have risen 92.5 per cent in ten years while landlord expenses have risen only 30.6 per cent.

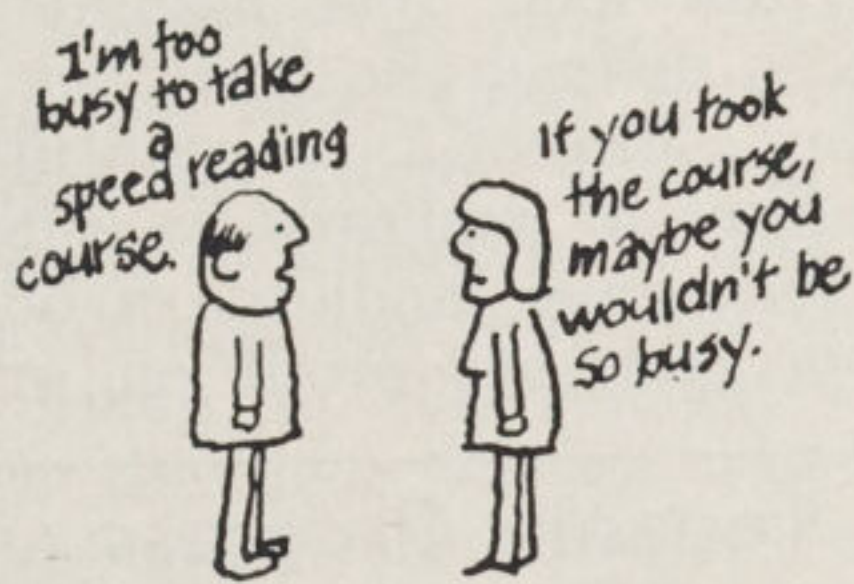
During the course of the rent control controversy, various political tactics have been employed by both sides. The tenants organized to strike and to secure collective bargaining, while the landlords moved to begin a propaganda campaign to convince tenants that rent control cannot work. Also, according to Goldowitz, "The landlord has undertaken the task of seizing the machinery of the rent control administration to get pro-landlord decisions." He specifically points to the appointments and decisions of Cronin and Corkery as evidence.

Tenants, with the help of CTOC, have now begun drafting more comprehensive rent control ordinances which would plug the procedural loopholes in the present rent control laws. The tenants hope to prohibit many administration abuses they have already witnessed. One set of proposals was circulated in Cambridge by the tenants to ensure its inclusion as an initiative on the November ballot.

However, city officials refused to put the ordinance on the ballot even with the number of signatures required by statute. Because the ordinance was not approved by administrator Corkery, they argue, it cannot be enacted. The portion of the enabling act which describes the duties of the rent control administrator allows him to recommend ordinances to effectuate rent control to the City Council. This, argues Cronin, now city solicitor, prevents the passage of rent control ordinances except upon the recommendation of the administrator.

This position was upheld by Superior Court Judge Harry Klaus, who was quoted as saying,

(Continued on Page 16)



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Edelman Calls for Relevant Courses

By Daniel M. Taubman

Peter Edelman, '61, former speechwriter for Robert Kennedy, called on students to make the Law School curriculum more oriented to social change in a speech Thursday, October 28, in Langdell South Middle.

Edelman, staff director of the Committee on the Future University of Massachusetts, addressed about 100 1Ls in the second of a series of lectures on "Perspectives on the Law and the Legal Profession."

He explained that in his work he has been dealing with questions of how institutions serve people and how "you make social policy work. All of us are going through this dilemma of where we can be effective . . . I'm going through it.

"I don't see any other alternative [to social policy work] because I do care about our country and our society," the former aide to Arthur Goldberg in the latter's unsuccessful bid for the New York governorship commented.

Edelman contrasted his national, policy-oriented work with the neighborhood, individual work described by Professor Gary Bellow, '60, in the series' first lecture. While conceding that working effectively at the national level may be difficult, Edelman questioned whether local activities such as Legal Aid may not be a "drop-by-drop approach" to problem-solving.

In advocating an increased value-orientation in the Law School curriculum, Edelman criticized public administration schools for being too "non-value oriented. I wonder whether they provide one with a sense of commitment, values, and skills to be involved with social change in this country."

Outside observation of the administration of the law is a potential area for social change in the legal profession, according to Edelman.

He noted that this less traditional role of the lawyer involves

advocacy, "but this is a lawyer's work." He suggested that a lawyer possesses the requisite skills to evaluate, for example, the administration of Title I of the Elementary Education Act.

Another avenue for social change involves working within

Insiders Necessary To Push Institutions

present bureaucracies. "I'd urge you to pick your bureaucracy very carefully," Edelman cautioned. "Large institutions badly need people on the inside to push them," he added.

Edelman also suggested working in senators' and representatives' offices as an additional mode of constructive social policy-oriented work.

The establishment of a Center for Social Policy Analysis was among Edelman's suggestions for revision of the Law School curriculum. Such a center would involve teams of students working with faculty to review the administration of laws from a legal point of view.

Edelman advocated undergraduate legal training to acquaint students with the way the law operates. He also suggested a greater set of interdisciplinary options and called for the inclusion of sociologists and economists on the law faculty.

"I remain discouraged about urging these changes," Edelman admitted however. "I don't see that there are that many more opportunities than when I was in law school."

(Continued on Page 16)

ECONOMIC PERSPECTIVES ON WOMEN

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Rehnquist Urged Senate Inquiry into

[The following article was written in 1959 by William H. Rehnquist, currently one of President Nixon's two nominees to the Supreme Court, while he was a practising attorney in Phoenix, Arizona. It found publication in the October 8 issue of the *Harvard Law RECORD* under the same title as it appears here. The editors of the *RECORD* are pleased to reproduce it in its entirety in the interest of advancing the kind of inquiry into the thinking of a Supreme Court nominee that Mr. Rehnquist herein espouses. A contemporary response to the article follows on page 13.]

"The Making of a Supreme Court Justice"

By William H. Rehnquist

The Supreme Court of the United States is now in the midst of one of the storms of criticism which have periodically assailed it. Bills have been introduced in Congress to limit the jurisdiction of the high court, to overrule some of its controversial non-constitutional decisions, and to declare the sentiment of the Senate as to the necessity of judicial background on the part of a nominee to the Court. It has been urged that the "advice" of Senate be sought by the President before any nomination to the Court is made.

Criticism of the Supreme Court can easily become frustrating to the critics, because the individual justices are not accountable in any formal sense to even the strongest current of public opinion. Nonetheless, it ill behoves the critics of the present Court to seek imposition of new curbs on it until such controls as now exist are fully tested and found wanting. Specifically, until the Senate restores its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him, it will have a hard time convincing doubters that it could make effective use of any additional part in the selection process.

As of this writing, the most recent Supreme Court Justice to be confirmed by the Senate was Charles Evans Whittaker. Examination of the *Congressional Record* for debate relating to his confirmation reveals a startling dearth of inquiry or even concern over the views of the new Justice on constitutional interpretation. Mr. Justice Whittaker was nominated by President Eisenhower in March, 1957. *Brown v. Board of Education* (the Segregation Cases), 347 U. S. 483, had been decided three years before, and implementing decisions had been handed down in the interim. *Slochower v. Board of Higher Education*, 350 U. S. 551, where the Court held by a vote of 5-4 that the New York School Board could not fire a teacher for the reason that he had invoked the Fifth Amendment before a Congressional Committee, had been decided less than a year before.

At the moment of Whittaker's nomination, the series of cases involving the rights of Communists to be admitted to practice law in a state and to refuse to answer questions put to them by legislative investigating committees was pending on the docket of the Supreme Court.¹

If any interest in the views of Mr. Justice Whittaker on these cases was manifested by the members of the Senate, it was done either in the cloakroom or in the meeting of the Judiciary Committee. The discussion of the new Justice on the floor of the Senate succeeded in adducing only the following facts: (a) proceeds from skunk trapping in rural Kansas assisted him in obtaining his early education; (b) he was both fair and able in his decisions as a judge of the lower federal courts; (c) he was the first Missourian ever appointed to the Supreme Court; (d) since he had been born in Kansas but now resided in Missouri, his nomination honored two states.

Given in addition the fact that Mr. Justice Whittaker had been an eminently successful courtroom lawyer, the fact that he had been a leader in the activities of the organized bar, and the fact that he had been very highly regarded as a judge of the lower federal courts — all of which he was — the Senators could still have no indication of what Mr. Justice Whittaker thought about the Supreme Court and segregation or about the Supreme Court and Communism.

Less than thirty years before, the Senate had made no bones about its concern with the judicial philosophy of a Supreme Court nominee. Then, too, the Supreme Court was nearing the vortex

Senate Should Screen Nominees, Not Seek More Curbs on Court

of a storm — but it was a storm raised by the very groups who are claimed to be the special wards of the Warren court. State and federal laws regulating minimum wages, maximum hours, and other business practices were being struck down by the Court as violative of "freedom of contract"; a freedom which, the Court said, was embodied in the phrase "due process of law." The labor injunction, the strike as a conspiracy, and the "yellow-dog" contract were in their heyday. When, in February, 1930, President Hoover sent to the Senate the name of Circuit Judge John J. Parker to be Associate Justice of the Supreme Court, he sparked one of the most remarkable battles over a judicial nomination in the history of the upper chamber.

Objections to Parker's confirmation were at once voiced by two groups: organized labor, and the

Court Nominees' Judicial Philosophy

National Association for the Advancement of Colored People. Labor's objection was based on Parker's opinion, as a judge of the Circuit Court of Appeals for the Fourth Circuit, in the so-called "Red-Jacket" case.² His opinion for that court had upheld an injunction forbidding certain union organizers from attempting to organize a mine, and thereby induce the employees of the mine to breach their "yellow-dog" contracts. The objection of the NAACP stemmed from a campaign speech made by Parker in 1920, while running for

Solons Have Right to Demand Liberal-Conservative Balance

governor of North Carolina on the Republican ticket. In his speech he had said:

The Negro, as a class, does not desire to enter into politics. The Republican party of North Carolina does not desire him to do so. We recognize the fact that he has not yet reached the stage in his development where he can share in the burdens and responsibilities of government. This being true and every intelligent man in North Carolina knows that it is true . . . the participation of the Negro in politics is a source of danger to both races.

No very definite issue developed as to the campaign speech. It seemed agreed by most of the participants in the debate that the statements were understandable in the context of North Carolina politics, but that from a hindsight born with Parker's nomination for national office they would much better have been left unsaid.

As to the labor injunction, though, precise battle lines were drawn and the issue was debated in editorial columns, in masses of letters and telegrams to the Senate Judiciary Committee, and finally on the floor of the Senate. The most surprising fact about this great debate of 1930 was that none of the protagonists on either side doubted that the question should be: What were Parker's views on labor injunctions and yellow dog contracts? *The New York World*, in opposing Parker's confirmation, probably spoke for both sides when it said editorially on April 23, 1930:

. . . The Senate has every right, if it so chooses, to ask the President to maintain on the Supreme Court bench a balance between liberal and conservative opinion in the country as a whole, and every right on this premise to object that the presence of Judge Parker on the bench would increase, rather than lessen, the top heavily conservative bias of the Supreme Court as now constituted.

Most of the participants further agreed that the result reached by the Court of Appeals in the "Red-Jacket" case was undesirable; Parker's antagonists

contended that he approved the result, or at least never batted an eye in reaching it, while his defenders claimed that he was bound by controlling decisions of the Supreme Court on the question, and as a judge of an intermediate appellate court had no choice but to follow them.

A few glittering generalities were hurled by each side, but to a remarkable degree editorial writers, members of the bar, and Senators engaged in a case-by-case analysis of the law as Parker found it when he had written the "Red Jacket" opinion three years previously. The administration stood squarely behind its nominee, and Attorney General Mitchell even prepared a legal memorandum reaching the conclusion that Parker had no choice in writing the opinion that he did. On the Senate floor, the forces in favor of confirmation were nominally led by Senator Overman from the nominee's home state of North Carolina. But though Overman did a prodigious amount of work behind the scenes, he took little part in the debate on the law. The forces opposing confirmation were led by Senator William E. Borah of Idaho.

Senator Borah's principal speech began in the afternoon of one day and concluded the following day. The first part of it, before any requests to yield were made, occupies nine of the full, closely printed pages of the *Congressional Record*. Borah spoke to a question charged with emotion and public interest, and on which most of the demagogic fireworks were in the armory of his side. Yet his speech is anything but rabble rousing. Instead it is a closely reasoned, masterful exposition of the role of the Supreme Court in our system, coupled with an analysis of the precedents

'Should Pass On Them Before They Pass On Us' - - Borah

in an attempt to show that Parker must have reached his "Red-Jacket" result by choice, since the controlling cases did not compel it.

Almost any reply to Borah would have been anti-climactic, yet Senator Gillett of Massachusetts gave the Idahoan no quarter. He did not quarrel with the propriety of the inquiry, but he took vigorous issue with Borah's interpretation of the state of the law as Parker found it. In what appears to be an even closer reading of the cases than Borah's, Gillett ably defended the proposition that Parker was doing only what the Supreme Court decisions required him to do. After extended debate, the Senate refused to confirm Parker by a vote of 41-39.

Several times during this debate Senator Borah made clear his views as to the nature and scope of

(Continued on Page 12)

Reason in Housing

Two articles in this issue of the RECORD deal with related problems of housing in the Cambridge area. Serious discussion is in progress within the University over the advisability of altering the basis on which married students are admitted to University-owned apartments. It is proposed that such housing be allocated according to financial need rather than to whoever happens to sign up for it first, as at present.

At the same time, financial aid grants apparently do not take into account the separate but very real subsidy accorded those married students fortunate enough to reside in University apartments for which the rent is significantly lower than for comparable outside housing. Thus, either some students are receiving a dual subsidy or others are not receiving enough.

Harvard's Director of Real Estate Henry H. Cutler states that University policy has been not to "segregate needy students," but "to create a community of married students with shared problems and interests which would add to their educational life without regimentation . . ."

It is arguable whether a community of "needy students" would be "regimented" or one in which some necessary diversity would be lost. Even granting Cutler's point, however, there would appear to be another more equitable way of obtaining the same result.

The problem within the University is related to the one in the Cambridge community. Rents are high and apartments hard to come by. Rent control has been instituted but so far has proved to be of limited effectiveness. The problem is due in part of course to the increase in the demand for housing created by the presence of so many students. But the market is skewed even further to the degree that Harvard awards a housing subsidy to those who don't need it and denies it to those that do.

As a first step, financial aid and housing policy need to be rationalized. As long as the amount of financial aid awarded a student is made to reflect the cost of living in Cambridge, Harvard should feel not only free but obliged to bring its rents up to market. The effect would be to contribute towards equalizing competition in the market place. Only those who really wanted or needed to live in Cambridge would be obliged to pay Cambridge rents. Many students might thereby be freed to seek housing elsewhere, thus easing some of the pressure on both Harvard and Cambridge.

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Fenno

"Boy, was I glad that we finally got that brief out of the way!" The finalist in the Ames Competition was speaking to one of his compatriots. His cheeks were sunken from lack of sleep and his face had the sallow cast of a Speluncan Explorer only recently rescued from the cave.

"You bet," the other Ameser agreed, nodding his head tiredly. "I only hope we can avoid another devastating remark like that delivered last year by Dean Griswold. He said that 'the briefs were good. They were not *very* good, but they were good.'"

"What a blow," the first Ameser said softly. "But I think we've guarded against that. By the way, did you count up the lines per page?"

"Yes. Three times."

"You idiot!" the first one screamed. We agreed to do it at least eight times! If you missed something, we're sunk!"

"Well, even if there is a mistake, they won't penalize us too much. It's only of minor importance."

"As G. B. Shaw said, 'You never can tell.' Well, we might as well go over some of our strategy. Checking off now. We've consulted with the vice president of the Review for appropriate witty remarks, both with and without caustic aspects. As we learned last year, the importance of humor is not to be overlooked."

"Check."

"We've considered the Svengali Gambit of having one and/or both of us faint. This is to be resolved later."

"Check."

"We've arranged for the waiter at the pre-Argument dinner to be bribed more than the other side can possibly pay (just to play it safe) to season their horse-steak entrees with fever-inducing chemicals."

"Check."

"We've hired a guy to secrete himself behind the wood panelling and, from a little peephole, shine a flashlight into our opponents' eyes while they are speaking."

"Check."

"Okay. Good. Everything is in order."

"Do you think we're going too far?"

"No. We're just making assurance double sure, as the Bard so aptly put it. It's a good game plan. The future is now. But if you're having doubts, see "Patton" the night before Argument. It will reassure you."

Letters to the Editor of the RECORD

Cheney Chided On CLAO Changes

I feel I must respond to Mr. Cheney's unfair and inaccurate assessment of student performances at CLAO as reported in the RECORD issue dated October 1, 1971. I was Assistant Director of CLAO from 1966-1968 and I am now in private practice with a Boston firm.

My recollection is and more recent feedback indicates that CLAO students were adequately supervised whatever that means in general terms. Mr. Cheney's criticism of inadequate preparation is completely contrary to the facts as local judges before whom CLAO students have appeared would readily assert. I must agree with Mr. Cheney's comment that "four different people might end up handling his [a client's] case," but the same is true of legal services offices without law student staff.

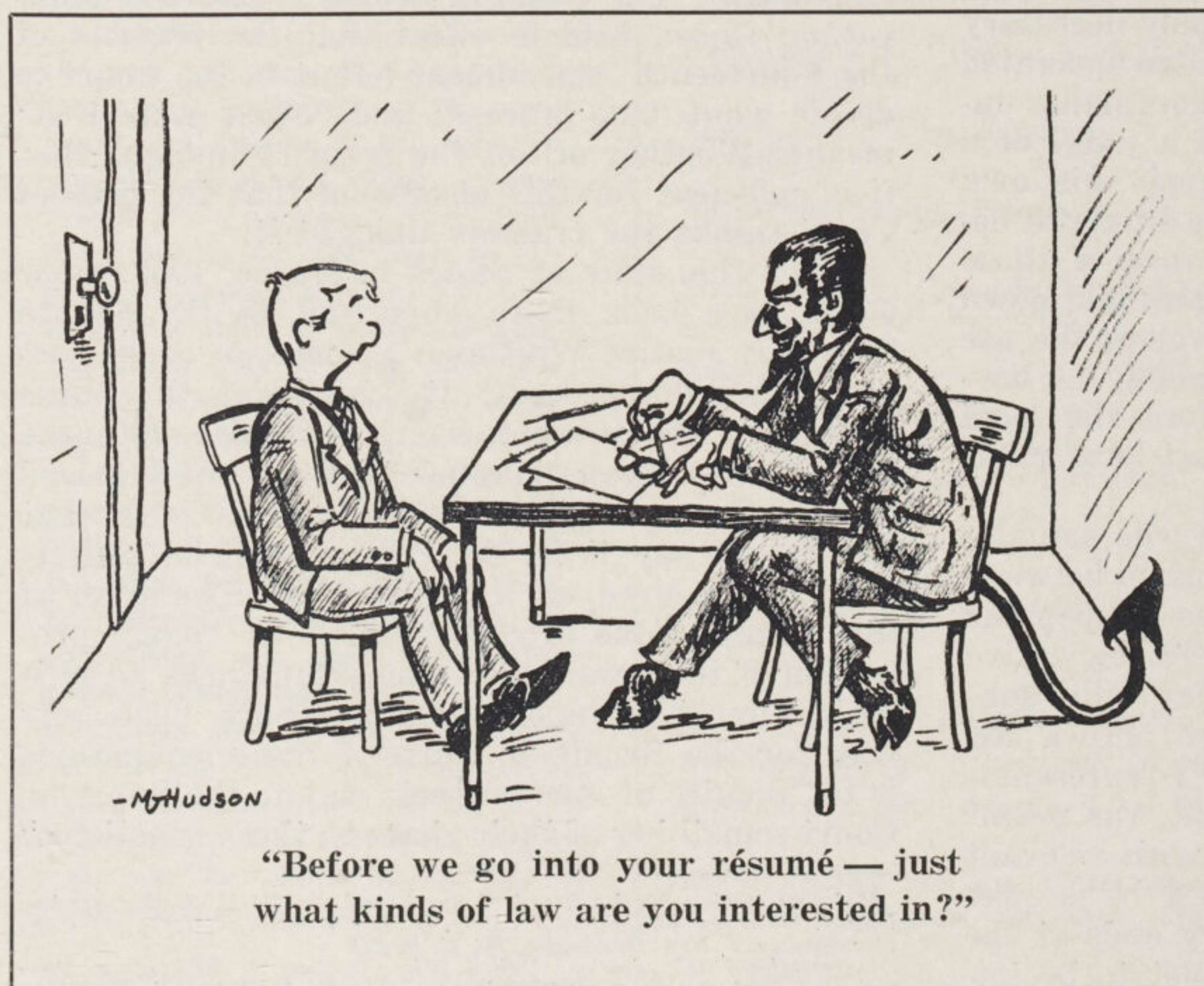
Perhaps the unkindest cut of all advanced by Mr. Cheney is his comment of "knee-jerk" responses to the problems of the poor which is OEO jargon for individual client representation at the expense of law reform. CLAO was one of the first, if not the first, neighborhood law offices to prepare and to lobby successfully for legislation, to initiate and to prevail in class action litigation, and to conduct

community education within and without the public schools of Cambridge. All of these "law reform" efforts were planned, prepared, and carried out by law students with staff attorney supervision and would not have been possible but for the law students.

Finally, Mr. Cheney implies that CLAO students are white middle class interlopers in a poor community out to educate themselves at the expense of that community. To be sure, I can recall students interloping at 2:00 a.m. at a bail hearing at Cambridge Police Headquarters and at meetings of almost every community organization in Cambridge but this interloping occurred at the request of and often at the insistence of the individual and group clients. I would assure Mr. Cheney that CLAO students were counsel to and did not co-opt client constituencies.

I am saddened that CLAO, in Mr. Cheney's words, is going to stop trying to be all things for all people and has "had to make calculated, selective, harsh and cruel decisions." CLAO, with its almost unlimited resources of hard-working and sensitive students and its willingness to employ this resource at the request of and at the direction of the poor community in which it was located, was not required to be calculating, selective, harsh, and cruel.

Paul G. Garrity, LL.M. '71



Law Notes

First-year section primaries for the Law School Council were held again yesterday morning as a result of alleged irregularities in the initial voting last week. Run-off general elections will be held Tuesday morning, at which time 1Ls will choose from the top two vote-getters in their section.

Leonard Boudin will lecture on "Immunity Laws and the Privilege Against Self Incrimination" on November 9 at 7:30 in Room 101 of the Pound Bldg. This is the third seminar by Boudin in a series sponsored by the Center for Criminal Justice.

Former dean of the Law School Erwin N. Griswold, solicitor general of the United States, has been elected president of the American Bar Foundation. He succeeds Lewis F. Powell, Jr., of Richmond Virginia, recently nominated to the Supreme Court by President Nixon.

Intramural basketball starts November 29. Games will be played Monday through Thursday evenings and Saturday afternoons. The deadline for turning in teams lists to Bob King in Shaw 210 is Wednesday, November 10. Each list should include team name, captain and his phone number, league desired (including first and second choices), team members and their year in the Law School. Each team must have at least eight members and no one can play on more than one team. Anyone interested in refereeing should also contact Bob King or call 498-5072. Referees will be paid \$2.00 per hour.

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Inquire Views of Nominee -- Rehnquist

(Continued from Page 9)

the Senate's inquiry into the philosophy of a Supreme Court nominee. In his principal speech, he mentioned that the case of *Hitchman Coal Co. v. Mitchell*, 245 U. S. 229, upholding the legality of "yellow-dog" contracts, had been decided thirteen years earlier by the Supreme Court. At this point he was interrupted by Senator Carter Glass of Virginia:

Glass: "And we have sat here all these years and permitted that to remain the law?"

Borah: "No; we have tried by an Act of Congress to repudiate that principle, but the Supreme Court of the United States said that our action was null and void. Mr. President, that is what makes this matter so very important. They pass upon what we do. Therefore, it is exceedingly important that we pass upon them before they decide upon these matters. I say this in great sincerity. We declare a national policy. They reject it. I feel I am well justified in inquiring of men on their way to the Supreme Court something of their views on these questions."

Again, during the debate on Parker's confirmation, Borah said:

Upon some judicial tribunals it is enough, perhaps, that there be men of integrity and of great learning in the law, but upon this tribunal something more is needed, something more is called for, here the widest, broadest, deepest questions of government and governmental policies are involved.

Surely the first part of this last quotation epitomizes the Senate's attitude, as manifested in discussion on the floor, toward the confirmation of Mr. Justice Whittaker. His integrity, his learning, his success at the bar, would be the only necessary subjects of inquiry in the case of a judge appointed to a lower court. Indeed, perhaps no further inquiry would be proper in the case of a judge of a lower court. He is not there to apply his own judicial philosophy, willy-nilly, to the litigants before him, but rather to decide the case of those litigants by application of the principles laid down by higher courts. Such a process involves the use of the same ability to reason by analogy as lawyers call on constantly, and therefore the legal ability of an appointee to a trial court is of paramount importance.

Similarly, in the case of the judge who actually tries the case, we do not expect a decision between individual litigants strictly in terms of popular sentiment. The people through their legislative representatives enact what laws they will, subject to constitutional limitations. But once a law is written, neither the people nor their representatives are further consulted as to what was meant by it; the written words, together with relevant background material, are interpreted by a presumably impartial judge. Democracy ends at the courthouse door, and Joe Doaks is not to be im-

prisoned simply because a majority of the people sitting in the jury box or on the courthouse steps think he should be.

These reasons suggest that the primary concern with an appointee to an inferior federal court should be his ability to apply rules laid down by more authoritative sources, rather than his feeling as to whether this material is right or wrong. But in the case of the Supreme Court, the "something more" which Borah spoke of comes into play. I would prefer to interpret this phrase, not as meaning that it takes more ability to be a Justice of the Supreme Court than a judge of the lower federal courts, but rather that there are additional factors which come into play in the exercise of the function of a Supreme Court Justice.

The Supreme Court, in interpreting the constitution, is the highest authority in the land. Nor is the law of the constitution just "there," waiting

Appointees to Supreme Court In Need of 'Something More'

to be applied in the same sense that an inferior court may match precedents. There are those who bemoan the absence of *stare decisis* in constitutional law, but of its absence there can be no doubt. And it is no accident that the provisions of the constitution which have been most productive of judicial law-making — the "due process of law" and "equal protection of the laws" clauses — are about the vaguest and most general of any in the instrument. The Court in *Brown v. Board of Education*, *supra*, held in effect that the framers of the Fourteenth Amendment left it to the Court to decide what "due process" and "equal protection" meant. Whether or not the framers thought this, it is sufficient for this discussion that the present Court thinks the framers thought it.

Given this state of things in March, 1957, what could have been more important to the Senate than Mr. Justice Whittaker's views on equal protection and due process? It is high time that those critical of the present Court recognize with the late Charles Evans Hughes that for one hundred seventy-five years the constitution has been what the judges say it is. If greater judicial self-restraint is desired, or a different interpretation of the phrases "due process of law" or "equal protection of the laws," then men sympathetic to such desires must sit upon the high court. The only way for the Senate to learn of these sympathies is to "inquire of men on their way to the Supreme Court something of their views on these questions."

¹*Schwabe v. New Mexico Board of Bar Examiners*, 353 U. S. 232; *Konigsberg v. State Bar of California*, 353 U. S. 252; *Watkins v. U. S.*, 354 U. S. 178; *Sweezy v. New Hampshire*, 354 U. S. 254.

²*International Organization, United Mine Workers v. Red Jacket Consolidated Coal & Coke Co.*, 4th Cir., 18 F.2d 839, decided April 18, 1927.

Rehnquist Article Elicits Response

[The following letter was received by the RECORD in October 1959 in response to the Rehnquist article on the Supreme Court published in the RECORD's October 8 issue and reprinted in this issue.]

To the Editor:

In your issue of October 8, William Rehnquist has argued persuasively that the basic outlook and attitudes of nominees for the Supreme Court ought to be known. But surely it does not follow, as the concluding statement in the article may be taken to suggest, that the Senate should "inquire of men on their way to the Supreme Court something of their views" on fundamental issues.

The practice of inviting nominees to appear for questioning by the Judiciary Committee began in 1939 when Professor Frankfurter's nomination was pending. It was worth recalling his opening statement before the committee. After pointing out that this practice was a new departure, save for a limited appearance by Harlan F. Stone, in order to explain a certain episode in his Attorney Generalship, Mr. Frankfurter continued:

"While I believe that a nominee's record should be thoroughly scrutinized by this committee, I hope you will not think it presumptuous on my part to suggest that neither such examination nor the best interests of the Supreme Court will be helped by the personal participation of the nominee himself. I should think it improper for a nominee no less than for a member of the Court to express his personal views on controversial political issues affecting the Court. My attitude and outlook on relevant matters have been fully expressed over a period of years and are easily accessible. I should think it not only bad taste but inconsistent with the duties of the office for which I have been nominated for me to attempt to supplement my past record by present declarations."

It was in similar vein that Lincoln spoke at the time of his nomination of Chief Justice Chase: "We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it."

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McGovern Notes Need for Reforms

(Continued from Page 1)

I would not only bring an end to the war in Vietnam, but I would also declare a general amnesty for all those who have stood up against it."

Post-war policy, Senator McGovern said, should assist both the war veteran and the draft resister to readjust to American society. For Vietnam veterans, the candidate urged greater benefits including increased educational and psychological programs.

Criticizing the Nixon administration for continuing "cold war paranoia," McGovern noted the 700,000 enemy troops killed since 1965 and asked, "Can we argue any longer that those people are better dead than Red? And, who gave us the authority to make that judgment for other people?"

McGovern proposed to erase anti-communism as the basis of American foreign policy, to use American influence to end military dictatorships in such countries as Greece, Pakistan and Brazil, and to halt the American blockade of Cuba. Suggesting that American deployment of nuclear arms might itself have provoked the reported Soviet arms buildup, McGovern promised to replace the arms race with a "peace race."

"I think when the United States has the capacity to destroy the world several times over," the South Dakota dove explained, "that's enough."

Stressing that all must participate in healing the country after the war ends, Senator McGovern argued that discrimination and injustice lie at the root of much current dissatisfaction with American life.

"In our rush to build and to conquer, we have neglected our basic humanity," he insisted. "We have forsaken the ideals which launched this nation two centuries ago."

McGovern criticized both the Nixon administration and Harvard University for failing to provide equal opportunities for women. Referring to the small

percentage of women on the Harvard faculty in professions, McGovern said, "President Bok is addressing himself to the problem—I wish him well—and I think there should be a man in the White House who will deal with the problem of women's rights. . . . We need a president dedicated to placing women not only in the courts but also in important cabinet positions."

prove prisons, housing, transit and day-care.

Alluding critically to the current administration's priorities and Vice President Spiro Agnew's most recent junket, McGovern mused, "I wish we had the one and one-half million dollars that his trip to the Greek dictators and the Shah of Iran's party cost."

Assuring the enthusiastic audience—including such early McGovern endorsers as Mary I. Bunting, George Wald and

Political Robin Hood Outlines 'Take-From-Rich' Proposals

Urging his audience to reread the adventures of Robin Hood, McGovern outlined several proposals which would take from the corporate rich and redistribute to the poor.

"In the tradition of Sherwood Forest, I think a good place to begin," McGovern declared, "is with a fundamental reform of the tax policies of this nation."

The senator's specific suggestions include elimination of the oil depletion allowance, a "realistic" minimum income tax on all incomes, an increase as high as 100 per cent in corporate taxes, imposition of an excess corporate profits tax and a sharp increase in the tax on large inheritances.

Under a McGovern administration, the candidate promised, the oil import quota would be abolished, and consumer and environmental protection would be increased. Funds diverted from defense spending would build schools and hospitals and im-

the program moderator, Abram J. Chayes—that he could win in 1972, Senator McGovern anticipated that many voters would respond to his penchant for "straight talk and direct confrontation."

"I won't have to remember from one day to the next what I said the day before," the candidate stated. "I won't have to remember what I said in the South and what I said in New England."

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- that successful companies in the United States will pay 40% to 60% of earnings in dividends
- that dividends, once begun, will be maintained or increased unless the company faces the most dire circumstances

The vitality of the company, in the last analysis, is the key to maintaining or increasing returns to shareholders. A company which turns its back on current opportunities in order to pay dividends is, in the long run, acting against the best interests of its shareholders, whether they be concerned with maximizing current income or personal assets.

Current tax laws enhance the need for reinvestment by providing a means for delaying the payment of taxes by the shareholder and by taxing capital gain at more favorable rates than other income. The company also typically has better investment opportunities available to it than do its shareholders as individuals.

The Boston Consulting Group is an international management consulting firm which specializes in the policy problems related to corporate business strategy. The above is an abstract from one of BCG's publications on corporate strategy.

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Harvard Housing

(Continued from Page 4)

No new housing for married students is planned, according to the housing officials, but changes in housing policy and procedures will be announced in coming months. "We expect to have new directions on all our housing problems within this academic year," said Champion. He said that the changes in different housing areas would probably be instituted separately rather than all at once, and he cautioned against expecting "an overnight answer."

"The situation is complicated," he said, "but that doesn't mean that new measures might not be worth the trouble. We have to look at where we are going in housing and ask 'What will the impact on Cambridge be?' and 'What are the alternatives?'"

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Cambridge Rent

(Continued from Page 5)

"This rent control initiative sounds like a Soviet proposal."

The initiative's sponsors plan to appeal the case to the Supreme Judicial Court to pave the way for its presence on next year's ballot. Most of the research for the appeal is being undertaken by the Law School's Civil Rights-Civil Liberties Law Review.

Harvard Law School Forum

— • —
"The American Role
in South Africa:
The Polaroid Question"

— • —
Joel Carlson
Attorney, Reformer, Exile
&
A Panel of
South African Students

— • —
Friday
November 5
Lowell Lecture Hall
8:30 p.m.

Edelman...

(Continued from Page 7)

The faculty came in for severe criticism as an obstacle to innovation. "There is a lot of oversensitivity to the academic euphemism about maintaining academic standards . . . which generally means doing things the way they've always been done," Edelman maintained.

He clarified that although he sought to make the Law School more value-oriented, he does not want the University itself to become politicized. "I am troubled about universities taking political stands," he confessed.

Frederick A. O. Schwarz, Jr., associate with the New York City law firm of Cravath, Swaine & Moore, will speak Monday, November 8 at 4:15 p.m. in LSM in the series' third lecture.

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