



Harvard Law Record

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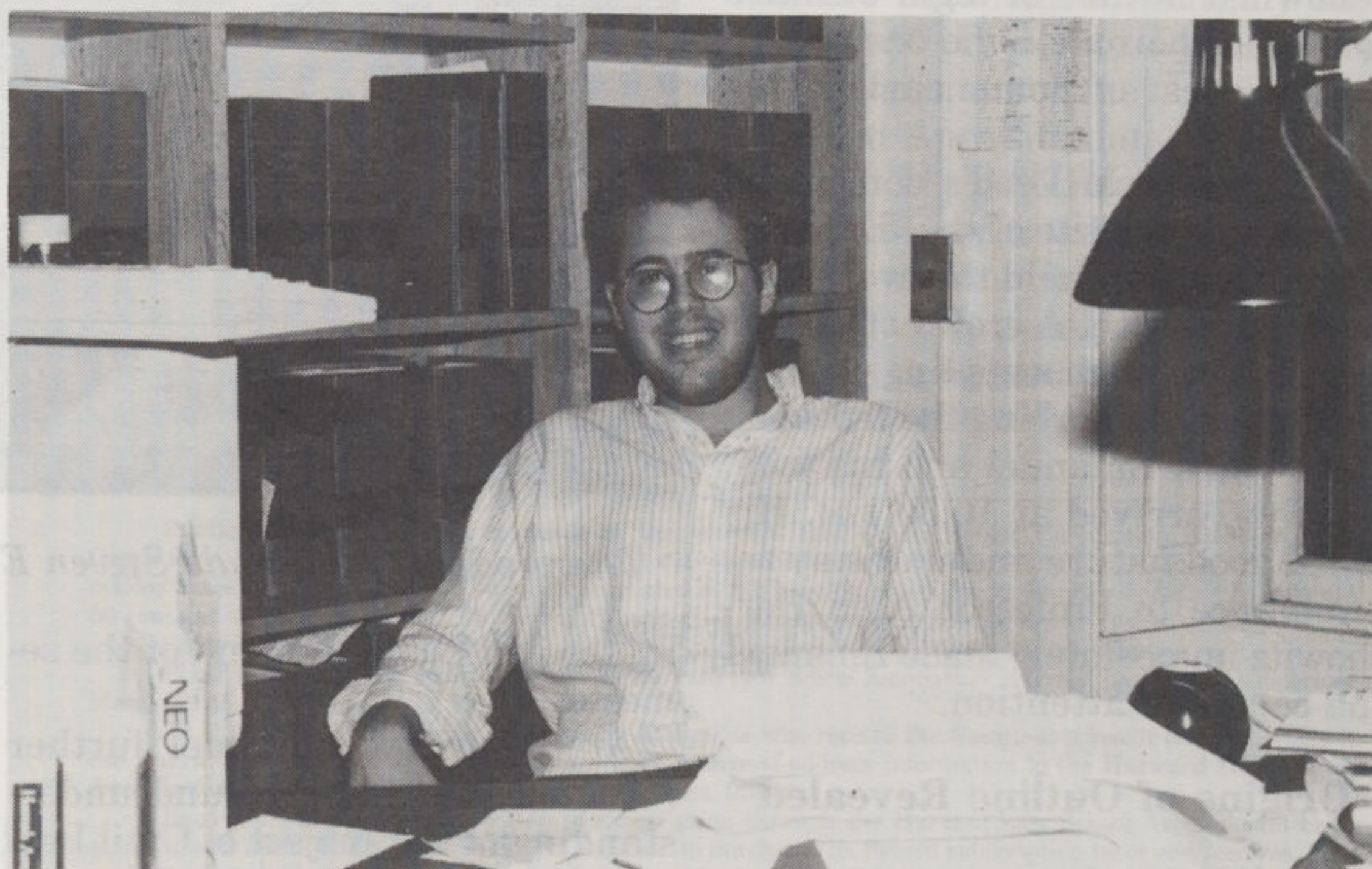
Student Editors Appear On TV

By Marla Becker

The president and the editor-in-chief of two of HLS's largest law reviews recently appeared live on-the-air on the Congressional cable-vision channel known as "C-SPAN." On Sunday, September 14, C-SPAN's Brian Lamb interviewed the president of the *Harvard Law Review* Adam Cohen, 3L, and editor-in-chief of the *Harvard Civil Rights—Civil Liberties Law Review* Jennifer Granholm, 3L.

C-SPAN's Connie Doebele explained to the two student editors that the live show would be part of C-SPAN's series, "The Judiciary Branch," and would give the audience a chance to see the law from a student's perspective. The interview was divided into two parts: First, Brian Lamb asked each student several questions; then the two took questions from callers from around the country.

According to Cohen, Lamb assisted him and Granholm. Knowing that they had never been on television before, he advised them to "just look into the camera and [he would] help out by asking real cream-puff questions." Once on the air, Lamb proceeded to grill Cohen about Critical Legal Studies. As soon as he recovered, Cohen responded by quoting Professor David Frug, telling Lamb that "one should not ask, 'what exactly is critical legal studies?' but rather, 'what are critical legal studies?'" He also expressed concern that an intellectual



Sal Casente

Adam Cohen, 3L, and editor-in-chief of the *Harvard Law Review* was recently interviewed on C-SPAN.

Aquino Recalls Nonviolent Rise

By Benedict M. Lenhart

Corazon Aquino continually stressed the theme of nonviolent politics in her short speech to a receptive audience last Saturday afternoon. Sanders Theatre was filled with those eager to see and hear the woman who recently captured the presidency of the Philippines and the attention of the world.

President Aquino divided her speech into three parts, each stressing one phase of nonviolent politics.

She began with an emotional description of her husband, Benigno Aquino, and of some of his last thoughts and actions before his assassination. "It was here, at Harvard, where 'Nino' found the leisure and atmosphere to reflect on the meaning of his prison years." It was

also here that Mr. Aquino prepared the speech he planned to deliver upon his return to the Philippines.

She quoted from part of that speech: "I will return of my own free will to join the ranks of those struggling to restore our rights and freedoms through nonviolence." She continued: "He did not have the chance to read that statement. Instead, he lay on the tarmac of the Manila International Airport — his head in a bright pool of blood, a vivid picture of his final statement on nonviolence."

President Aquino repeatedly stressed the importance of her husband's death to the Philippine revolution and to the doctrine of nonviolence. "Two million people threw aside passivity and fear as they marched for seven long hours in his

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Students Throw Party for Author of Outlines

By Jonathan Grunzweig

Of the many sources of influence and comfort in contemporary legal education, none exceed the contributions of Steven Emanuel '76 to Harvard law students. This sentiment motivated 2Ls Peter Levine and Wilson McLeod to invite the renowned author of legal outlines to attend their welcome-back party as the guest of honor earlier this month.

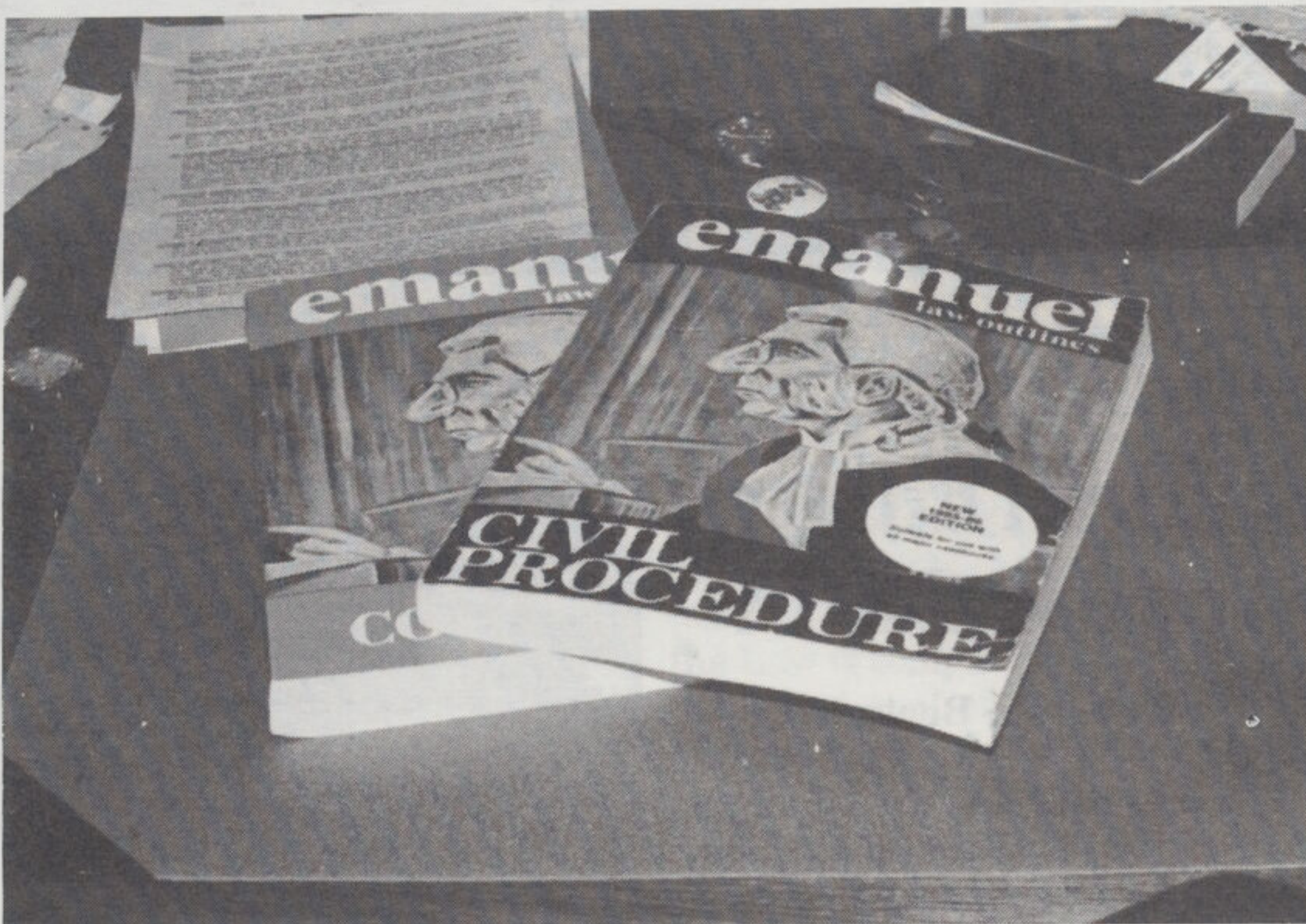
Levine and McLeod's Somerville duplex was the site of the "Emanuel Extravaganza," held the evening of September 13th. A crowd of almost 100 revelers were sampling draught Guinness and absorbing the left-wing decor when Emanuel and his wife, Marilyn, arrived at 10:30 p.m. His jovial good nature and uncanny resemblance to Professor Alan Der-showitz immediately made Emanuel the center of attention.

Origins of Outline Revealed

After mingling with the guests, Emanuel scaled a small platform to address the throng of admirers and curiosity-seekers. He expressed regret that Messieurs Gilbert and Nutshell were unable to attend, but agreed nonetheless to reveal the origins of *Emanuel Law Outlines*. As with most great efforts, this project traces its roots to somewhat mundane beginnings.

It seems that in the 1973-74 academic year, HLS was host to a particularly uninspiring visiting professor, whom Emanuel refrained from identifying. Emanuel found himself incapable of attending his first-year civil procedure class. Rather than surrendering, however, he reached deep inside himself and determined to digest every aspect of the course himself.

What began as a private endeavor soon evolved into a highly anticipated examination of the intricacies of the Federal Rules of Civil Procedure and the Field and Kaplan casebook. The initial product, printed by Emanuel's father and sold at lunchtime in Harkness Commons, was available to class-



Sal Casente

The products that made Steven Emanuel famous with law students.

mates just before the end of the semester.

At the party, Emanuel further revealed that his profound understanding of the subject of Civil Procedure may have been his downfall as well. A mistaken assumption about the Federal Rules went unchecked by the confident first-year student. As a result, an issue specifically treated by a small, obscure portion of the Rules pamphlet became a detailed *Erie* problem in Emanuel's examination.

Emanuel received a "C" in Civil Procedure that year. While this kept

him off Law Review, it also solidified his decision to turn to the profession of law publishing, rather than practice. His current fleet of outlines has, he said, provided him with a standard of living that places him precisely at the median of the Class of '76 income survey.

The hosts gave to Emanuel a T-shirt bearing the legend "Most Valuable Professor." McLeod reports that the redoubtable author was seen sporting his new prize while perusing Harvard Square shops the next day. Emanuel, no doubt, was checking out the competition.

Profs Get Endowed Chairs

By Julia Loewy

Professors Arthur R. Miller and Henry J. Steiner were recently appointed to endowed professorships. HLS Dean James R. Vorenberg announced last May that Steiner had been named the Jeremiah Smith Jr. Professor of Law and that Miller had been made the Bruce Bromley Professor of Law.

Named chairs have long been awarded to faculty members on the basis of seniority, subject to having the chair match the recipient's area of specialization. Faculty members

are appointed by the governing boards of the University upon recommendations by Dean Vorenberg.

Vorenberg said it is "always wonderful to fill a chair as it is a way of remembering the donor and honoring the faculty member who holds it." Many HLS chairs are not fully funded, Vorenberg said, and "the hope is to raise funds to complete the endowments."

The Bromley chair was previously held by former Professor Paul Bator, who left HLS in January to teach at the University of Chicago Law School.

Spring Tenure Rejections Lead To Criticism

By Vincent Chang

The HLS faculty's decisions last spring to refuse tenure to two professors has drawn criticism from a number of students and at least two faculty members. Controversy over the faculty's votes to deny tenure to Assistant Professor Daniel Tarullo and Visiting Professor Zipporah Wiseman contrasts sharply with widespread faculty agreement to promote two assistant professors and hire three full professors laterally earlier in the year.

The denial of tenure to international trade and corporations professor Tarullo represented the end of a 17-year tradition. Since 1969, no tenure-track professor before Tarullo had been denied tenure.

Nor was the Wiseman decision uncontroversial. Some HLS sources said that Wiseman was promised tenure before she decided to leave her Northeastern University post to teach at Harvard.

Some observers now speculate, as did Professor Morton Horwitz in the Sept. 19, 1986 issue of the RECORD, that a "purge" of left-leaning, "Critical Legal Studies faculty" has begun. Although Wiseman was not affiliated with the CLS camp, Tarullo was one of its most vocal adherents. Five hundred ninety-nine HLS students apparently agreeing with Horwitz's dire prediction, signed a petition last Spring criticizing the school's new tenure standards. "We believe that the internal divisions among faculty members have prevented a fair consideration of their scholarship and teaching ability," the petition stated.

Many observers also fear that the faculty's ideological divisions could disrupt the tenure decisions scheduled to be made this coming year. Six additional tenure-track junior professors are to be considered for promotion in the next two years, including: Assistant Professors Christopher Edley, David Kennedy, and Clare Dalton, who narrowly escaped rejection two years ago when a faculty committee postponed her tenure decision until this year.

Others, however, say last spring's tenure decisions reflect efforts to toughen the standards HLS uses to evaluate tenure candidates. A stricter tenure process would, it is thought, tighten academic standards and improve the scholarship of the school.

But Tarullo said scholarly and ideological issues are intertwined. "In retrospect I was crazy to think I could get two-thirds of the faculty to accept scholarship that challenged the basic orthodoxies of legal theories," Tarullo told the *Harvard Crimson* last spring.

Supporters of Wiseman have contended exactly the opposite, arguing that Wiseman was denied tenure because she was politically

neutral. One Wiseman backer, quoted in the *Harvard Crimson*, said Wiseman "was not a political person, not a candidate of the left or the right. There is reason to think that she would have been better off if she had been factional."

Conservatives and mainstream professors respond that the school's tenure decisions are largely based on merit. Professor Robert Clark, '72, chairman of the Committee on Lateral Appointments, contended in an Oct. 18, 1985 RECORD article that "We just try to educate each other about the merits of the work we want. . . . It really is possible for people to agree about what is good work. The really good people shine through."

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Student Editors Answer Calls On Cablevision

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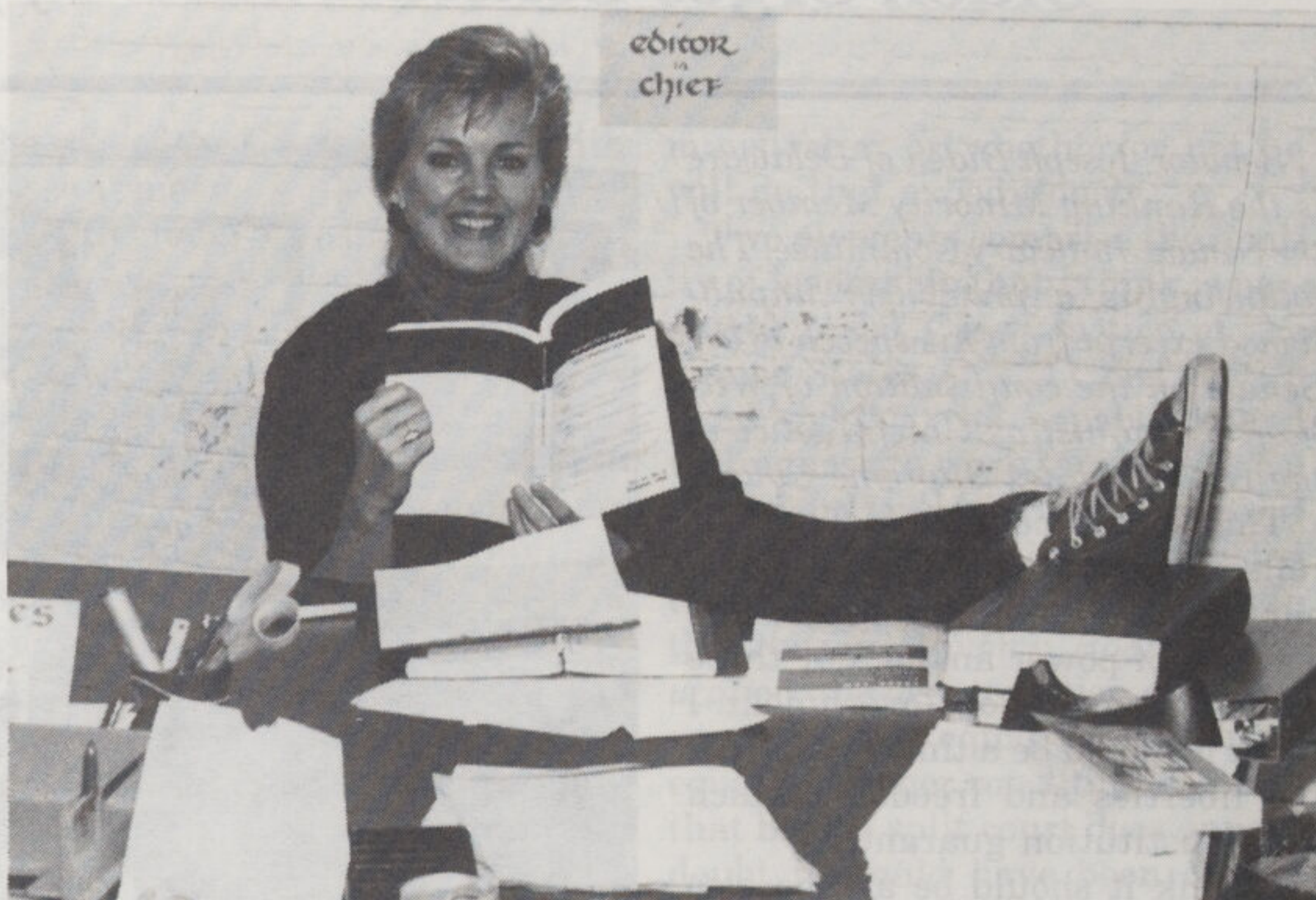
purge of the left might be occurring, citing the recent denial of tenure to two assistant professors, Tarullo and Wiseman. Cohen described that part of the interview as "a horrible moment."

Both editors fielded calls from all over the country requesting predictions of how likely it was that the caller would be admitted to HLS. According to Granholm, one caller identified himself as a convicted felon, and asked if he had a chance to be admitted to HLS. Granholm responded favorably, telling the caller that he would "provide a fresh perspective on the penal system." Cohen agreed, telling the caller to write to Admissions Director Molly Geraghty for the admissions criteria.

One caller expressed concern that she was maintaining a 3.75 average in French Literature at a college in California; she asked if perhaps she should switch to a government major. Both Cohen and Granholm responded by extolling the virtues of diversity and exclaiming about how interesting it was to be a French literature major. According to Cohen, "we out-bleeding-hearted each other on that question." Responding to a military school hopeful with a 2.75 GPA, they again responded that Harvard Law School was always looking for diversity.

According to Granholm, one caller was horrified to hear that Granholm used the word "alumni" where she should have used "alumnus" in a response to a previous caller's question. The caller could not believe that a latin course was not a pre-requisite to admission to HLS.

The editors were asked numerous questions by callers about such broad-ranging topics as attorney advertising, which Cohen noted "reveals the false gentility of our profession;" and Harvard's holdings in South Africa and the divestment movement. One caller requested legal advice; Cohen responded by saying that he had not taken legal ethics yet and that the best advice he could give was for the caller to



Sal Casente

Jennifer Granholm, 3L, and editor-in-chief of the *Civil Rights — Civil Liberties Law Review* was also interviewed by C-SPAN.

report his problem to the Bar association.

A caller Cohen described as "intensely pre-law" asked about the possibility of starting a law review for undergraduates. Cohen told the *Record* that he "had to laugh; I told the caller that there were many more interesting things to do in college than write for a Law Review — nobody I know at HLS has ever told me that they wished they could have written for an undergraduate law review." Callers also wanted to know if the rumors about the law firm Cravath, Swaine and Moore raising its salary levels to as high as \$72,000 were true; both editors responded that they didn't know, as Cohen was going to clerk for Judge Abner J. Mikva of the D.C. Circuit after graduation and Granholm would be clerking for Sixth Circuit Judge Damon Keith.

Cohen found one caller's question asking why no "conservative" law journals were represented an ironic one, commenting that "traditionally, any panel with the president of the *Harvard Law Review* on it would never be asked about where the conservative representative was."

When Granholm and Cohen were asked about their opinions of the newly confirmed candidate for Chief

Justice of the United States Supreme Court, William Rehnquist, both expressed their disapproval, Granholm by giving him "thumbs down" and Cohen by shaking his head. Granholm cited three reasons for her disapproval of Rehnquist for the position of Chief Justice, who at the time of the interview had not yet been confirmed: his refusal to recuse himself from *Laird v. Tatum*, in which the Court decided to require proof of a chilling effect upon First Amendment rights from protesters who were being electronically surveilled by the Justice Department, although he had worked on that topic as a member of the Justice Department; the racially exclusionary lease he holds on property in Vermont, and his behavior in challenging the qualifications of black voters in Arizona.

In response to her discussion of Rehnquist, Granholm received two letters addressed to her at the *Civil Rights — Civil Liberties Law Review* as well as one proposal of marriage. One letter she received was from David J. Roberts, guest columnist for the *Cincinnati Enquirer*. He submitted the following question to Granholm, which he said he could not phone in during the telecast: "By what moral standard do you

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Biden Urges Consideration Of Justice Rehnquist's

Senator Joseph Biden of Delaware is the Ranking Minority Member of the Senate Judiciary Committee. The following is a previously unpublished excerpt from his speech to the Senate on the confirmation of William Rehnquist as Chief Justice of the United States Supreme Court.

This should be a time of serious reflection about the very nature of our constitutional system and the division of power among our three coequal branches of Government. I think it should be a time to consider the liberties and freedoms which the Constitution guarantees.

I think it should be a time also to look a little bit into the future 10 and 20 years hence to contemplate the role of the Supreme Court of the United States of America, not only as it is constituted today but during the tenure of the next Chief Justice of the United States. It is a fact that the man before us and others who might come before us are men who have a good, long time left to serve their country if they are confirmed.

So, if we fail to look down the road the next 10 to 20 years, we will, in my view, be doing a disservice to the country and a disservice to the Court.

To contemplate the role of the Supreme Court in governing this diverse and fragmented society is one of the responsibilities we have.

The hearing conducted by the Judiciary Committee delved into a number of very important issues regarding the personal background and the judicial philosophy of the nominee as well as exploring the significant role the Chief Justice plays in the conduct of justice in America.

Quite frankly, the Chief Justice of the United States of America is a metaphor for justice in America. There are those who will say the hearing exhausted every possible avenue of objection, but I might suggest it is also possible to assert that the hearings raised more questions than were answered.



In many instances Justice Rehnquist's answers were not sufficiently forthcoming to satisfy the burden — and I emphasize “the burden” — the burden on every nominee to justify his or her confirmation.

We should set that straight. The burden is not on the U.S. Senate to suggest that someone not be the nominee, to prove they should not be the nominee. The burden is upon the nominee and the proponents of the nominee to demonstrate that he should be confirmed.

We are talking about the second-most important person in America, heading one of the three coequal branches of the Government. And the burden is on the nominee to prove that he should be Chief Justice.

At the beginning of the Rehnquist hearing, I commented extensively on the historic role of the U.S. Senate in evaluating Supreme Court nominees. I think it bears repeating.

I am certain it will be argued, and argued repeatedly, that the Senate has traditionally “gone along” with Presidential choices for the Supreme Court and that our advise and consent should be abbreviated.

I have no doubt this argument will be asserted with regard to a sitting Justice being elevated to the

position of Chief Justice, as is the case with Justice Rehnquist.

As Prof. Larry Tribe of Harvard University noted in his recent book “God Save This Honorable Court,” and as many others have noted — nothing could be further from the truth than to say the Senate has gone along with Presidential nominees to the Court.

Let us look at the record. The Senate has rejected more Presidential nominees for the Supreme Court than nominees to any other Federal office. Out of the 18 nominations for Chief Justice of the United States over our 200-year history, the Senate has rejected 4 of those, 4 out of 18.

Throughout our history it has been the Senate's solemn responsibility to assure that men and belatedly women picked by the President to sit on the Supreme Court are up to the task. The duty comes directly from the Constitution. Article II, section 2 requires that the Senate give its “advice and consent” before a Presidential nominee is approved to a position on the Court.

Doubts about the capability or character of a nominee in the past have resulted in Senate rejections of the Court nominee sent up by the President. The nominations of Clement Haynsworth and Harold

Personal Background And His Judicial Philosophy

Carswell were rejected for those reasons along with many others, but historically these have not been the sole basis for the Senate's opposition to a Presidential choice. From the fight over the Rutledge nomination, which centered on his speeches against the then-controversial Jay Treaty, through the more contemporary struggles over the nominations of Louis Brandeis, Judge John Parker, and Justice Abe Fortas, the Senate has often considered the nominees' judicial philosophy and vision of the Constitution as part of what they had the right to consider.

I would like to put another notion to rest. That is the idea that the U.S. Senate constitutionally is precluded from considering anything other than whether the nominee is intellectually capable, competent as a jurist — by the way, you need not be a lawyer or a judge to be on the Supreme Court under the Constitution — and whether or not he or she has committed a crime of moral turpitude. All constitutional scholars agree that the Senate may go beyond this in considering the fitness of the nominee. I might note parenthetically we do not have to get to that in my view on this man to conclude that he should not be Chief Justice. But it is fully within the constitutional authority of the U.S. Senate to do so.

One need not go back to the 1930's to witness Senate leaders scrutinizing the judicial views of a Supreme Court nominee. During hearings on the last Chief Justiceship that was not confirmed — Abe Fortas' nomination — our distinguished Judiciary Committee chairman, Senator Strom Thurmond, stated, and I quote:

"It is my contention that the Supreme Court has assumed such a powerful role as a policymaker that the Senate must necessarily be concerned with the views of prospective Justices or Chief Justices as they relate to broad issues confronting the American people, and

the role of the Court in dealing with these issues."

As the loyal opposition, the Democrats owe this country no less now than Senator Thurmond and his colleagues from the other side of the aisle offered at that time. And they were right. These hearings should meet the same standard for completeness and hard scrutiny that Senator Thurmond expressed in those words 18 years ago.

From my perspective, three areas directly relate to the ability of Justice Rehnquist to serve as Chief Justice. I should say there is no doubt about the legal ability or professional competence of the nominee, and that is not what these reservations are about. Rather, my concerns relate to the unique symbolic role which the Chief Justice plays in our scheme of constitutional government.

"The Chief Justice of the United States of America is a metaphor for justice in America."

The Chief Justice not only serves longer than any President, but he and his colleagues exercise power limited only by their consciences and principles. The Chief stands as a metaphor for justice in our society more than any other individual, including the President of the United States of America, or any U.S. Senator or Congressman. The Chief symbolizes the guarantee of equal protection under law, "equal justice under the law," for all Americans. And that is not just an arcane legalism. It is the embodiment of the fundamental purpose of our entire judicial system.

My first concern is whether Justice Rehnquist can serve effectively as a leader of the Court, and to my mind, this does not mean whether or not he can be an effective ad-

ministrator, or whether or not he will do that expeditiously.

Two elements comprise the quality of leadership that I think is necessary to be Chief Justice of the United States. One, a Chief Justice must exhibit the capability and willingness to work for and forge a consensus for cases, cases where if there is not unanimous decision there would be serious problems in this Nation. *Brown v. Board of Education*, the desegregation case, said separate but equal is no longer equal, no longer constitutional. Had that been a split court does anyone doubt it would have been considerably more difficult, and possibly resulted in considerable bloodshed in this land, to bring the change?

Second, the Chief Justice must demonstrate the flexibility and openmindedness to put aside his own philosophical or legal views when consensus on the Court is required even if he disagrees with the majority holding. It is essentially two sides of the same coin requiring sensitivity to the great legal and social issues of our day.

It seems to me Justice Rehnquist is not such a person to recognize the sensitivity of the consequences of the Court's decision.

I explored with Justice Rehnquist his views on the 14th Amendment, especially the distinction which becomes apparent from a reading of his opinions with regard to his treatment of race and gender cases. It became evident that the nominee regards the 14th Amendment, the most basic affirmation of equal treatment under the law, as something different for blacks than for women and other minorities.

I believe that Justice Rehnquist's incapability of joining or associating himself with the findings of Justice Burger is a window into his soul as well as to his mind. He has an agile mind but not an open mind.

I intend to vote against the nomination of William Rehnquist to be the 18th Chief Justice of the U.S. Supreme Court.

This Time It's War

What is going on in the war against drugs?

The *Wall Street Journal* reports that "Majority Leader Dole wants the death penalty for drug dealers."

Pierre S. du Pont 4th, announcing his candidacy for the '88 Republican presidential nomination, has called for mandatory drug testing of all teenagers. Du Pont argues that "if we can require vaccinations before kids go to school, we can require drug testing while they're in school."

What is going on in the war against drug testing?

The National Treasury Employees Union has filed suit to block an order by President Reagan that would subject many Federal workers to mandatory drug testing. The union argues that the testing program would violate constitutional protections against unreasonable searches and seizures. Some members of Congress, such as Rep. Charles E. Schumer (D.-N.Y.) are worried by the inaccuracies inherent in the more inexpensive drug test; the *New York Times* quotes Schumer as stating that "with the most widely used tests laboratories could draw false conclusion of drug use as often as 66 percent of the time."

Meanwhile, in Newark, Federal District Court Judge H. Lee Sarokin has ruled that surprise urine tests of police and fire personnel, nineteen of whom were suspended without pay when the tests detected illegal drugs in their samples, were warrantless searches and an unconstitutional violation of privacy. Sarokin wrote that "the invidious effects of such mass roundup urinalysis is that it casually sweeps up the innocent with the guilty and willingly sacrifices each individual's Fourth Amendment rights in the name of some large public interest."

Reagan's Justice Department has filed an application to enter, as amicus curiae, a case here in Boston in which police officers are challenging similar testing. The department will argue that the Fourth Amendment does not apply to such testing.

The administration must argue that the amendment does not apply, because it has selected a weapon in the "war against drugs" that is dramatically, fatally overinclusive — the most, rather than the least, restrictive means. It is an overly broad tool aimed at an overly broad end, at the total eradication of drug use from the U.S., rather than the end of on-the-job impairment that may hamper productivity, result in injuries, and go undetected by urine tests that detect drugs only after they have passed through the system.

Fourth Amendment protections require, Sarokin wrote, that urine tests be allowed "only on the basis of a reasonable suspicion predicated upon specific facts and reasonable inferences drawn from those facts in light of experience." Impairment testing could prevent the harms associated with on-the-job impairment, as well as constituting probable cause for individual, rather than random, chemical testing.

—RJP
—GMP

Fenno

Fenno had a hangover. After drinking several cases of beer and gorging himself on Pepperidge Farms pizza-flavored fish, which had been appropriated from a Hackensack law-firm reception, Fenno awoke inhaling fumes from an unfamiliar carpet. Rolling over in semi-panic, Fenno immediately thought he was in Hell, or worse, the library. The dilated eyes attempted to focus on the living nightmare before him. Dozens of 2Ls were scrambling about the room, climbing over each other in futile efforts to find an unclaimed bundle of xeroxed sheets.

Suddenly, the pain receptors in Fenno's mind went off. Someone had fallen on top of him.

"What are you doing here?" quipped the sprawled student.

"Snorting Carpet Fresh, what else? Want some?"

"No thanks, I've got to find the firm description of Wynne, Biggor, Dye. I think it's in volume 49, which appears to be under your head. They're the only firm I've found which pays \$1550 a week this summer."

"This summer? How long have I been asleep? Last time I noticed it was September."

"Of course it's September. It's late enough as it is. Do you realize that most schools are already into their interviews?"

Perplexed, Fenno scanned the room. "Placement Office" he read. Suddenly his head reeled. He recalled last year's wasted efforts to avoid employment, and his rich uncle's offer from Nasty, Brutish & Short. His soaked mind remembered the receptions, dinners and open bar, fly-out and hotel suite, followed by a summer where the hiring partner threatened to handcuff him to the Lexis machine. Even earning enough money to purchase every Led Zepplin album ever pressed wasn't enough inducement to leave his comfortable apartment in Somerville.

The elevator released another dozen fevered searchers. The terror of students fearing new competition for limited information spread throughout the room, making the pizza-flavored fish start to swim in Fenno's stomach. From the far corner of the room, a voice screamed out, "Look! San Francisco at a thousand a week!!"

The crowd surged towards the voice. Fenno bolted to the closing elevator doors, collapsing on the otherwise empty floor. Staggering out, Fenno headed to the Aces, muttering, "I really need a beer."

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HARVARD LAW RECORD

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TOM the DANCING BUG BY RUBEN BOLLING

HOW YOU CAN CELEBRATE HARVARD'S 350th ANNIVERSARY!

YOU DON'T NEED PRINCE CHARLES TO PROPERLY CELEBRATE HARVARD'S ANNIVERSARY (ALTHOUGH, OBVIOUSLY, HE HELPS A LOT). IT IS FAR MORE FULFILLING TO CELEBRATE ON A PERSONAL LEVEL/ YES, YOU YOURSELF, THROUGH A FEW CAREFULLY CHOSEN SYMBOLIC ACTS, CAN COMMEMORATE THE BIRTHDAY OF AN INSTITUTION THAT HAS COME TO BE KNOWN AS A BASTION OF ELITISM, INTELLECTUAL SNOBBERY AND SUPERCILIOUSNESS! HERE ARE A FEW SUGGESTIONS.

Is Harvard really all that silly?!

MAX: A YEAR OLDER, BUT A YEAR WISER?



IT'S TOM THE DANCING BUG'S SEVEN-MONTH ANNIVERSARY! HELP HIM CELEBRATE BY MOLTING!

Reader's Forum

The RECORD welcomes views from all perspectives. In addition to Letters to the Editor and more elaborate Off-the-Record ruminations, the RECORD would like to introduce a new feature: The Readers' Forum. The purpose of the Readers' Forum is to allow students, alumni/ae, and faculty to express their thoughts on various areas of the law, the profession, and life at HLS; we would like to stress that we welcome all viewpoints on subjects outside the scope of Harvard Law School as well. Please limit Forum pieces to a length of 500 words or less. The Editors reserve the right to edit Forum submissions for length or objectionable language.

**Next
RECORD:
on
October 3, 1986**

Letters to the Editor of the Record

To the Editor:

RE: Statements attributed to Renda Johnson, Director of Financial Aid in the RECORD, September 19, 1986.

Johnson claimed that the federal government required HLS to include the equity in parents' homes when calculating imputed contribution to a child's education. This may be true when her office is preparing needs tests for federally-sponsored loan programs. Such governmental policy, however, is not applicable to determinations of need for HLS grants. Recent Financial Aid Committee policy changes, such as recognizing some forms of financial independence and the ratio of grants-to-loans, indicate the lee-way HLS has.

More directly, Johnson has not used the Feds' excuse in the past. In her Fall 1984 response to my petition to the Committee (requesting that my parents' home not be considered an asset to raise money for my education) Johnson agreed that excluding the equity "in no way constitutes an exception to our normal policy."

In late December 1984, A. Simone Reagor, Administrative Dean, stated that she, personally, had made a mistake and that my

aid package (including grants) would be recalculated. The "official" determination was written on January 23, 1985: My parents "are in an essentially different circumstance from parents who must rent. The GAPS FAS calculation . . . allows them a maintenance allowance . . . as if they were renting. Therefore, we . . . must include the net value of [their] home in calculating their [discretionary] assets."

Johnson further stated that if parents cannot borrow against the equity, "we can work with reducing the equity after receiving documentation from parents about their real situation." Maybe they can, but they have not. What more documentation does HLS want other than sworn GAPS FAS and 1040 forms, plus its own research of Texas law and two petitions explaining the problem?

Replacement borrowing allows the student to remain in school, but it also changes grants into 12 percent interest (accrued, deferred and capitalized) loans.

Financial Aid has ignored published procedures. The 1984-85 Guide said that the committee ruled on award appeals. The committee granted my appeal. Reagor overturned it. Later, Reagor, in consultation with

Professor Wolfman, chair of the committee rejected my second appeal.

Under current policy, appeals are made to Johnson and then to Reagor. The committee reviews policy only at their request.

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Letters Policy

All letters submitted to the RECORD are read by the RECORD's staff. Many of them appear on our pages, subject only to editorial discretion. We encourage letters on any subject, particularly those subjects which have been covered in the RECORD. Short letters are more likely to be printed.

Letters must be received by 2:00 P.M. on the Tuesday before the issue. Letters should be addressed to the RECORD rather than to third parties. In no event will the RECORD publish letters by writers who have not identified themselves to the RECORD. Organizations should identify the specific individual(s) responsible for approving the letter. All letters submitted become the property of the HARVARD LAW RECORD Corporation.

"Rehnquist Believes In Maximum State Power Over

By Jamin B. Raskin

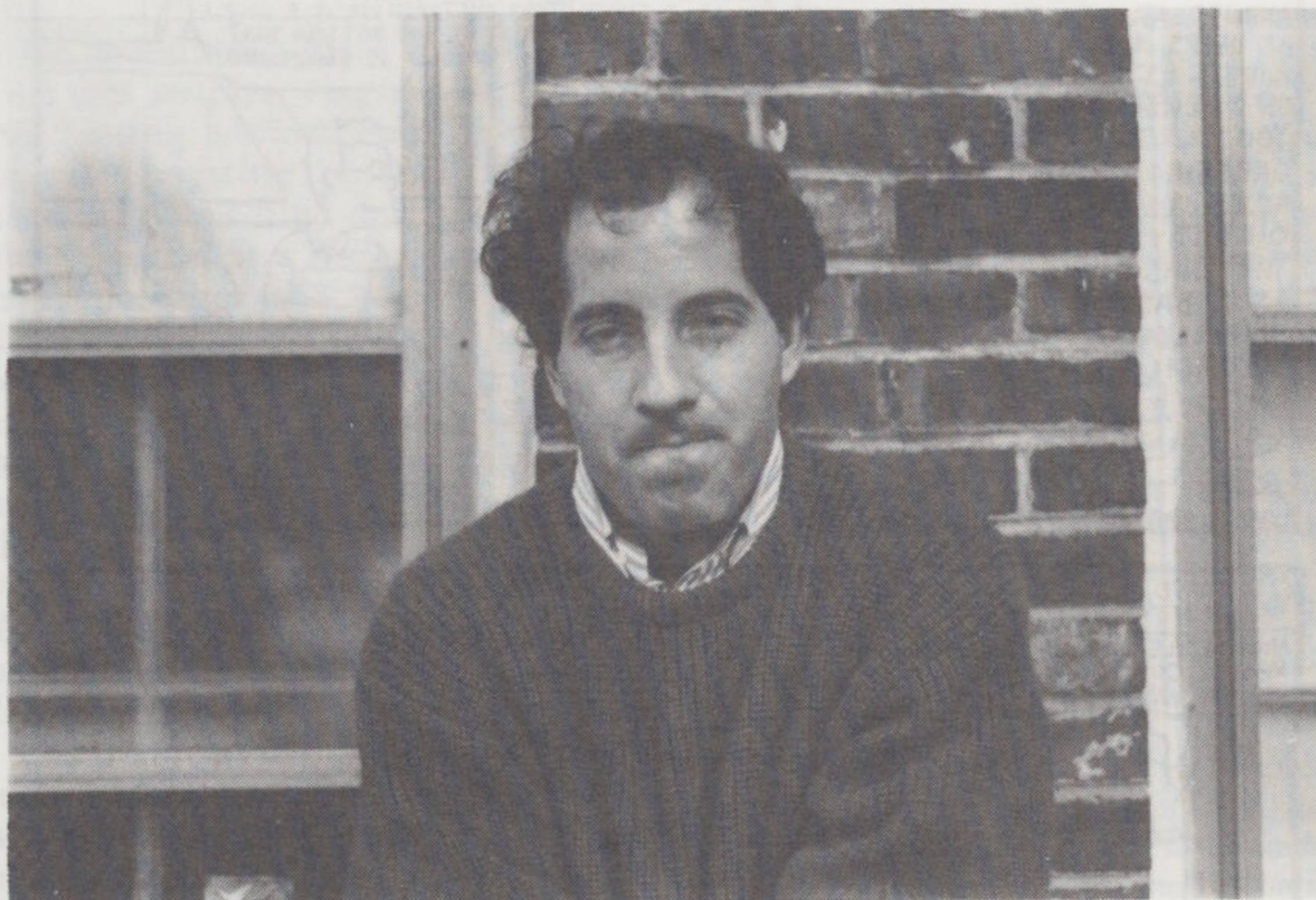
As appearing in The Los Angeles Weekly.

"You won't fall for that: law and order is a baton in the ribs." —*The Clash*

When I heard that President Reagan had nominated William Hubbs Rehnquist as the next Chief Justice, I thought of Michel Foucault. I used to go see Foucault lecture on rainy Paris afternoons and he had this wonderful way of clarifying social relationships. To understand a society, he would tell his overflow student audiences, simply watch how the state exercises control over citizens' bodies. In *Power/Knowledge*, Foucault argued that the study of domination "should be concerned with power at its extremities, in its ultimate destinations, with those points where it becomes capillary."

If we train our sights on the key transfer points of violence and control which Foucault tried to shine light on, the jurisprudence of William Rehnquist assumes a beautiful clarity: he believes in maximum state power over citizens and total freedom for authority. He will find an argument to justify anything which makes the state strong and the person vulnerable; he will find an argument to oppose anything which makes the person freer and institutions more democratic. As I enter my third year of law school, having read probably more than 75 opinions of William "I dissent" Rehnquist, I can report that there is no unifying logic or interior consistency to his jurisprudence other than this: the state can use whatever means necessary to keep everyone in his or, more likely, her place, but it may do almost nothing to make our society more democratic and more just.

To see the kind of raw state violence which the "Lone Ranger" (that's what his clerks call him) Rehnquist defends, I offer the case of *Ford v. Wainwright* (1986) which



was handed down last term. The majority held that the Eighth Amendment prohibition against cruel and unusual punishment prevents states from killing prisoners who have gone insane on death row. The decision means that states will have to provide full and fair hearings to condemned prisoners claiming insanity before they can be executed. It is not a perfect decision since it sanctions a bizarre situation in which insane prisoners are cured to be killed, but it marks a slender inroad against the death penalty and exhibits a measure of respect for life. The Court's two beleaguered opponents of the electric chair Marshall (who wrote the opinion) and Brennan, could not have done much better in the waning and increasingly conservative days of the Burger King Court.

Rehnquist didn't like this holding one bit. Historically, you see, "it was the *Executive* who passed upon the sanity of the condemned." Since the days of old, the king alone possessed the power of reprieve for prisoners waiting to hang, and no Supreme Court butted into the castle waving a copy of the Constitution and making up rights. But Rehnquist let on towards the end of his opinion what was really bugging him, and you can smell the

blood in his bloodless language: "Creating a constitutional right to a judicial determination of sanity before [the] sentence may be carried out, whether through the Eighth Amendment or the Due Process Clause, needlessly complicates and postpones still further any finality in this area of the law." That is, it's more important to kill the sane prisoners than to spare the mad. Bill's pleading with us: don't pull the plug on the chair.

Rehnquist's meticulous defense of the state's power to take the body of the condemned prisoner presents merely the most extreme expression of his belief in the state's power over all disfavored bodies: those of gays, women, minorities, aliens, and criminal suspects. A reliable foe of sodomy whenever it pops up, he eagerly concurred with the outrageous *Hardwick* decision allowing states to criminalize most sexual acts excepting the insertion of the penis into the vagina. He has worked overtime trying to overturn *Roe v. Wade* (1973). He justifies all kinds of gender distinctions except those which might work to allow women to reconcile the roles of mother and worker. When he's not defending gender discrimination in the military or the workplace, he's resurrecting the most feudal chauvinist atti-

Citizens And In Total Freedom For Authority"

tudes, holding in *Michael M. v. Superior Court* (1981), for instance, that a California law making it statutory rape to have sex with a female under the age of 18, but not with a male under 18, is constitutional because female chastity is a special and legitimate concern of the state. He summoned up deep reservoirs of animus to attack the *Bakke* decision, claiming there is no difference between the discriminatory exclusion of blacks from all-white educational institutions and the affirmative action policy of taking minorities to integrate those schools. (There is, however, at least one important difference: Rehnquist was never bothered by the former practice, but he's red-faced about the latter.) I have not been able to locate a single school desegregation order which Rehnquist has supported, and it is obvious that he believes it suffices for a state simply not to formally segregate schools; he would require no positive effort to overcome centuries of racist segregation. If Rehnquist's rule might involve the sharp curtailment of rights for minorities, however, it could involve the total loss of rights for aliens; he has consistently voted to allow states to deny them bodily mobility, medical and welfare benefits, employment and even basic education. As for criminal suspects, forget it: Rehnquist would throw away the key before *Miranda* is even read; indeed, the *Miranda* warning may be discarded early on as a hippie relic from the Earl Warren era, a kind of Constitutional hoola-hoop. Children of the 90's who watch old cop show re-runs will grow up wondering what the "right to remain silent" was all about.

If Rehnquist always regards kindly government discipline of the body, he also votes reliably for state control over ideas and beliefs, unless they are the beliefs of the Christian majority. He is a sure vote for state governments which push around protesters and tell dissenters to shut up, which is not surprising given

his shameful but still largely unknown role in organizing surveillance and harassment of the anti-war movement as assistant attorney general in Nixon's Justice Department. (For all of his sycophantic service to Nixon, however, the Watergate tapes caught Nixon calling poor Rehnquist "Renchburg" and placing him in the "group of clowns" at Justice. Nixon ended up appointing Rehnquist to the Court when his two first-choice nominees bit the dust in the Senate.) Rehnquist champions the idea that the First Amendment does *not* apply to the states since the first Amendment states only that "Congress shall make no laws" abridging the freedoms of speech, press and religion. Unlike most other Justices, Rehnquist rejects the standard view that the Fourteenth Amendment incorporates the states into the protection of the Bill of Rights. Most commentators have ignored this most extraordinary fact, but Rehnquist believes that states can censor newspapers, deny free speech, and establish their own religions. Accordingly, he has voted to allow schools to mandate a moment of silence and to advertise the Ten Commandments. Rehnquist's Constitution applies only to Congress; the states can pretty much do as they please.

It's a peculiar kind of federalism, but one Rehnquist has used to convince everyone that his conservatism is a principled one. And yet he only supports the states because they exercise repressive power over minorities; he is just as enthusiastic for the federal government when it's showing uppity citizens who's boss. He's notorious for his deference to the military, an attitude which easily trumps his deference to religion (at least non-Christian ones); last term, in *Goldman v. Weinberger* (1986), Rehnquist proudly handed down a decision allowing the armed forces to stop Orthodox Jews in the military from wearing Yarmulkes. (Don't you feel more secure now?)

Of course, sometimes Rehnquist is torn between his love for power and his respect for upstanding white citizens. In *Regan v. Taxation With Representation of Washington* (1983), Rehnquist had no problem writing a majority decision denying tax-exempt status to a group which he saw as not exclusively devoted to the "public interest" because it lobbied Congress. He wrote in that decision that "tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system." But in *Bob Jones University v. United States* (1983), a case handed down the same year, Rehnquist dissented from the majority's decision that racially discriminatory private schools should be denied tax exemptions because they violate public policy. In his dissent, Rehnquist said that it would not violate equal protection to grant tax-exempt status to racist schools if the governing statute was "facially neutral."

The general impulses which animate our new Supreme Court Chief are as simple as his desire to take advantage of his brother-in-law with multiple sclerosis (who is now suing Rehnquist for violation of fiduciary duty); but to get the full effect of Rehnquist's reactionary temper, rhetorical acrobatics, and graceless sarcasm, one must read his opinions. Rehnquist engages in numerous dishonest techniques of pursuing his views. He will blur, confuse, reduce, misrepresent, and ignore precedents which stand between him and his destination. When the facts are against him, he'll argue the law; when the law's against him, he'll argue the facts. Of course, none of these tricks are unique to Rehnquist, but there is one which seems to belong exclusively to the enterprising new Chief. When he sees the court moving against him on an issue dear to his heart, he will often join with the majority with which he actually disagrees so he can write the opinion and state it

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Students Pledge Never to Contribute to HLS

By Marla Becker

Amid the celebration of Harvard University's 350th anniversary, a new group has sprung up at the HLS. It is called "N.O.P.E.," to communicate the group's decision to contribute "Not One Penny, Ever," to HLS. According to one founder, Gene Garfield, 3L, N.O.P.E. is a "totally egalitarian movement" which was conceived last spring in the Back Bench Pub over multiple pitchers of beer. Garfield explained that "even when we were sober, it still made sense."

Michael Christian, 3L, another founder, added that the group grew from "informal meetings in the style

of spontaneous grass-roots uprising discussions."

The group's petition-drive to get students to sign a non-pledge "never to contribute money or property to Harvard Law School" was launched on Friday, September 19, in Harkness Commons. That day, Garfield collected more than 55 signatures. The group plans to collect signatures for the remainder of the year as long as people continue to sign the petition.

Garfield said that so far, the bulk of signatures have been collected from 3Ls. The petition is "completely non-binding; we're not in any position to enforce it," Garfield said, "but it expresses how we feel."

Another founding member, Brink Lindsey, 3L, added that "nobody is binding anyone never to contribute; there is no conspiratorial plot to bring Harvard to its knees." No reasons for withholding money are actually stated on the petition. Garfield explained that "if we state the reasons on the petition, then it may become too focused; some people may not want to sign because they don't have those particular reasons."

Students told Garfield that they were signing the petition for a variety of reasons: to protest the University's refusal to divest from its holdings in companies doing business in South Africa, because "we don't learn anything here," or because they were planning to contribute instead to their undergraduate institutions.

Several students have written their reasons for not contributing on the petition; others have agreed to sign the petition not to contribute until HLS remedies what they see as its problems. The group has set as its short term goal the collection of 100 signatures, according to Garfield, and hopes eventually to collect over 500 signatures.

Garfield said that he will then hand the petitions to HLS Dean James Vorenberg, and say "This is what you've done; this is how we feel about the administration." He admitted that he "doesn't anticipate much of a public response. If enough people sign, they might sit up and take notice; our aim is to hit them where it hurts, in the pocketbook."

Reasons for Joining N.O.P.E.

The founders of N.O.P.E. have varied reasons for wanting to start a group whose sole purpose is to encourage other HLS students to sign a petition pledging that they will not contribute to the law school after they have graduated. The most important reason for not contributing, Christian said, was that contributions perpetuate HLS' continued dominance of legal education in America.

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Aquino Describes Role of Nonviolent Activism

Continued from Page 1

funeral procession. Until then, nonviolence was the unpopular alternative. After that day of mourning, it was the face of the Philippine revolution."

Women in the Revolution

She went on to describe the actual use and tremendous power of nonviolent activism during the revolution. After her husband's funeral, the discontent in the Marcos government and the belief in nonviolent activism "grew by leaps and bounds." Demonstrations and protests swept the country — with women often at the forefront of events.

President Aquino also elaborated on the unique and vital role that women played in the revolution. "The women in the demonstrations reached across wide and human barriers to reunite the soldiers who kept sullen guard on what was happening."

Although former President Ferdinand Marcos' call for snap elections and continued violence and intimidation hindered the efforts of her supporters, Aquino said, "Marcos lacked the one thing he needed to keep power when confronted with the full force of nonviolence. He did not have the people."

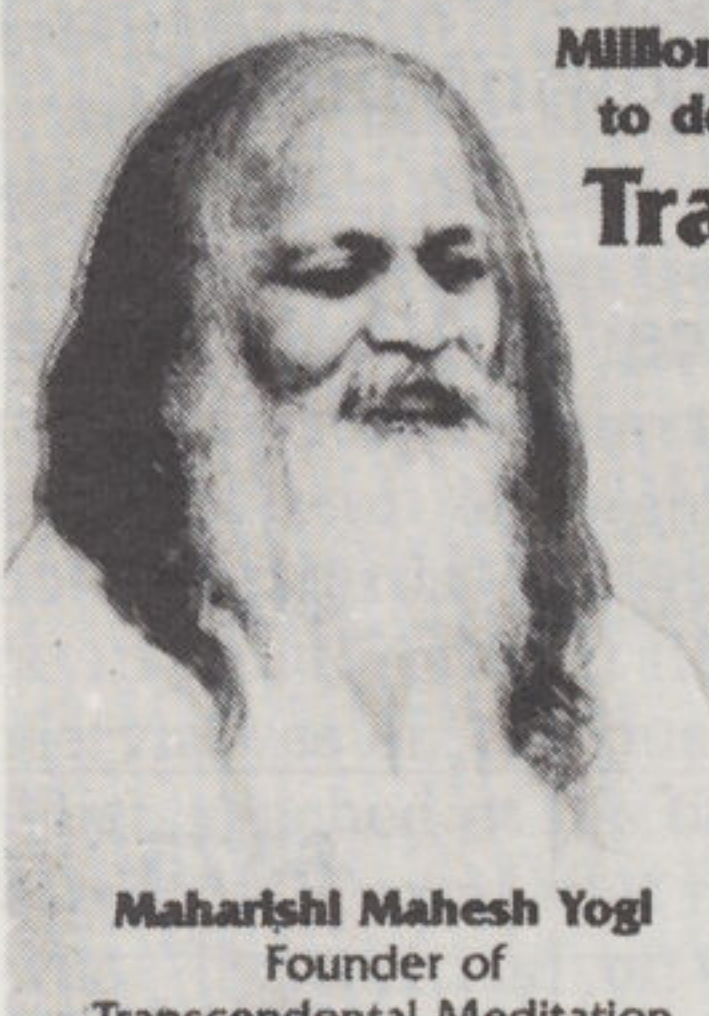
President Aquino used the phrase "people power" to describe the one thing she had that was more powerful than all of Marcos' guns and money. Throughout the campaign, the fraudulent election returns, and the tense four days prior to Marcos' departure, the movement could not have triumphed without people power, Aquino said. The popular movement was continuously drawing in former Marcos supporters, she explained, because of the very nature of nonviolent activism. She then went on to state the central character of her political philosophy: "When you touch the actual humanity of your opponent, you find the way to his basic decency. That is the central part of nonviolent political change."

Nowhere was this philosophy more evident than when Marcos election counters, disgusted by blatant fraud, deserted their jobs and sought sanctuary in a church. President Aquino recalled the event: "Nervously huddled together, they announced the fraud to assembled newsmen and election observers from around the world." This spelled the end for then-President Marcos, according to Aquino. Within days of this press conference he fled the Philippines aboard a U.S. Air Force jet. Through "nonviolent activism and great people power," the "miracle" of the Aquino presidency occurred.

Nonviolence Against Insurgency

The last part of Mrs. Aquino's twenty-five minute speech con-

cerned the future of nonviolent activism in Philippine politics. The main problem now confronting her philosophy is the steady presence of a sometimes violent Communist insurgency. Confronted with strong pressure from both Washington and the Philippine military to use force to combat this uprising, President Aquino stands firm in her commitment to the doctrine of nonviolent activism. She said that while some people might consider this an "amateur political strategy," it has nevertheless done incredible things in the Philippines, and she insists on exploring its potential to the utmost. "My support," she said, "is rooted in people power and in what made it. The nonviolent approach. It would be a foolish politician who jeopardized all that by reaching for a gun whenever he or she is challenged."



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Student Dissatisfaction Leads To N.O.P.E.'s Birth

Continued from Page 12

Christian hoped that the withholding of financial support would aid in stripping HLS of "its mystique, its grand reputation, and, as a result, its ability to draw what it thinks of as the best students." Christian explained that "by being so easily and clearly dominant, Harvard Law School is able to ignore the quality of education and experience here, without any fear of losing prestige in competition among law schools." Christian said

that he was "hoodwinked by the Harvard myth, and very disappointed with my experience here; I know fifty people who are grossly disappointed."

Garfield, who described himself as the "more pragmatic and political" member of the group, explained that the "core goal is not to change administrative policies. It is to unify students who are dissatisfied with the institution; it is a way to tell the administration that we're not happy, and because of that we're not going to give them any money."

Garfield's major reason for starting the group was his dissatisfaction about this year's tuition increase of almost eleven percent, following a substantial increase in tuition prices last year. Garfield became a founder of N.O.P.E. after receiving a response from Vorenberg to a letter he wrote protesting the tuition hike; Vorenberg replied that the tuition had been justified in a memo he originally circulated among students. Garfield said that he sees N.O.P.E. as the vehicle of expression for students who are affected by financial aid policies at the school, as well as the people who complain that "the Hemenway athletic facilities are pitiful; and *we* have to pay extra."

Miserable Expectations

Lindsey described his personal reasons for getting involved in N.O.P.E.: "For me, the thing that ticks me off most about this institution is that there is no striving to make the place feel like a community; [the administration] cuts everyone off from everyone else, doesn't make students feel good about this place; it doesn't make people feel good about being Harvardians."

Lindsey expounded by saying that "from the word go, the attitude has been an expectation on everyone's part that three years here is supposed to be miserable and alienating; and it's a self-fulfilling prophecy. I don't think that it has to be that way. It could have been an exciting three years." Lindsey hopes that N.O.P.E. can, "in a semi-serious way, give voice to the frustration of HLS students. . . . I picture the effectiveness of N.O.P.E. as being the ability to show the administration that the students are turned off; they're disgusted with the way the school operates. Hopefully, the administration will be stirred out of its complacency." Lindsey described the effort to mobilize the administration as a "swim upstream against the institutional tide."

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Student Attacks Rehnquist's Judicial Ideology

Continued from Page 11

in as narrow a fashion as possible, planting little time bombs which explode against reason later on. An extraordinary illustration of this duplicity came last term in *Meritor Savings Bank v. Vincent* (1986) when Rehnquist saw that the Court was going to hold that sexual harassment on the job includes not only explicit demands for sex but a generalized harassing atmosphere, characterized by come-ons, put-downs, leers, unwanted touching, and so forth. Reading the writing on the wall, Rehnquist got with history and saw to it that he was appointed to write the opinion, which he did. But he snuck into the holding two little caveats, the first saying that a woman's dress and behavior can be considered in the judgment of harassment and the second saying that the employer is not strictly liable for a harassing workplace. This first little trick violates all of the law built up around the prosecution of rape cases, and the second overturns all statutory and common law notions of employer liability. What he gave with one hand he took back with the other, and so he knocked the teeth out of the decision.

What effect will he have on the Court? A tremendous one. He will control all the perks and assign the writing of majority opinions whenever he is siding with it. He and ideological soulmate Antonin Scalia will be, with O'Connor, the youngest judges on the court, the most vital and the most active. The ruling troika of Rehnquist, Scalia, and O'Connor will preside over a federal court system packed with Reagan appointees; by 1990, half of all federal judges will have been picked by Reagan. If Brennan (80 years old), Marshall (77), Stevens (66), Blackmun (77), or Powell (78) leave office before Reagan does, and the President gets to appoint Bork or Posner or Meese or Manion or Schlaffly, the Court will almost certainly have an anti-choice, anti-affirmative action, conservative majority. If two of them go, the Su-

preme Court will have the political complexion of a Pinochet cabinet meeting. If three of them go, almost everything we ever believed about

Constitutional rights will be undone. And if four of them leave Washington before Reagan, God save America.

Editor Sparks Angry Responses

Continued from Page 5

liberals presume to question the tolerance of William Rehnquist when for decades Republicans, conservatives, and anti-communists have been censored, harassed, and banished from our 'liberal' colleges and universities by a bigoted left wing?"

Roberts also enclosed a copy of his guest column of June 16, 1986, "Intolerance on Our Campuses," in which he claimed that "[u]ntil recently, Republican clubs were banished from campuses controlled by left-wing inquisitors. Then, as now, the excesses were shamefully excused by pious officials of the Association of American Colleges . . . as might be expected, the American Civil Liberties Union, that well-known bureau of prejudice and double standards, refuses to intervene in behalf of civil liberties for conservatives on campus."

When reached at his home, Roberts told the *Record* that he thought it was "hypocritical of Granholm and Cohen to condemn William Rehnquist when you are left-wing students, you have condoned injustice for the past twenty years. . . . It's time to put a stop to this. The only

way to do it is to cut off student loans and grants until those colleges can guarantee First Amendment rights for conservatives will be restored." The author of the other letter urged Granholm to "push for what you believe in, and be conservative about it." He also enclosed a chapter of his book, *The Mystery of Life*, which he used "to accrue eminently inherited powers over a long period of time."

In response to the marriage proposal, Granholm said that she would have to decline, as she is already married.

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Residents, Grace Settle Water Contamination Suit

By David Snouffer

Twelve Woburn, Massachusetts families who had charged a subsidiary of W.R. Grace Co. with causing the leukemia that killed six of their relatives have settled their case against the company, lawyers for both sides announced Monday.

While the attorneys would not disclose terms of the settlement, *The Boston Globe* reported Tuesday that Grace agreed to pay the families \$8 million, and the plaintiffs in turn

agreed to drop their claims against Grace.

One of the plaintiffs' attorneys, HLS Professor Charles Nesson '63, a specialist in statistical proof, had enlisted the paid assistance of about 40 members of a first year criminal law class he taught last fall.

The families had charged Grace's Cryovac subsidiary and Beatrice Foods Corp. with negligently dumping chemicals that they said had polluted their drinking water and then caused five children and one adult to die of leukemia, a blood

disease.

Nesson's students performed a variety of research projects to bolster the plaintiffs' case, which went to trial in U.S. district court in February before Judge Walter Jay Skinner. A jury found in late July that Grace's Cryovac packaging plant had negligently dumped trichloroethylene, which later polluted well water used in parts of Woburn. Jurors absolved Beatrice of any liability in the case.

The jury had been slated to reconvene this fall and consider whether the chemicals had actually caused the victims' leukemia. Skinner was about to order a whole new trial, however, because jurors' answers to some of his certified questions had left their findings unclear, according to the *Globe*.

One of Nesson's students who helped coordinate the work of other student researchers, Sean Reilly, 2L, termed the settlement "unfortunate" because it provided no judgment to show that Grace caused the leukemia.

Letters (Continued)

Continued from Page 9

So why bother with the committee or student representation?

Another well-documented example of following next year's policies occurred last year when HLS attempted to require a co-signer for an HLS loan because of previous PLUS credit denial. Although (after extended debate) HLS deferred the requirement, I had been expected to accept the premature change. I would like to see the memos on these and other changes which the Financial Aid Office earnestly distributed and which I ignorantly failed to read.

The student budget (about which Johnson maintains she does not hear enough complaints) is not altered to reflect individual educational expenses. What comes out of

"personal" expenses (budgeted at \$1450) may be as much as \$700 for loan origination, guarantee and application fees.

The image of HLS as a self-perpetuating, monolithic conspiracy weighing on the backs of myth-charmed students is too abstract. The misrepresentations and attitudes evidenced to me by the Financial Aid Office, however, are pervasive. A proper, if not congenial, administrative relationship with students is a low priority for HLS. My only remaining, tangible way to protest that low ranking is to withhold contributions. I may someday contribute to a student effort at HLS. Absent a miracle this year, however, the alumni phone bank can cross me off its list now.

Nancy A. O'Neal, 3L

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