

HARVARD LAW RECORD

America's Oldest Law School Newspaper

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TWENTY CENTS



Mark McNeil

Chief Judge Bailey Aldrich of the First Circuit presided at Wednesday's mock trial.

First Year Students Witness Mock Trial

By Jim Stewart

It wasn't a controversial murder trial which packed the Ames courtroom Wednesday, but the Board of Student Advisers' model trial before Boston Federal Chief Judge Bailey Aldrich.

The simulated trial of a medical malpractice suit sought to recreate the setting, atmosphere, and activity of an actual trial. Perhaps the only feature out of the ordinary was the caliber of the counsel — Richard Marcus of Cleveland, Ohio assisted by Robert Keeton of the Harvard faculty for the plaintiff, and James St. Clair of Boston assisted by South African barrister Stanley Kitteridge for the defense.

The case was tried before a jury of non-law school students, and other students played the parts of witnesses. The trial was video-taped for transmission to Austin North and possible future use. The production was planned by the Board of Student Advisers, with the faculty assistance of Keeton.

During the trial Peter Lawson, the plaintiff, sought to establish that through the negligence of Dr. David Freeman, defendant, the use of his left hand had been permanently restricted, leading to the loss of his job as a secretary - typist for Sears.

Freeman is an anesthesiologist, and was trying to administer an intravenous anesthetic before dental

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Profs Condemn Firing of Cox

By Kermit Kubitz

Two members of former Watergate Special Prosecutor Archibald Cox's staff joined this week in criticizing President Nixon's firing of Cox. Both Professors Stephen Breyer and Philip Heymann, who had worked intensively for Cox during the summer, felt that Congressional action to establish an independent prosecutor is necessary.

Breyer called the firing of Cox "a tragedy, that a man who was doing his job" should be dismissed for, in Breyer's view "executing the orders that he was given when he took office."

Bryer, who had been investigating administration connections with the International Telephone and Telegraph Company, said that promises made to Cox were broken. He referred to the rules establishing the office of Special Prosecutor (28 CFR 0.37G-1 (App.)) which prohibited the President from firing him except for gross improprieties.

The rules also allowed Cox to test the President's claim of executive privilege in court. Although Cox had won at the Appeals Court level on his demands to see Presidential documents, the President offered a compromise.

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Cox To England

Former Watergate special prosecutor Professor Archibald Cox will teach American History in England next year. The one year appointment at Cambridge University was announced Wednesday.

NYC Genetics Debate Set

By Ricardo Hinojosa

After having one debate canceled by the Harvard Law School Forum, Stanford Professor William Shockley will argue his views on race and genetics with Alvin F. Poussaint, Associate Dean of the Harvard Medical School. The debate, moderated by David Susskind, has already been taped and will be televised in December in

New York City by WNEW.

Spirited discussion of the Forum cancellation of what promised to be a controversial debate between Shockley and Roy Innis, National Director of the Congress of Racial Equality, on "Race Differences in IQ, and Dysgenics" has continued at the Law School and elsewhere.

After listening to faculty
(Continued on Page 5)

Profs Say Prosecutor Needed

By Daniel M. Taubman
and
Kermit Kubitz

Three Law School faculty members, including Dean Albert M. Sacks, called last week for the appointment of an independent special prosecutor to replace fired former prosecutor Professor Archibald Cox.

Speaking at a teach-in October 24 attended by more than 400 students, Sacks said that it was "entirely in order" for Congress to pass a statute to appoint a special prosecutor who could not be fired by the president. The authority for such a statute, Sacks said, can be found in Article II, Section 2 of the Constitution.

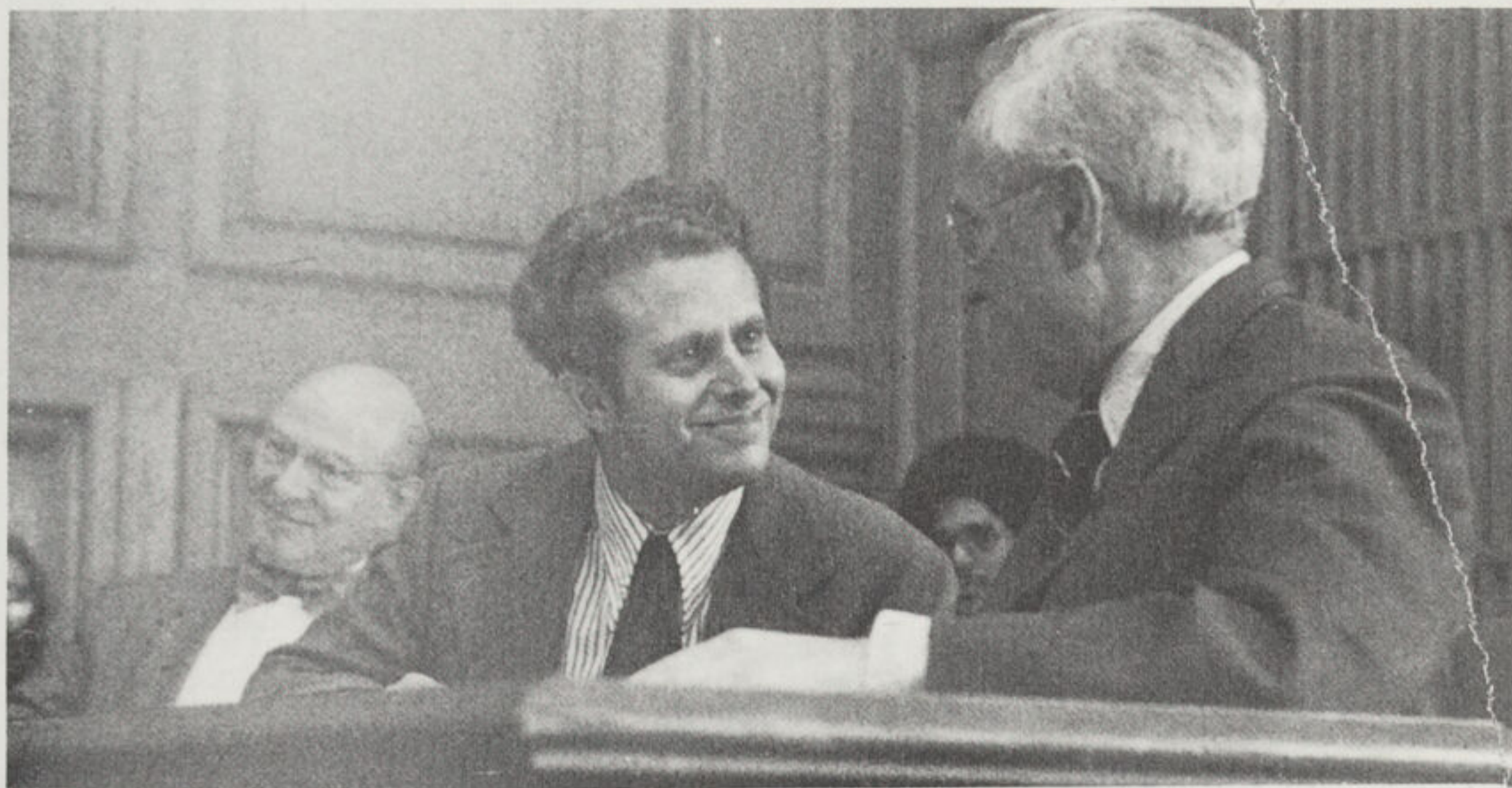
Because of "credible charges of criminal behavior at the highest levels of the Executive Branch, possibly including the President," Sacks stated, "it is not acceptable" to have an investigation by someone beholden to the President.

If a statute for an independent prosecutor is vetoed by the President, and is not overridden by Congress, Sacks continued, a hearing in the House of Representatives "ancillary to impeachment proceedings" would be necessary.

"If there is no other way to bring the executive to account for wrongdoing, then it must be done by impeachment," the Dean declared.

Sacks' reliance on Article II, Section 2 of the Constitution as authority for a statute to appoint a special prosecutor free from executive control was echoed by Professor Laurence H. Tribe. He suggested, however, that such a prosecutor might still be removable by the president, unless Congress were to pass another statute to prevent the Executive from firing the prosecutor.

Tribe also suggested that the "necessary and proper" clause of the Constitution (Article I, Section 8) would justify the ap-



Bob Mack

Dean Albert M. Sacks, Professor Lawrence H. Tribe and Raoul Berger

pointment of an independent special prosecutor.

Regarding the impeachment hearings in the House of representatives Tribe hinted that it might not be meaningful to ask whether the President has committed impeachable offenses. This is so, he said, because if the President were impeached from committing "high crimes and misdemeanors," the House's definition of that term would never be challenged by the Supreme Court.

"Though he has so far managed to contrive it otherwise, the President has given enough doubt to make us seriously consider whether we are living under the rule of law," Tribe charged.

"The question of whether we are living in a banana republic or a democracy is still very much with us," he concluded.

Raoul Berger, Charles Warren Senior Fellow in American Legal History, said that he had planned to speak on non-criminal grounds for impeachment but that "the pressing thing right now is to go forward with creation of the independent prosecutor."

Berger asserted that there was an inherent offense in de-

fiance of the Courts. The framers of the Constitution, according to Berger, built a structure of enumerated powers because they foresaw "the illimitable greed of those in power for ever more power." The crossing of the limits set by the framers, he concluded, is a threat to the whole democratic structure and subverts the scheme of the constitution.

From President Nixon's capitulation on the tapes, Berger drew the following principles. First, the rule and supremacy of law is acknowledged, albeit grudgingly. Second, "the principle of absolute confidentiality ... was now abandoned by the promised turnover of the tapes." Third, the "cave-in of Mr. Nixon testifies to the health of our democratic system."

Berger said that there was a historic basis for impeachment, stemming from statements of James Madison, for a President's "wanton dismissal of meritorious officers" as well as for concealment of important intelligence from the Senate.

At the beginning of the teach-in, moderator Joel J. Seligman, 3L told the audience that approximately 1045 Harvard Law Students signed a petition urging the House of Representatives to impeach President Nixon. The signatures were gathered on Tuesday, October 23, just before it was announced that Nixon would turn over the Watergate tapes to Judge Sirica.

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Independent Special Prosecutor Sought

(Continued from Page 1)

The compromise offer "to turn over summaries of documents" which would not have been admissible in court, was, said Breyer, "not a compromise that any lawyer could accept."

Heymann speculated that the President's motives in the firing were a combination of wanting to get rid of Cox, hold onto the particular tapes, and restrict demands for other Presidential tapes, documents, and papers.

The necessity of Congressional action to establish a special prosecutor stems from the fact that the President, "gave every assurance that he could give, through the Attorney General, of the independence of the special prosecutor." The implication Heymann concludes is that any new prosecutor not independent of the President might be fired as was Cox.

Such an independent special prosecutor, Heymann felt, was so important that the office must be created by overriding a Presidential veto if necessary. Breyer agreed that Congress has to act, because "The President has said he will not allow the prosecution access to documents, tapes, and other

records highly relevant to the prosecution."

Congress has the authority to vest in a court the appointment of a Special Prosecutor, according to a letter written by Professor Paul Freund to House Majority Leader Thomas P. O'Neill, October 25. (The text of Freund's letter appears on Page 16).

The constitutional basis for this power is in Article II, section 2, which provides: "... but the Congress may by law vest the Appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Professor Freund told the RECORD that he supposed that such a Special Prosecutor would supersede any appointed by the Attorney General, just as the former Special Prosecutor superseded the U.S. Attorney. The power to create the special prosecutor's office was analogized by the noted constitutional authority to Congress's power to "create or abolish inferior courts without depriving existing judges of their status; but it can change their jurisdiction."

Study Shows Familiar Look in 1Ls

After several delays due to computer breakdowns, Director of Admissions Russell A. Simpson last week released a statistical study detailing the composition of the current 1L class.

To no one's surprise, the class of '76 is remarkably similar to its predecessors. Once again, Harvard-Radcliffe led the annual parade of undergraduate colleges with its graduates accounting for 90 of the 570 registering 1Ls. Following somewhat distantly — as usual — was Yale, with 32 of its grads represented. Cornell contributed 20 while the Ivy League as a whole provided some 180 of the current 1Ls. Among the non-Ivies, Michigan led with 11 graduates in the entering class.

Political science proved again to be the most popular undergraduate major, with 25.5% of

the first year class indicating that as their chosen discipline. Not surprisingly, history and economics followed as the most common majors.

New York retains the title "Mother State," with 92 of its residents in the new class. Other leading states and their representation include California, 53; Illinois, 38; New Jersey, 36; Pennsylvania, 34; and Massachusetts, 31.

Of some 6700 applicants, up 300 from last year, 804 were accepted and 570 ultimately registered. While approximately 12% of the total applicants were accepted, Harvard-Radcliffe applicants did noticeably better, 18% of their number being admitted. However, the highest ratio of acceptances were shown by residents of Montana and Wyoming: 36% of those applicants were accepted.

Students Crowd Ames Courtroom for Mock Trial

(Continued from Page 1)

surgery when the needle apparently slipped from the plaintiff's vein, allegedly resulting in nerve damage causing the disability of the hand.

Lawson testified that Freeman continued to administer anesthetic even after he screamed to be released from the dental chair, and that Freeman finally used gas to put him asleep against his express orders. As a result, Lawson also charged Freeman with battery.

Freeman testified that he was only following standard medical practice, and was required to take the steps he did for the safety of the patient.

Defense counsel emphasized the fact that Lawson is a former heroin addict, and had frequently exposed himself to injury through his self-injections. They also established that a clinical test had shown no nerve damage resulting from the anesthetic, and that Lawson had been told his injury might be psychosomatic.

Both plaintiff and defense counsel relied on extensive use of published medical authority and expert witnesses to establish their medical allegations. Several objections, however, were sustained to excerpts from medical sources which had no specific bearing on the facts of the case.

First-year sections met with Keeton and Kitteridge in advance of the trial to discuss what procedures would be necessary for trial, and strategies which would be used during the trial. Students were given copies of depositions, complaints filed, and requested instructions to the jury. The jury's verdict was scheduled to be returned yesterday afternoon. Trial participants met at the same time to discuss strategies they had used during the trial.

Keeton said that this is the first time in several years a model trial has been staged. Previously, films of an actual trial were shown first-year students.

Council Reports on Forum Incident

By Paul Weiner

The cancellation of the scheduled Shockley-Innis debate by the Law School Forum — allegedly resulting from threats of disruption — may actually have been the result of a misunderstanding between the parties to the dispute, according to a report made by Stephen Calkins, 2L, to the Law School Council a week ago today. Calkins released a written version of his report Tuesday. At the same meeting, faculty members of the Council protested the scheduling of the meeting to coincide with a faculty meeting, the Council elected new officers, and members discussed the procedure for appointing students to Law School faculty-student committees.

Calkins spoke as the representative of an informal Council committee, members of which talked to Dean Albert M. Sacks, Associate Dean Paul M. Bator, Assistant Dean Stephen M. Bernardi, Black Law Students Association President Francesta F. Ormes, 3L, Forum President Howard Brod Brownstein, 2L, and Forum Vice President Jeffrey N. Drummond, 2L. Drummond was also present at the Council meeting.

According to Drummond, the Forum initially sent invitations to 180 potential speakers, one of whom was Roy Innis of CORE. Innis accepted the invitation. Initially, Innis proposed a debate with Roy Wilkins. Wilkins declined. Innis then suggested a debate with Shockley, who agreed to debate on the topic of alleged racial differences in the genetic factors which determine human intelligence.

According to Calkins, Professor Derrick A. Bell learned of the scheduled debate and protested to Dean Sacks about both the speakers and subject matter approximately three weeks ago. Sacks then decided to make his personal opposition to the debate known to Brownstein, but not to act in an official capacity or attempt to censor the debate.

Sacks scheduled an appointment with Brownstein for Wednesday, October 17, but broke his wrist on Tuesday and was unable to attend.

The meeting was attended instead by Brownstein, Bator, Bernardi, and Professor Louis Loss, who was to moderate the debate.

Bator relayed the Dean's opinion: the decision was up to the Forum, but in Sacks' view, the debate was likely to be a "circus" lacking intellectual merit. According to Calkins, Sacks and Bator told the Council that they did not even consider the possibility of disruption at that time, although an article in the *Harvard Crimson* for Tuesday had mentioned threats of disruption. Sacks claimed that if he had known of threats of disruption, he would have urged Brownstein to go ahead with the debate.

Sacks Thought 'Circus' Likely

However, Brownstein was aware that Shockley had been shouted down once at Stanford and, according to Calkins, "was very concerned from the beginning about disruption" and apparently assumed that Sacks and Bator were also talking about possible disruption.

On Wednesday night, October 17, the Forum executive board met and voted 5-4 to cancel the debate. At the invitation of Brownstein, Ormes had attended as a representative of BLSA. She made their opposition to the debate known, but made it clear that BLSA did not threaten to disrupt it.

Calkins disputed the charge that Sacks had "bribed" the Forum to discontinue the debate by either agreeing to meet any expenses which the Forum might realize as a result of the cancelled debate or by forcing them to pay for extra police protection if they held the debate. According to Calkins, Sacks said only that if any student organization incurred an unexpected deficit, the administration would listen favorably to a plea for financial assistance. The Forum has always paid for the Buildings and Grounds employees and the University police present at lectures. Re-

garding that expense, Calkins said, Bator had noted merely that that cost would be a matter between the Forum and the University administration, which is separate from the Law School administration.

"The actions which I disapprove of are two," Calkins concluded: Brownstein's stating that the Forum was cancelling the debate because of threats of disruption when such a threat was unclear and the Dean's error in failing to inquire into the possible threat of disruption or to consider how his statement would be interpreted by Brownstein.

In other matters, the Council elected Jamienne S. Studley, 2L, President and Brian A. O'Connell, 3L, Secretary. Russell L. Richeda, 2L, was also a candidate for President.

Professor Alan A. Stone protested that the meeting had been scheduled to coincide with a faculty meeting, thus forcing faculty members to miss the bulk of Calkins' report. Student members replied that they hadn't known that the faculty meeting had been scheduled for that period.

The Council concluded by discussing whether student appointments to faculty-student committees should go to Council members or to outsiders. In favor of Council members, it was argued that this was the only way to keep the Council informed of committee action. Against the proposal, members noted that preference for Council members smacked of nepotism and would give the individual members too many time-consuming duties.

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HARVARD LAW RECORD

Shockley, Medical Dean to Debate

(Continued from Page 1)

views on the cancellation at an informal faculty meeting October 24, Dean Albert M. Sacks issued a statement Tuesday discussing free speech at the law school. He stated that "the Forum and all other groups of students and faculty members are free to bring to the Harvard Law School for speeches or debates such persons as they see fit."

(Text of Dean Sacks' statement on Page 13).

Sacks stated that a decision by the Forum to cancel the debate, if based on requests by fellow students on grounds of personal integrity, was understandable. However, he said "if threats or predictions of disruption of order played a significant part in the Forum's decision, then I think its decision should be reconsidered." He emphasized that he did not assert that such threats or predictions were made.

The faculty meeting was held after several members of the faculty expressed concerns about free speech at the law school. According to Assistant Dean Stephen M. Bernardi there was no effort at the faculty meeting to reach a consensus on the cancellation of the debate itself, rather there was a strong feeling that Sacks issue a statement outlining law school policies.

At least one member of the Forum resigned in protest against the cancellation. Geoffrey W. Oblath 3L, cited as one of the reasons for resigning that "the Forum has committed an injustice to the principles of free speech which have guided it in the past."

The two would-be debate participants reacted swiftly and strongly to the Forum's action on October 17. Shockley stated he is considering approaching the American Civil Liberties Union because he believes the Forum violated his constitutional rights. Innis attacked what he called a hypocritical view of academic freedom at Harvard.

Early this week Cyril Boynes, Director of Cultural Affairs for CORE, charged that "left wing

white students" were mainly responsible for the Forum cancellation. He went on to say that some black law students had made a basic political mistake of letting these white students speak for them.

The Forum has decided to schedule a program dealing with free speech at the Law School, but no specific date has been set.

An anonymous flyer about the cancellation posted on the Law School campus October 18 has also received comment from the Law School Administration recently. The flyer stated that Sacks had "encouraged the Forum to withdraw its invitation to Dr. Shockley, and offered that if it became necessary the Law School would pay for the extra expenses caused by the cancellation."

The Administration's comments came in the form of a memorandum issued by Associate Dean Paul M. Bator to clarify what were felt to be some misleading statements in the mysterious flyer. Bator stated that it was Sacks' opinion that "the proposed program was unlikely to

have any serious intellectual content and would in all likelihood be a circus." Because of this, Sacks "thought that the Forum should give careful consideration to the question whether it wished to proceed with the planned program."

Bator also said that Sacks had stated that "if at the end of the year the Forum (or any other student organization) shows a deficit due to such justified and unanticipated expenses of an unusual nature, the Dean would give favorable consideration to meet the deficit in whole or in part."

The origin of the flyer, which also stated that "Black students would use violence to disrupt the proposed debate," has not been ascertained. In a letter to the Harvard Black Law Students Association, Howard Brod Brownstein, 2L, Forum President, acknowledged that "the possibility of violence by black students was not discussed" at the Forum Board's meeting and that the flyer "was not released under the auspices of the Forum or with my personal knowledge."

WLA Law Day Tomorrow

WLA plans an organized Law Day program as its first effort to reach potential women students. The program will be held tomorrow, and includes panel discussions by members of the Law School admissions staff, current women law students, and practicing women lawyers. Connie J. Sipe, 2L, said the discussions would be aimed at problems of women, but that men could attend if they wished. She said that invitations had been extended to other colleges and universities in the Boston area, and that women who had already graduated were being encouraged to attend.

WLA members will also be assisting the admissions office by recruiting at various colleges and universities. Most of the trips will be in the Northeast and Mid-Atlantic regions, but trips to the Southwest, Chicago, and the Mid-

west have also been scheduled.

In addition to recruitment efforts, WLA has scheduled appearances by Brenda Feigen Fasteau, '69, an editor of *MS.*, and Congresswoman Elizabeth Holtzman, '65, both HLS alumnae.

Last year 55 women, one-third of those accepted, turned down Harvard's offer of admission, according to Sipe. She said this percentage is substantially higher than that for men. "We don't really know why," she said, but pointed to Harvard's cost and its reputation for intense competition as possible factors discouraging women.

WLA Spokeswoman Jamie Studley, 2L, said that Hemenway Gymnasium facilities are now available on an equal basis to women as a result of an effort dating from last April by WLA. She said the project, under the direction of Ann Libbin, had met opposition from the University Athletic Director,

B-Ball League Open to All, Council Votes

The Law School's intramural basketball program will be open to both sexes on an equal basis, the Dorm Council decided Monday night. Sheldon Solow, 2L, commissioner of the intramural basketball league, presented the league's regulations in the course of his request for a \$1,000 Dorm Council appropriation. Under questioning by Council treasurer Lucia Fakonis 2L, Solow noted that the proposed rules would permit women to play on teams that included men, to form exclusively female teams to compete against all other squads, and to organize a league composed entirely of women's teams, for those whose interests lay in that area. The Council approved the proposal and the appropriation unanimously.

The first close vote to occur in the Dorm Council this year took place a few minutes later when Council president Greg Bowe 3L suggested that the Council purchase two pages in the Law School yearbook, at a cost of \$65. Steve Ostrach 3L, first floor Ames representative, protested that, "Two pages are entirely unnecessary — if we need anything at all, one page is perfectly adequate." Ostrach then moved to limit the appropriation to the cost of a single page, \$35. Ostrach's proposal was defeated 11 to 9, whereupon the larger authorization was passed 14 to 6.

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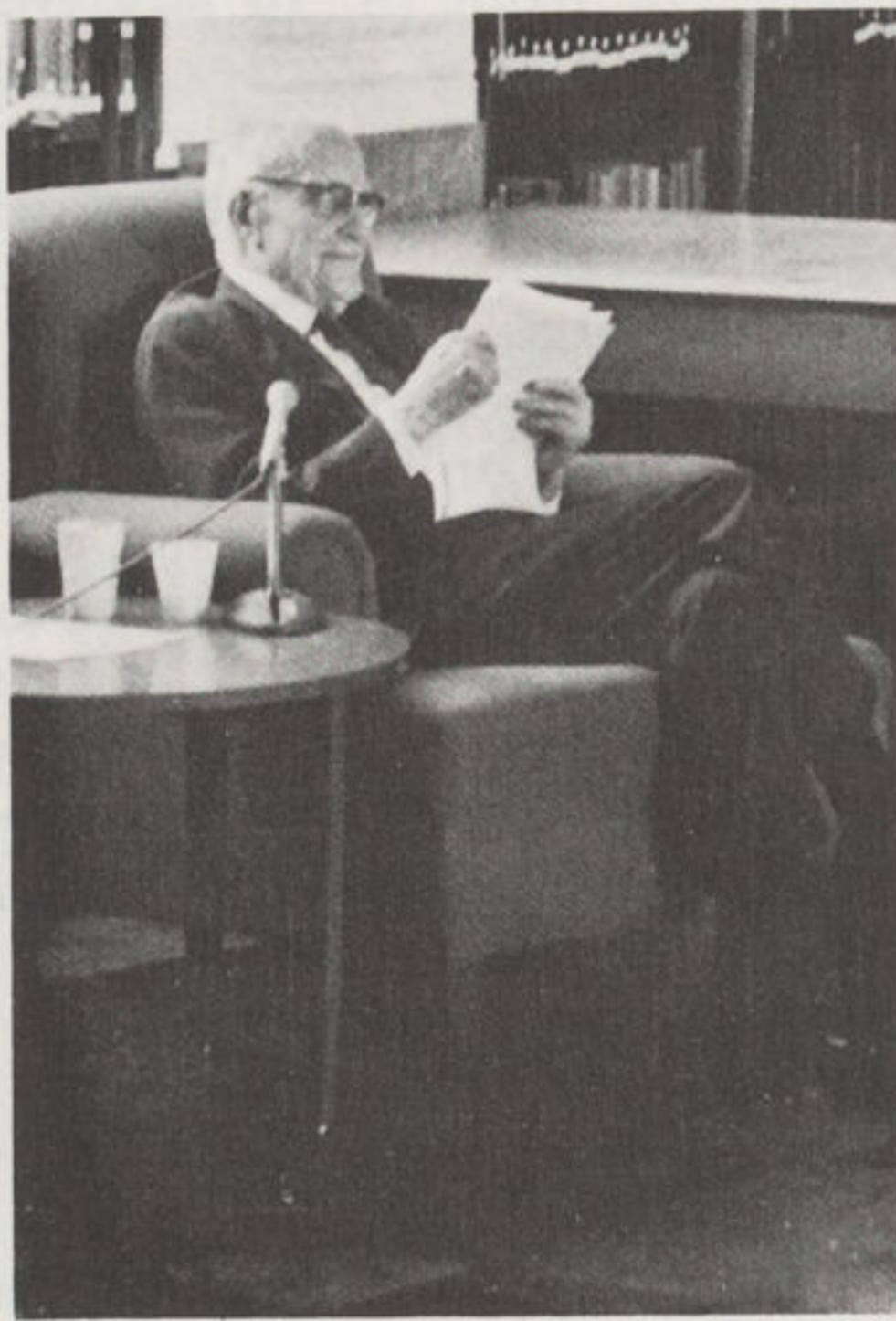
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Professor Scott Reviews 63 Years at Law School



Mark McNeil

Austin W. Scott

By Michael Bowen

As Professor Emeritus Austin Wakeman Scott reviewed the perspectives gained in his six-and-a-half decades of association with the Law School October 17, more than 70 students, seated on chairs, tables and the floor of the Root Room and standing along its walls, broke into laughter frequently and applause occasionally in the course of an often irreverent review of the Law School's history.

Scott devoted his attention to three broad eras in the 150 plus years that Harvard Law School has existed, the "New Beginning (1829-46)," the "Fair Afternoon (1846-70)," and the "New Dawn," from 1870, when Langdell came, to 1910 — when I came." In discussing each period, the 89 year old emeritus professor attempted to characterize it in the words of former first year students.

With reference to the first period, Scott quoted Rutherford B. Hayes as writing that, in preparation for Justice Story's classes, the student "never need more than glance at the text." John Fisk, who came to Harvard during the second era, professed in letters to his fiancée to find the reading of law books "perfectly diverting." "He

didn't remain with the school long," Scott informed the audience.

Scott noted that Christopher Langdell, whose arrival had inaugurated the third era, had increased the term of study required for graduation from one-and-a-half to two and then to three years, and had introduced examinations. This brought hisses from Scott's listeners leading him to cite Justice Louis Brandeis's opinion that, "Langdell wasn't a very good teacher, as a matter of fact."

With respect to another Langdell innovation, the case method, Scott made no concession to student disparagement.

"He had the right idea there," Scott averred, "and it's still the right idea, and it will always be the right idea."

Concentrating on the Law School's history prior to 1910, Professor Scott was reticent about developments during his own lengthy tenure. His only reference to his own experience came when he advised the law students listening to him to "concentrate on the academic and the theoretical while you're here, because you won't have time to do it after you leave."

'Let Them Eat Pig'

Just after Professor Archibald Cox was fired as special Watergate prosecutor and while war was raging in the Mideast, pink leaflets advertising a Women's Law Association cake and cookie sale appeared throughout the Law School. Among other things, the unknown authors of the intended satire advertised a WLA Information Booklet with "Twenty-five Great Places to meet MEN (with an emphasis on eligible career types) near the Law School."

The Women's Law Association responded by announcing that there was no cake and cookie sale scheduled. Instead, they sponsored a "male chauvinist pig roast" last Friday.

1L Was POW in China

By Phil Spector

Many Law School students make headlines after graduation, but few have been on the front page of nearly every newspaper in the country just a few months before they enter Harvard. Even fewer start as 1Ls after being imprisoned for a long term, and no doubt only one 1L spent the first 20 years of his adult life in a prison in the People's Republic of China.

The class which began its first-year labors last month contains that unique student. He is John T. Downey, a 42-year-old former Central Intelligence Agency agent who was shot down while flying an intelligence mission over China in 1952. Downey remained in prison in that country until March of this year, and his release was a direct result of the thaw in Sino-American relations, with President Nixon appealing personally to Chinese Premier Chou En Lai on Downey's behalf.

The man whom *Nation* called "a remarkably candid spy" because of his statement, shortly after his release, that "The 20 years were to a large extent wasted; I don't see that it benefited anybody," and his admission that, under pressure, "I revealed about every bit of information I could;" is reluctant today to talk about either his past Chinese experience or his present law school experience. Since his initial press conference in March, where he said that he was not planning to write a book about the experience because "life in a Chinese prison is a crashing bore," Downey has refused all requests for interviews. In response to a question about his future plans, Downey expressed sentiments shared by many of his peers: "I'm just not ready yet to make a judgment about the future."

Because he was released in March, 1973, and the admissions application deadline at the Law School was February 1, questions have been raised about the process by which Downey was admitted. Downey explained that several law schools waived the admissions deadline for him: "I took the July

LSAT, and all admissions decisions were pending on the results of that test. I didn't know that I was coming to Harvard until about a week before school started."

Assistant Dean Russell A. Simpson, Director of Admissions, said that it was established Law School policy to waive the deadline "when, through no fault of his own, it was impossible for a person to meet the deadline." He pointed out that the application deadline was waived for several people in 1971 and 1972, when the armed services cut their forces abruptly and applicants were given very short notice of their release.

Downey should not have to visit Simpson in the Assistant Dean's other capacity as Director of Financial Aid. His accumulated back pay at the CIA amounted to approximately \$350,000.

Drinan Scheduled To Speak Tonight

The Harvard Law School Forum will present Father Robert F. Drinan, U.S. Congressman from the Fourth District of Massachusetts, who will speak tonight at 8 p.m. in the Ames Courtroom. Father Drinan, presently serving his second term in the House of Representatives, is a member of the Judiciary Committee, the Internal Security Committee, and the Democratic Study Group Task Force on Constitutional Rights.

Chesterfield Smith, President of the American Bar Association, was scheduled by the Forum to appear last night. Reports of both Smith's and Drinan's presentations will appear in the November 9 issue of the RECORD.

Placement Heads Note Gripes

By Bill Kenety

With the fall interviewing season once again here, the placement office is, as usual, the subject of frequent student complaints. In separate interviews with the RECORD last week, Assistant Dean Russell A. Simpson and Placement Director Eleanor Appel discussed some of the problems the office is facing.

Simpson stated that while the placement office is not understaffed per se, it is suffering from a shortage of experienced personnel. Only two members of the current staff have worked in the office before this year. Simpson and Appel also pointed to the lack of adequate space for the office and staff. The placement office currently schedules 15-20,000 interviews a year.

Although the computer used by the office has occasionally misdirected an interviewee, there does not appear to have been a repetition of last year's "horror show" in which students were repeatedly sent in groups to the wrong place at the wrong time to interview a misnamed or non-existent law firm they had never heard of.

Simpson said that some of the mishaps resulted from employers failing to notify the placement office when changing interview locations. He attributed some of the tension surrounding the office to employers making last minute demands and to the surliness of some students who refuse to be patient with the often harried staff. Appel echoed these observations, noting that both employers and students often demand immediate, personalized attention that the office is not equipped to give.

Appel and Simpson are currently considering an idea that involves moving all law firm interviews out of the placement office, thus reducing much of the congestion and tension pervading the third floor of Pound. Interviewers are now allowed to use Law School facilities for one day only. Beyond that they are expected to provide their own rooms, usually at a local hotel. Simpson speculated that if law firms were not allowed to use the placement office at all, the space there could be reserved for government agencies and non-profit organizations.

Gorman Adds Year at Harvard

By Arnold S. Rosenberg

Visiting Professor Robert Allen Gorman '62, teacher of *Contracts* and *Labor Law*, ambles forward to the podium, retreats backward to the blackboard, then saunters forth again, his cravatted and baggily jacketed torso simultaneously swaying from side to side in slow pursuit of gesticulating arms. His apparent offhandedness and circumscribed movements, however, set in relief a disciplined and far-reaching intellect.

Gorman was born a Taurus in New York City in 1937, his mother a housewife and his father the owner of a chain of luncheonettes. His father's business exposed him at an early age to "problems of interpersonal relations." An easy-going child, he was fascinated by science and mathematics, an interest his parents encouraged. "It's interesting: nobody in my family was a lawyer or a doctor. My parents were always strong believers in letting me pursue things that interested me; they had no professional design for me to follow."

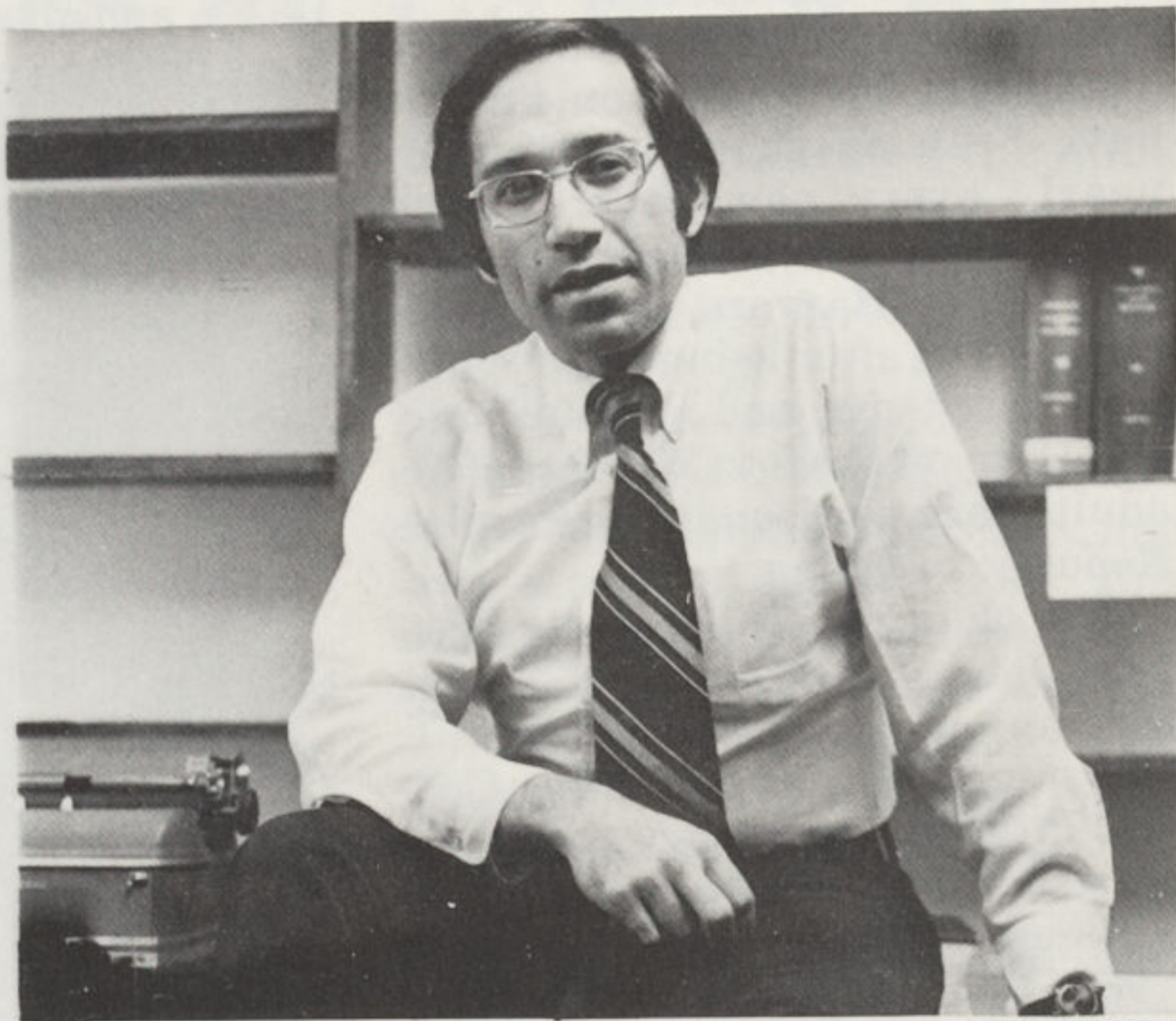
Nevertheless, they were considerably surprised when Gorman, by this time a sophomore at Harvard College, switched from the sciences to Government. "Professor Robert McCloskey triggered (the switch). I took his course in Con Law at the same time that I was taking an advanced course in Physics, and ..." The choice was clear.

After graduating summa cum laude from the College in 1958, Gorman spent a year on a Fulbright Fellowship at Oxford, where, "knowing neither philosophy nor law," he studied legal philosophy under H.L.A. Hart. "Professor Hart was an extraordinary man. There was no reason why he should have spent time with me, yet he gave me the impression that the occasional papers I wrote were meaningful to him. He was what students would like to have today: he cared about you both inside and out of class."

Gorman returned to Harvard in 1959 after his year abroad, this time to enter the Law School. He considers his finest teacher here to have been Professor Benjamin Kaplan. "Kaplan," he says, "was a tremendous motivator — a little terror, a little wit, and a tremendous amount of critical intellect. He has left a retinue of law teachers in the fields of copyright and procedure." Professor Clark Byse took particular interest in Gorman as a potential educator; it was Byse who Gorman surmises was "largely responsible in a practical sense for my winding up teaching at the University of Pennsylvania," where the star pupil made his teaching debut.

The *Harvard Law Review* named him its Treasurer, and the Law School awarded him his degree *Magna Cum Laude* in 1962. Despite the exactions of the *Law Review*, however, Gorman found time to marry his wife Caryl, then a Boston University student, whom he had known since college. ("It was a summer camp romance.")

Upon graduation Gorman was lured by Judge Irving Kaufman of the United States Court of Appeals



Professor Robert A. Gorman

Mark McNeil

for the Second Circuit, to serve as a clerk. The chief attraction of a clerkship to him was its educational value, and Kaufman, he says, "took great personal interest in clerks and their education. He spent a tremendous amount of time intellectually wrestling with his clerks and accorded great respect to their views. He possessed the highest standards of rigor and felicity of style."

After one year as a clerk, Gorman stepped onto what he refers to as "the 69th rung" of the then - 70 - lawyer New York firm, Proskauer/Rose/Goetz and Mendelssohn, for which he had worked during his second law-school summer. Again his choice hinged on the position's educational value: "Proskauer is a firm of tremendously high quality, with great interest in educating its associates. The firm saw itself as the next link in the chain of legal education. The work involved research and thinking on problems of intellectual challenge and social significance, problems likely to have impact on the life of a client in a commercial setting."

"Firms are large usually because they have important clients with important legal problems." But bigness, says Gorman, often means impersonality for a firm's younger associates. "The firm tried to make you 'see through' the work, to participate with the client, but in 1½ years there weren't really too many occasions for me to service a client on my own — and, frankly, for good reason."

Gorman viewed Proskauer as a phase in his career worthwhile in part as verification of his ability to practice law, as a means of avoiding the "gnawing sense of self-doubt" he feels would plague him had he never practiced. In 1965, aided and abetted by Professor Byse, he moved on to a teaching job at the University of Pennsylvania. Penn "was the only law school that made me an offer, and it's a first-rate institution that was willing to let me teach what I wanted to teach" — labor law and "intellectual property"

To Outstanding Legal Career

(copyright). In addition, during the past eight years, he has taught Contracts and Conflict of Laws at Penn, summer courses at the Universities of Kansas, Michigan, and Texas, and a semester (Spring, 1972) at the University of Southern California.

So what is Gorman doing here at Harvard? "The Law School wanted at least two introductory sections of Labor Law, and Archie Cox is gone. Also, there was a teaching vacancy in Contracts with Dawson's retirement." Gorman insists that he's here for just one year, but won't say whether he'll stay on longer if asked. He also professes affection for the city he left: "I'm very fond of Philadelphia. It combines the good qualities of large and small towns. It's a warm community, and possesses a first-rate legal community, a small and friendly professional group the members of which tend to know one another. This is reflected in the quality and temper of the bar; it strikes me as less combative than New York's."

Warmth, smallness, and non-combativeness strike Gorman as desirable in legal education as well, but difficult to achieve at Harvard. "One thing that makes the University of Pennsylvania outstanding is the close relations between faculty and students. This is a function of the small class size. Before they graduate, I'll have taught 80-85% of the students. You can feel the difference between 90-95 people in a first-year class there and 140-150 people here." Harvard, he says, was big and impersonal when he was a law student, too, but "this was accepted as standard. We were content to accept professors pursuing their own private, scholarly concerns."

In his own Contracts class, Gorman has been inviting students to lunch on an alphabetical basis. "I've never felt a need to invite students to lunch so systematically before," he declares. In addition, he considers the first-year faculty advisor program, TGIF's, and first-year electives effective in improving faculty-student relations.

While he would excise unhealthy competition among students, Gorman sees considerable merit in competing with oneself. "Often interest is honed by competition, in the sense of the desire to perform at top capacity." Grades, he asserts, are beneficial in providing an incentive for such competition. He opposes pass/fail grading: "There's no question that a pass/fail system does not evoke the serious engagement with study that a graded system does." In addition, he says, "It would be unfortunate if prospective employers, particularly judges and law schools, had no knowledge of a student's performance in law school." Grades should reward "consistently excellent classroom performance," but "shrinking violets may shrink for perfectly acceptable reasons. A student can learn vicariously, too."

Gorman supports the use of a writing competition in the selection of *Law Review* members. He also feels that the quality of other Law School journals has risen to the point where they offer comparable training.

Besides his luncheon invitations, Gorman

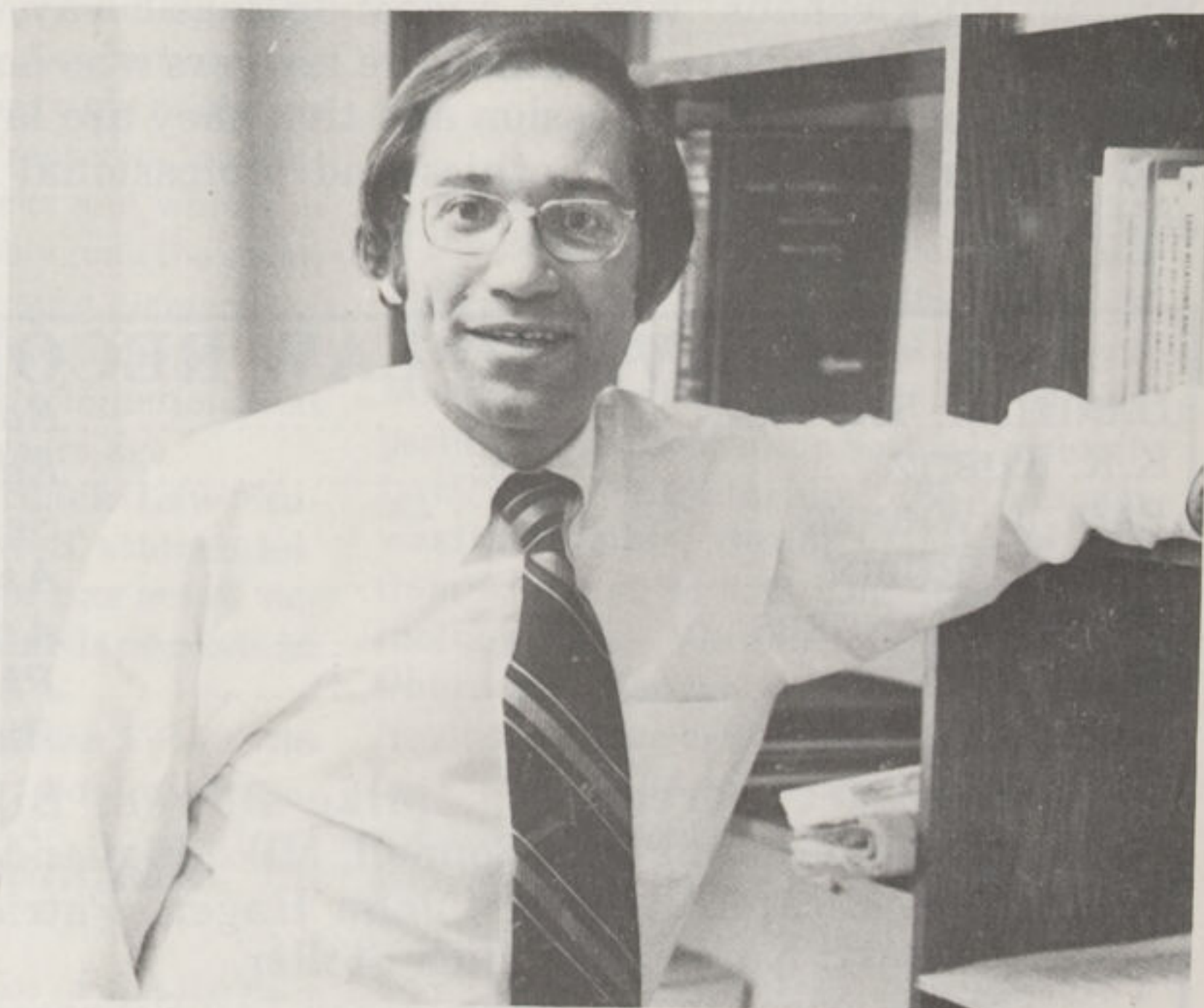
has distinguished himself in class with his evident concern for ethical issues. "The natural tendency when educated in a system is to cling to it out of self-interest. This explains the resistance of attorneys to no-fault legislation and the resistance of law schools to educational reform. But this status quo orientation is not intrinsic in what we teach; the tools can be used for social progress as well as retrenchment." Gorman particularly takes issue with the suggestion of Ralph Nader '58 "that law schools train people to serve the wealthy, not the poor." "We may not wear social values on our sleeve," he maintains, "but I'd like to think they shape our teaching."

Rarely does Gorman leave his Langdell Hall office to do outside legal work. However, he does harbor an occasional wish that he "could go back (to private practice) for a while and do some high-class lawyering." His few extracurricular tasks have included mediation in the public sector in connection with school-teacher bargaining for new contracts in New Jersey, and arbitration in the private sector to resolve disputes arising under union collective bargaining agreements.

Gorman is presently working on "what will hopefully be a short treatise on the law of collective bargaining."

In his spare time, Gorman is a player of piano and phonograph; a singer, formerly with the Harvard Glee Club and more recently with a singing group he helped organize at the University of Pennsylvania; a Mets and Knicks fan; a movie and theater enthusiast; and the father of three boys, aged 4, 6, and 10.

Of his sons, Gorman remarks, "I'd be fibbing if I didn't say I encourage them to work hard in school, especially in musical studies." Harvard Law School has been able to assimilate one Gorman without much trouble, but a trio ...?



New York - born Taurus Gorman

Mark McNeil

Dishonorable Discharge

"There is a style of very great recalcitrance, a willingness to accept the rule of law with very great grudging, and a willingness to act with a suddenness that is almost brutal," Dean Albert M. Sacks said last week at a teach-in on the topics of impeachment and the appointment of a special prosecutor, in describing the recent actions of President Nixon.

Sacks was correct in pointing to the President's "manner and style" — quite apart from any allegations of substantive offenses — as a topic of justifiable concern.

Maitland said that the progress of civilization is measured in the transition from status to contract. Unfortunately, the President feels that his status permits him to violate the contract made with the American people by the appointment of a special prosecutor. When a President discharges someone for "executing the orders he was given when he took office," as Professor Stephen Breyer has said, it is indeed a tragedy. It is a tragedy precisely because such a discharge demonstrates to the American people and to law students in particular that the President's devotion to the ideals of the American legal system may be more apparent than real.

As ordinary citizens, too, we expect we will be governed by a leader of the highest standards of professional and moral conduct. Sadly, this has not been the case. To restore confidence in the American judicial system and in our system of government, we must move rapidly to consider whether the President has committed impeachable offenses. We must also lobby and work actively for the appointment of a truly independent special prosecutor so that all the allegations of criminal behavior in Watergate and related matters may be tried fairly in courts of law.

Professor Freund, Dean Sacks, and others have argued that there is constitutional justification for court appointment of a special prosecutor. Assuming that is the case, we recommend that any special prosecutor be appointed not by Judge John J. Sirica to avoid any appearance of conflict of interest — but by other federal district or appellate court judges.

Revelations Wednesday of the nonexistence of two of the nine long-sought-after tapes only serve to stress the need for the prompt appointment of a special prosecutor so that justice may be done. We hope that Professor Cox's replacement will serve as he did with diligence and a sense of propriety. As American Bar Association President Chesterfield Smith said last week, we need more attorneys like Cox, Elliot Richardson, and William Ruckelshaus "who, in a most dramatic way, have emphasized to the people of this nation that they are lawyers who honor and cherish the traditions of the legal profession and that they are lawyers who properly and without hesitation put ethics and professional honor above public office."

HARVARD LAW RECORD

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Fenno

Times certainly have changed, Fenno reflected conclusively, mentally arching his eyebrows. Squinting at the six-point type in his *Contracts* casebook, he tugged at the collar of his burgundy turtle-neck, feeling uncomfortably for the place where, in years past, the knot of his black and crimson tie had rested securely against his throat.

"Mr. Buck," Professor John F. Princely said, his voice brimming with assurance and encouragement, "what was the measure of damages in *Hawkins v. McGee*?"

From force of habit, Fenno breathed what had become a superfluous sigh of relief, grateful that someone else had been chosen to deal with the question. Buck, the student who had been called on, stiffened unthinkingly in his chair—a gesture converse to Fenno's, and equally gratuitous.

"Well," Buck offered pensively, "in that case there was a plaintiff and a defendant."

A ripple stirred through the class. Princely himself stared for a moment, but no longer.

"That's a good answer," he said emphatically and almost convincingly, "but it doesn't go far enough. What was *Hawkins* asking for?"

"Exactly," Buck answered with renewed confidence.

This time, Professor Princely's pause was more than momentary. "Uh, you can pass if you want to," he said hopefully.

But Buck was off and running. "Hawkins had entered into the contract in reliance upon his—that is the doctor's—expectations. Therefore, he was asking for a consideration."

"Reified," someone suggested in an acid undertone. "Why don't you throw *that* in?"

The ball's in your court now, Prince, Fenno thought edgily, obliquely inspired by the previous comment.

And Princely almost pulled it off. Not for nothing was he teaching this course: he knew how to get out of it.

"Who can summarize what Mr. Buck has just told us?" he asked, brightening.

But it had gone too far. "A deaf mute," one anonymous voice heartlessly asserted, in answer to the Professor's question. Other students limited themselves to non-oral expressions. The five members of the section destined for the *Law Review* broke into sarcastic applause, and two dozen less imaginative students began hissing—an open and flagrant defiance of Princely's firmest standing rule.

Even now, Buck remained blissfully unaware of the millstone hung round his neck. Fenno, his countenance reflecting his resignation, reached into his pocket in search of a dime: *someone* had to uphold the traditions around here.

Letters to the Editor of The Record

Forum's Injustice

To The Editor:

I learned with some regret last Thursday morning of the decision to cancel the Shockley-Innis debate on "Race Differences in IQ, and Dysgenics." Because of the controversial nature of the program and the decision to cancel it, a response is necessitated. The comments below are made after considered reflection on my part, discussion with individuals involved in the decision, and examination of the public statements appearing in the Harvard Law RECORD of October 19, 1973.

First, the Forum has committed an injustice to the principles of free speech which have guided it in the past. The Forum has brought to the Law School in previous years speakers who have presented a wide variety of controversial viewpoints. The principle embodied in that policy has died a small amount when a program must be canceled on the grounds that the viewpoints to be expressed are odious to a significant portion of the community.

Secondly, the argument that Mr. Innis would not present sufficiently intelligible and competent replies to Mr. Shockley's thesis and, therefore, the debate must be canceled, does not support the Board's decision. Assuming the premise of the argument regarding Mr. Innis' inabilities, it is inconceivable that the Board could not find an individual of repute and competence who could have appeared with Mr. Innis in order to provide technical scientific assistance. However, regardless of such a suggested accommodation to improved programming and to the sensitivities of a portion of our community, it is not at all clear that the debate could not have been presented as originally scheduled. In addition to the content of any presentation, one of the values of a speaker's program is in the opportunity of the audience to evaluate the character and intellectual abilities of the speaker. If Mr. Innis does not have the capability of answering Shockley's arguments or will present a demagogic response unbefitting to his forum (a proposition put forth to me in conversation with individuals familiar with Mr. Innis' background), then such a revelation would justify holding the debate. More significant, however, is the opportunity of the audience to make its own judgment on the acceptability of Mr. Shockley's positions. It is truly an insult to the intellect of the Law School community to infer by your decision that the members of that community do not have the capacity to distinguish truth from falsity, an inference which cannot be avoided.

Lastly, it is indeed shocking that your de-

cision to cancel the debate could have been influenced by the threat of disruption, as implied by the public statements. One must question how long our freedoms can remain vibrant when the exercise of such can be curtailed by threats of actions antithetical to them. I can only ask rhetorically why the Board did not meet the threats of disruption (or, for that matter, the charge that a "circus atmosphere" was prevailing in which free debate could not take place), for example, by putting the debate in a smaller lecture hall, limiting admission to season ticket holders only, and broadcasting the debate into another lecture hall. If the Forum were being charged with sensationalizing the debate, why did it not come forth with public statements aimed at defusing the controversy?

Overall, I cannot help but conclude that the Forum has acted improvidently and in contradiction to the principles upon which it was founded and, until this date, has followed. In addition, I have decided that I cannot continue to maintain my relationship with an organization which has followed such a path. Therefore, I have tendered my resignation from the Forum staff. I expect that my name will be removed from the Forum's programs and any other public documents from which the conclusion might be drawn that I had any further contact with that organization.

Geoffrey W. Oblath, 3L

Forum Lauded

To The Editor:

One can only approve the action of the Harvard Law School Forum in cancelling the scheduled debate on "Race Differences in IQ, and Dysgenics", and *disapprove* the contents of its statement which appeared on page 15 of the October 19, 1973 issue.

I think the matter was very well stated by the Black Law Students Association. The admitted and conceded civil right to discuss this subject in public is no reason to "exacerbate tension between blacks and whites in this community, and possibly rend the social fabric at Harvard by infusing elements of racism, genocide and the haunting spectre of selective breeding and extermination that stalked Germany not 30 years ago."

In this situation the Black Law Students Association showed statesmanship, whereas the Forum has acted according to the false standards of modern liberal chic.

Hirsh Freed, '36
Boston, Mass.

Offsetting Factors

To The Editor:

While photography editor of the RECORD in 1966-1967, I was frequently irked by both

the long lead time and the excessive expense resulting from letterpress printing, and I repeatedly urged that offset printing be utilized. The reaction to my suggestion was somewhat on the order of "the old ways are the tried ways and the true ways." Just as with the common law, however, even the RECORD must change with the times, and I am happy to see that this particular change has finally been made. Congratulations!

Steven L. Stern, '68
Newport Beach, California

Law Notes

Professor Alan A. Stone has been appointed to a new interdisciplinary Commission on the Mentally Disabled organized by the American Bar Association. Stone was appointed by ABA President Chesterfield Smith.

Commission members, including educators, psychiatrists, judges, psychologists, and social workers, are expected to recommend and implement action programs designed to correct deficiencies in the mental disability system. The commission will also consider the problem of providing procedural safeguards for the mentally disabled.

* * *

The 1974 Client Counseling Competition of the American Bar Association's Law Student Division will take place in February. The object of the competition is to simulate an actual law firm consultation as closely as possible. Participating teams receive a very brief memo concerning a typical client problem, conduct a 45-minute interview with the client, and then prepare memoranda of their own proposing a solution to the client's problem or outlining what further research is necessary.

Each ABA-approved law school may enter one team in the competition. Applications, available from the Law Student Division upon request, and a \$25 entry fee should be received by November 19, 1973.

* * *

The Center for Law and Health Sciences of the Boston University School of Law will sponsor an all-day symposium on "Psychosurgery: The Legal and Ethical Issues" Saturday, December 1. The symposium will be held at the Boston University Law School Auditorium, 765 Commonwealth Avenue, Boston, Massachusetts from 9:00 a.m. to 4:30 p.m. Speakers will include Drs. Vernon Mark, Stephen Chorover, George Annas and Robert Neville. A demonstration of multidisciplinary review will take place in the afternoon.

Further information may be obtained by contacting the Center for Law and Health Sciences, 209 Bay State Road, Boston, Massachusetts 02215, or by calling (617) 353-2910.

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To Create an Energy Shortage

Natural Gas — Set a ceiling price on natural gas. This discourages exploration and increases use. Keep the prices down in spite of inflation. This amplifies the effect and guarantees a shortage eventually.

Coal — Ban the use of coal with sulfur content. This sharply restricts the supply. Sharply restrict strip mining for cosmetic reasons. This further restricts the supply. Then suddenly impose drastic new safety rules which will substantially cut output from existing mines. Freeze prices so no one can offset cost increase from reduced output or justify further investment.

Atomic Power — Delay construction a matter of years by uncertainty about licensing requirements. Delay operation at full power after construction. Delay start of construction by environmentalist suits.

Oil — With natural gas, coal and atomic power all severely restricted, that leaves only petroleum. First, grossly increase automotive consumption of gasoline by requiring drastic reductions in engine efficiency because of pollution related modifications. That alone will insure a severe shortage of energy. Then ban the use of oil containing sulfur. This severely reduces refining capacity. Put into effect new pollution objectives which make refineries far more expensive. At the same time, introduce great uncertainty into the requirements that must be met. That will virtually stop refinery construction or expansion. Eliminate practically all new refinery sites because of environmental legal delaying tactics. Further curtail refinery investment by making supplies of crude oil very uncertain. Block the use of Alaska North Slope oil by arguments on the cosmetic effects in uninhabited and unreachable regions. Stop the use or search for oil offshore in California because of potential leaks. Slow all offshore operations for environmental reasons. For good measure, hold down the price of gasoline to half that in Europe. This encourages large cars.

To be sure that all of the above is misunderstood by the general public, bring a law suit which charges all the largest energy companies with being non-competitive and therefore causing the energy shortage.

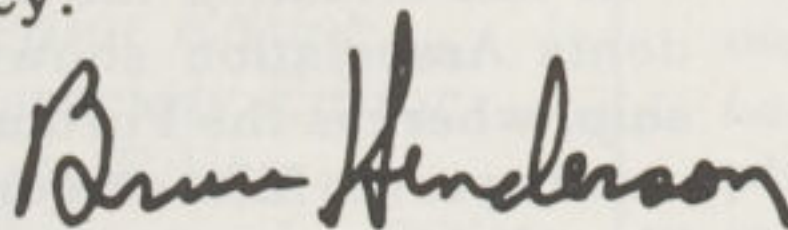
The above scenario has actually occurred in the U.S. Each and every action described above has been the result of public policy. Each act had laudable objectives. In the aggregate these actions will prove to be very punishing to the general public for years to come.

Such program management by a private business would justify charges of gross mismanagement. The whole task of management is optimization of value delivered from the resources available. False weighting of values or misallocation of resources are equal failures.

All the ultimate objectives can, in due course, be achieved by coordination, by scheduling, by value/cost optimization and by resource allocation priorities. That, however, is what management is.

The object of management is optimization of benefits from the use of the available resources. The objectives of public policy also require management to achieve optimum results. Impulsive, extremist, poorly timed and uncoordinated actions produce inevitable frustration, waste, and cures that are worse than the disease.

Whom do we blame when mismanagement in public policy is imposed by the Congress and amplified by the Judiciary? This kind of mismanagement is occurring at all levels of our government in all areas of public policy.



Bruce D. Henderson

Perspective # 127

BOSTON • LONDON • MILAN • PARIS • TOKYO
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Dean Sacks' Statement on Forum Debate

The decision of the Harvard Law School Forum (a student organization at the Harvard Law School which is run entirely by students) to cancel a scheduled debate between William Shockley and Roy Innis, and the various comments on the cancellation, seem to me to call for this statement. The statement is in part re-expression of past and present Harvard Law School policy, and in part an expression of my personal views.

On behalf of the Faculty of the Harvard Law School, I reaffirm that the Forum and all other groups of students and faculty members are free to bring to the Harvard Law School for speeches or debates such persons as they see fit. The Forum was free and remains free to hold the Innis-Shockley debate, or whatever other debate it wishes. And so is every other group. The University and the Law School will act to protect and defend the exercise of that freedom.

I want to express personal views concerning the two reasons that have been stated to underlie the decision of the Forum to cancel the debate. I say "stated to underlie," because I gather that it is not clear precisely what role, if

any, each of these reasons played in the final decision. I do not mean to judge the facts, but simply to comment on these reasons because many have assumed that each may have played some part.

One reason which has been stated as justifying the cancellation is that the Executive Board of the Forum was requested by a group of black law students to cancel the debate: first, because the subject matter of the debate was in its nature personally demeaning and therefore offensive to these students; and, second, because the treatment of this sensitive subject required utmost care in selection of speakers, whereas the Forum's selection of debaters promised neither understanding nor sensitivity. (I should add that I directed a comment to the Forum criticizing the selection of speakers.) In my view, this request posed a difficult problem for the students who manage the Forum. Once a debate has been scheduled, the principle of freedom of expression argues strongly against cancellation. On the other hand, here was an appeal from fellow-students on grounds of personal integrity for a reconsideration of the program. I find a

decision by the Forum not to go forward, if based on this ground, quite understandable, though I know that many will criticize it. I would note that such a ground for the decision would permit the Forum to consider whether the debate might not be rescheduled with some change of format.

A second reason that has been stated to underlie the Forum's decision is that there were threats of disruption, or at least predictions of disruption, that would prevent an orderly debate. (I emphasize that I do not now assert that such threats or predictions were made or that the Forum acted on them, but only that this has been stated to be so.) In my view, such threats or predictions cannot justify the cancellation of a debate. Just as the Forum must be free from pressures from the Law School's Administration, so too must it be free of any other pressures which are expressed through coercion rather than persuasion. Otherwise, the precious tradition of free speech at Harvard is in peril. If threats or predictions of disruption of order played a significant part in the Forum's decision, then I think its decision should be reconsidered.

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On Love, Law, and Innocence

By Robert Flanders

Do With Me What You Will by Joyce Carol Oates. Vanguard Press. New York. 1973, 561 pages. \$7.95.

This is a novel about love, law, and innocence, and the powerful corrosions they work upon the lives of the central characters. The first of these is Elena, utterly beautiful in her resolute passivity, the cold and captive prize of two men: Marvin Howe, her husband and fabulously wealthy defense lawyer, and Jack Morrissey, her lover and also a lawyer, though just managing to scrape out a living with his civil libertarian wife, Rachel. There is a deep cynicism here about the effects of law and the ethics of lawyers on the moral character of and relations between people. "Everyone is innocent until the crime he has committed is given a name," Marvin tells Elena, and it is very clear that Oates intends for us to take that remark beyond the courtroom.

Although this is a long and sometimes emotionally ponderous novel, there is no denying the author's skill at depicting the vital, human disintegrations of a lost innocence, a world without luck, a world where the only true belief is in "human control and direction." In such a world, the lawyer is the high priest, but even he is cursed with "the sly conviction that no amount of work, no dedication to any cause, would guarantee a victory in the courts or in life." Although Jack worked constantly, seven days a week, "he never had enough time, not really, to prepare a case, perfectly, to learn as much about anyone as he should have learned; he would not live long enough to do his job right ... and even his victories anesthetized him to his own imperfections."

The incursions of the legal conceptions of guilt and innocence into the morality of those whose lives are inextricably involved with the combative advocacy of the courtroom are portrayed in the struggle for Elena; each lawyer envisions her as the ultimate verdict of in-

nocence, of not guilty; as if, by winning her, they would somehow be granted an acquittal from all their myriad depredations, their spiritual rapine. But Elena is a woman of porcelain. She has always acquiesced to the needs of those who sought to control her life: her ambitious mother, her insane father who kidnaps her when she is in grade school, and of course the lawyers who love her, the silence of her beauty, the still and deathly peace which surrounds her. At one point, Jack tells her: "Sometimes I think I'd like to walk away from it. My life. My work. The world. Everything. The law, my so-called career, my so-called dedication ... Just give it up and walk away. Burrow very deeply into you, Elena, whoever you are ..."

If this is a death wish it is also a

longing for complete unthinking innocence, the nemesis of all tradition, experience, and law. The one is of its very nature ephemeral, transient, and the other ongoing, permanent. Elena's innocence, while somewhat contrived, is as alluring to the lawyers as the law; it too seems permanent, resistant to change, and therefore in open contempt of all expectation, all prediction, the law itself.

Do With Me What You Will is still too long a novel. There is unquestionable talent for emotional characterization, and some striking passages, but on the whole one is not left with too great an affinity for the people Oates has created. But if only for its provocative treatment of law and the legal profession, and the way these forces can play against our humanity, I would recommend it for your consideration.

Few 2Ls Join in Intern Lottery

Three years ago Assistant Dean Russell A. Simpson instituted the Summer Internship Program as an alternative to regular placement procedures. In an interview with the RECORD last week, Simpson termed last year's response to the program "terrible." Only 43 members of the current 2L class signed up last spring, a decided drop from the previous year's total of 106. Of the 43, only seven were matched participating law firms.

Students must commit themselves to the program in May of their first year. They then specify the sort of employment they wish—indicating type and size of employer, location, and salary—for the summer following their second year. If they are matched with a job of that sort, they are bound to accept it; otherwise, they are released from the program in the fall and go through the normal interviewing procedure. Employers committing jobs to the program are likewise required to accept any student who is matched with them, sight unseen. They cannot establish any stand-

ards based on grades—or on anything else.

Although the program offers the chance for an early end to summer job worries and the avoidance of the fall interviewing scramble, last spring's student response was so minimal that many attractive positions went begging.

Simpson cited several high-paying (\$200-\$250 a week) jobs with prestigious firms in Baltimore and Philadelphia that went unfilled as examples of opportunities the program offered. Simpson also noted that firms in Pittsburgh and Columbus, Georgia had openings for HLS students that went unfilled. In addition, the school had offers from the District Attorney's Office in Philadelphia and a foundation in Chicago.

Simpson noted the program's relatively low cost, but theorized that continued student non-response might place the program in jeopardy, particularly if 2L interviewing is moved to the spring semester.

P/F Grading: Is Silence Agreement?

By Phil Spector

In the mid- to late-1960's, two actions were taken by the faculty to reduce the pressure and anxiety regarding grades at Harvard Law School. First, class rankings were abolished (or at least no longer made public). Students at last did not have to worry about the consequences — in terms of self-respect, respect from one's fellow students, and (to many people, most important of all) employment opportunities — of placing 540th in the class, or even in the lower half. Competition was certainly not eliminated, but it was at least made a little less public, precise, and painful.

Second, after much student agitation on the subject, the faculty instituted a voluntary pass/fail option (as well as a four-tier grading system) in the first year. In 1969, the first year that the new system was in operation, one-third of the first-

year class (179 persons) chose the pass/fail option, and an additional one-seventh (75 persons) opted for the four-tier scheme.

Voluntary pass/fail had a few problems, however. Many students were not willing to unilaterally take the option, either because of societal constraints (e.g., employers might be less likely to hire someone who had opted for pass/fail) or because of personal hang-ups. Yet they wanted a reduction in the pressure and tension, and thus the idea of mandatory pass/fail for the entire first-year class was conceived.

Faculty Vote Ended Months of Prayers

In the spring of 1972, petitions were signed, meetings were held. Approximately 70 per cent of the first-year class signed petitions; the meetings were well-attended and the debate was lively. Around exam time, a 1L committed suicide in the dorms, undoubtedly at least partly because of first-year anxiety. This event heightened the concern, and the faculty promised to look into the matter by appointing a special student-faculty committee — the Cohen Committee on First-Year Evaluation and Related Matters.

The committee has reported, recommending one semester of

mandatory pass/fail, and now the faculty has made its choice: no pass/fail at all, even on the former voluntary basis. After years of forward progress toward reducing first-year tension and competition, progress based on hours of student (and faculty) work, organizing, petitioning, writing, and discussing; the faculty has taken a step backwards. And the student response? Nothing so far.

Perhaps people don't care anymore; perhaps, as much of the national press would have us believe, students have turned inward, watching out for themselves and their interests. First-year pass/fail can't affect 2Ls and 3Ls, who have problems of their own, and 1Ls won't organize until it's too late.

Students who do care (and I personally believe that most do) could at least make their opinions known to the faculty, either individually or in groups by petitions. The days of mass demonstrations and student strikes are over, but a continuing exchange of opinions, even on an issue as much-discussed as pass/fail, can only be beneficial. Without some pressure for change, faculty members can go complacently along believing that they made the right decision.

The present student silence is a message that the faculty can read very clearly. Most of them have seen that message before, as students or professors in the 1950's.

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Freund: Court Appointment of Prosecutor Constitutional

The following is the major part of a letter sent last week by Professor Paul A. Freund to Rep. Thomas P. O'Neill (D-Mass.) regarding the constitutionality of judicial appointment of an independent special prosecutor:

Dear Congressman O'Neill:

Questions have been raised concerning the constitutional authority of the Congress to vest in a court the appointment of a Special Prosecutor in succession to Professor Cox. Having given some thought to the problem, I am venturing to express my opinion that such authority does exist. In this conclusion I am in agreement with the statement issued several days ago by law school Deans.

The Constitutional text is clear. Article II, section 2, provides:

"...but the Congress may by law vest the Appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Any limitation on this express power must arise from implications of the Constitution. There appears to be no case holding invalid an appointing power vested in the courts, though a variety of appointments have been so vested, ranging from marshals of the courts and temporary United States Attorneys to supervisors of federal elections and members of the board of education of the District of Columbia. See *Hobson v. Hansen*, 265 F. Supp. 902, 911 et seq. (D. Col. 1967), per Fahy, J.

The challenges that have been advanced and rejected in cases of judicial appointments have invoked the doctrine of separation of powers, — more specifically, that the appointing power vested in courts should relate only to offices concerned with the ad-

ministration of justice. In the leading case of *Ex parte Siebold*, 100 U.S. 371 (1879), the Supreme Court refused to place this limitation on Article II, section 2, and upheld the vesting of authority in the circuit courts to appoint supervisors of federal elections. The duties of such officers appear to be less germane to the judicial branch, and more naturally thought of as "executive," than the duties of a special prosecutor charged with investigation and prosecution of offenses within the higher reaches of the executive department itself.

Refusing to fetter the Congressional choice of the appointing authority, the Supreme Court put to one side cases involving the performance of non-judicial duties by judges themselves. The appointing power is specifically authorized by the Constitution, the Court observed, and Congress will decide where it may be most appropriately vested, unless there is manifest "incongruity" in the judicial appointment....

From the standpoint of "propriety" or "congruity" the judicial appointment of a Special Prosecutor in the present circumstances rests on a firmer footing than a similar appointment of election supervisors or of United States Attorneys while a vacancy exists. Though limited in tenure until the President and Senate agree on an appointee, a United States Attorney appointed by the court assumes all the powers of the office, regardless of subject matter. The limitation of subject matter in the case of a Special Prosecutor even more clearly satisfies the criterion that the appointment not be "incongruous." Indeed, it could with reason be thought that in all the circumstances incongruity would inhere in an executive appointment.

The Special Prosecutor would be as independent as it was originally contemplated he should be. To this end, it might be appropriate to vest his appointment in no single judge but in the judges of the District Court. Moreover, he would be removable only for specified cause, such as "extraordi-

nary inproprieties," again as originally contemplated.

Provision for removal by the body that appointed him would raise no further problems. The power of removal (aside from impeachment) is not dealt with in the Constitution. It has been assumed that the power to appoint carries with it the power to remove, save that where the office requires a measure of independence Congress may protect the functioning of the appointee by placing qualifications on his removal. Compare *Humphrey's Executor v. U.S.*, 295 U.S. 602 (1935) (Federal Trade Commissioner) with *Myers v. U.S.*, 272 U.S. 52 (1926) (postmaster). The same considerations that support judicial appointment apply to judicial removal, subject to the specifications of grounds for removal in the interest of independence.

The power conferred on Congress in Article I, section 8, "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." That justice shall be done and shall be seen to be done is a paramount and legitimate concern of the Congress. That concern requires no extra-constitutional powers. It does serve to caution against raising barriers to the exercise of the power expressly granted by Article II.

In the present state of affairs it may not be amiss to recall the classic words of Chief Justice Marshall, which Justice Frankfurter used to describe as the single most important utterance on constitutional interpretation: "This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." (*McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819)).

Sincerely yours,
Paul A. Freund

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