



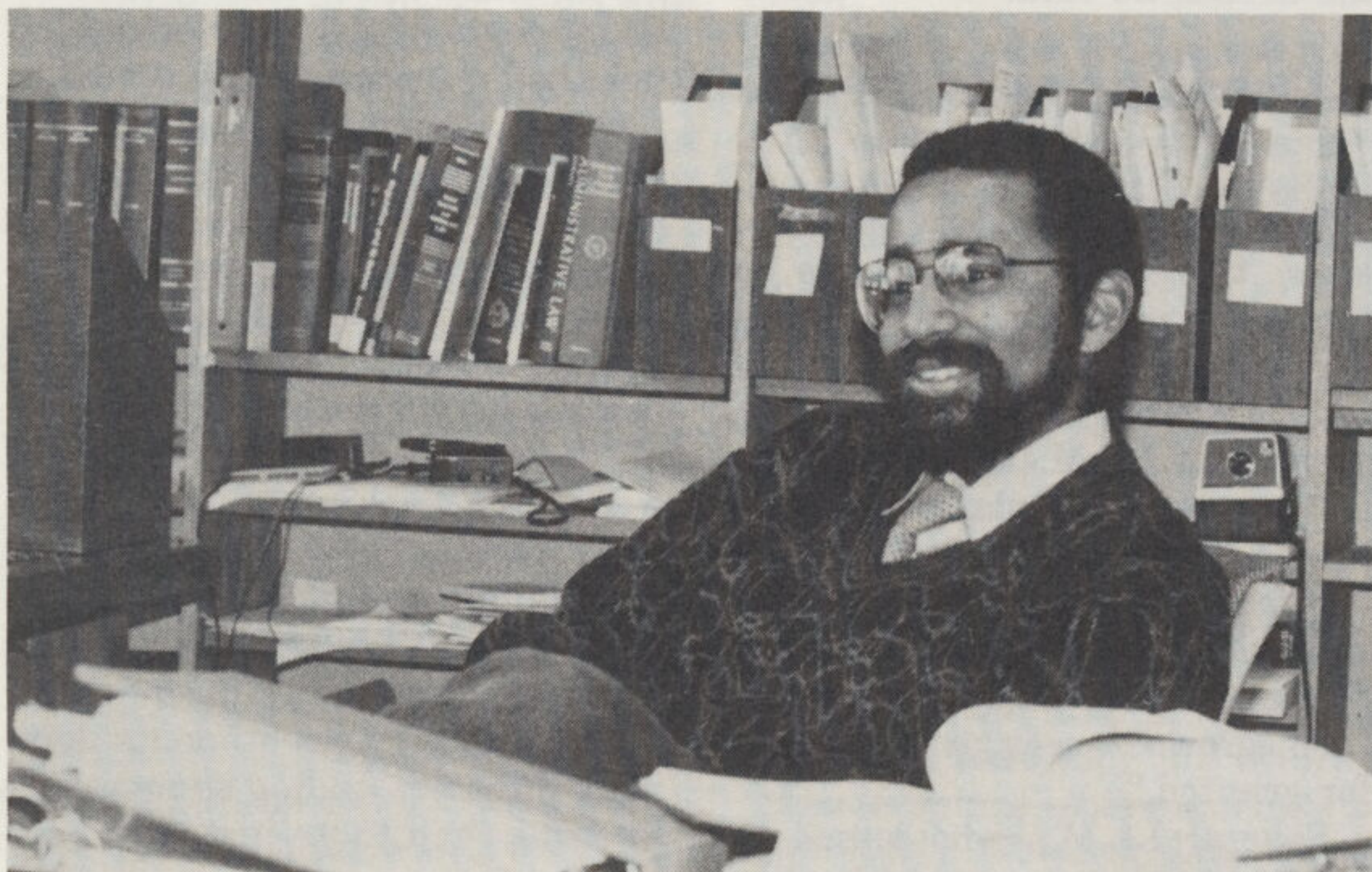
Harvard Law Record

America's Oldest Law School Newspaper

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DECEMBER 5, 1986

25 CENTS



Sal Casente

Assistant Professor Christopher Edley, Jr.

Edley, Meltzer Awarded Tenure

By Hillary Richard
and Risé Peters

Last week the Harvard faculty made two of its five scheduled outstanding tenure decisions for this academic year. Assistant Professor Christopher Edley, Jr. and Assistant Professor Daniel Meltzer were both granted tenure, and now wait for approval from the governing board. Clare Dalton, David Kennedy and Richard Fallon, Jr. are also due to have their future at HLS decided sometime during this academic year.

Edley, once approved by the board, will be the second tenured Black on the faculty. Professor Derek Bell is currently the only tenured Black out of approximately 60 senior faculty members.

Edley graduated from Swarthmore College in 1973 with a B.A. in mathematics, and went on to get a

joint degree from HLS and the Kennedy School, finishing in 1978. He spent the following three years in the Carter Administration, holding three successive positions.

From 1982 to 1984 Edley was a consultant to the *Washington Post*. He wrote pieces for the editorial and op-ed sections of that paper.

Edley's areas of expertise are public interest litigation, administrative law, and federal income taxation.

No Better Offers

Edley said he is very pleased to be offered the tenured appointment and has no better offers at this time. While he plans to go back to government work sometime in the not too distant future, Edley has no immediate plans for a leave of absence.

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19 Arrested In Fogg Protest

By Hillary Richard

Nineteen pro-divestment activists, students and Harvard alumni, were arrested by Cambridge police on Friday, Nov. 21, as they tried to blockade a dinner held by Harvard President Derek Bok at the Fogg Art Museum. It was apparently the first time that anti-apartheid protesters have been arrested at Harvard.

The decision to have the protesters arrested was made by Harvard Vice-President and General Counsel Daniel Steiner. The dinner was held as scheduled, with police escorting guests inside past the protesters.

Six protesters were arrested and charged with trespassing at about 6:30 p.m. They had been blocking one of the entrances to the Fogg Museum. The other 13 were arrested shortly thereafter on charges of disorderly conduct. This group had sat down on the sidewalk, linked arms and refused to move in an attempt to prevent alumni from entering the dinner.

The blockade was organized by the 350th Coalition for Divestment. The 350th Coalition was also responsible for the successful blockade of the Memorial Hall dinner during the celebration of the 350th anniversary of the College.

Although Steiner said that the University did not know in advance that there was a protest scheduled, the police were prepared for such an event. There were obvious signs of police preparation for a conflict,

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Law School Couples Sponsor 14th Craft Sale

By David Snouffer

A social group for law student couples expects that its annual holiday crafts fair will match the success the event has enjoyed in past years, organizers say.

More than 50 artisans from all over Massachusetts will offer fair-goers a selection of pottery, jewelry, stained glass, hand-painted clothing, original Christmas cards, holiday ornaments and toys, according to the event's chief organizer, Anna Szaz, a board member of the Law School Couples Association (LSAC). The fair will be held Saturday, Dec. 6, from 10 a.m. till 5 p.m., in Pound Hall's Ropes-Gray Room.

High Profit Expected

As many as 400 persons attend the annual crafts festival, said Bruce Hill, 2L, another board member, although turnout "depends on the weather." The group expects to raise over \$1,600 on the event, Szaz said.

Not only casual visitors, but "craft fair fanatics," as well, show up for the fair each year, Szaz said, and although the Christmas season is a competitive time to attract vendors, many return year after year because their sales are so high.

Club Provides Social Alternatives

The couples club allows married 1Ls to meet students outside their sections, Szaz said, but it can be even more helpful for spouses of law students who often come to Boston without many friends in the area.

Szaz, who lives with Chris Lynch, 2L, and teaches in an elementary school in Medford, said she didn't know anybody in the Boston area when she arrived last fall.

Other teachers at her school were very nice, she said, but all were some years older than Szaz. The couples group helped her make several friends who were also recent college graduates.

Besides, for people who are not law students, Szaz said, "the law is

very interesting, but sometimes you just want to talk to somebody else who's out working in the world."

"Social life at the law school tends to be a little dorm-oriented," Hill said. Since married students have to live off campus to be with their spouses, they can feel "a little more isolated" than students who live in the dorms, he said.

Club Reaching To Include LL.M.s

The couples group "just lets people know there are other people out there who are in the same situation as they are," he said.

As natives of other countries, spouses of LL.M. candidates may feel especially isolated in Cambridge, Hill said, "because they're not familiar with [U.S.] culture." But with a little help, he added, foreigners can enjoy things that "homegrown Americans would take for granted."

Several LL.M.s who joined the club for a recent canoe trip down the Concord River, for example, had

"never been in a canoe before," Hill said.

LSCA Success Encourages Others

Bruce Hartman, 3L, says he wants to emulate the thriving LSCA as he strives to revive the Roscoe Pound Society support organization for students who worked in another field before entering law school.

Older students face a "culture shock" when they return to school and suddenly find themselves "back in a classroom listening to a professor lecture," he said, after having worked full-time and in many cases being married with children.

"Trying to juggle the family life with law school is a problem in itself," Hartman added. And students with families often have less flexibility than others about where they can accept summer jobs, he said.

Older first year students have more difficulty finding summer jobs in firms than those just out of col-

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TV Chronicles Jamaica Plain

By Colleen McNenny

The Boston television news show *Chronicle* on October 28 reported on community developments in Jamaica Plain and Roxbury that have involved HLS students working at the Legal Services Center. *Chronicle's* story concerned the City of Boston's project to extend the Orange Line of the subway farther into those areas while rebuilding underground the part of the line that now runs above ground.

Land values have already risen in Jamaica Plain and Roxbury in anticipation of the 1987 completion of the project, and developers have become interested in these areas.

Chronicle looked at what effect the Orange Line project will have on the neighborhoods of Jamaica Plain and Roxbury, now home for many of Boston's poor blacks, whites, and Hispanics. HLS stu-

dents in the House Workgroup, at the Legal Services Center in Jamaica Plain, represent many of these residents who are fighting increased rents and threatened eviction.

Chronicle interviewed city officials, including Mayor Raymond Flynn, who said the Orange Line project will have only positive effects on the area, and that residents will not be displaced.

Also interviewed was Paula Pope, a paralegal in the Housing Workgroup at the Legal Services Center, who holds a different view. Pope says that people have already been displaced as a result of the Orange Line project, and that the problem will get worse. She asserts that the resulting increases in land values will be to price low-income residents out of their neighborhoods. These

(Continued on Page 3)

Administrative Board Issues Statement

By Tegan M. Flynn

The HLS Administrative Board commented Nov. 20 on two recent disciplinary actions. Its statement was published in the *HLS Adviser*.

The first incident, originally noted in the September 5 *Adviser*, involved a student who misrepresented himself to two law firms with whom he had received summer associate positions through the use of the Placement Office. Each firm had a policy against splitting the summer. Frank Sander, chairman of the Administrative Board and Bussey Professor of Law, said the student had "strong links abroad" and told each firm that the portion of the summer he would not spend with it would be spent abroad.

The same student, whom Sander would not identify, was also reprimanded for submitting a memorandum to one of the law firms, portions of which were substantially copied without citation to a law review article from which they were taken.

The incident was originally reported in the fall, Sander said, because the student had decided to withdraw from HLS. He said the notice was printed "to advise the student body of the kinds of things

the Board has under consideration." The student, abroad last year, had answered the charges by saying that if he had fully explained the situation to the firms he thought they would have accepted his decision. With regard to the plagiarism charge, the student said he had meant to cite the article, Sander noted.

Sometime after the original notice was printed, the student contacted HLS and requested permission to finish his legal education. While the Ad Board voted to allow the student to complete his third year at HLS, it also issued a reprimand and voted to deny him the use of the Placement Office. The entire matter will become a part of his permanent record.

Students Aware of Abuses

Sander noted that "students have said to us that they are aware of other occasions where students act improperly toward law firms." Sander gave as an example, students withdrawing from positions at law firms without giving the firms the honest reason. Sander said that this situation, if true, is "disturbing." According to Sander, the Ad Board had a case "some years ago" where

a student had misrepresented grades to an employer.

Sander said that "I think things like this in the placement process are unfortunately not unique."

June Thompson, director of the Placement Office, said that the Placement Committee plans to discuss the problem. Thompson said that she was "not terribly concerned" about HLS students "inflating their accomplishments." She said she has had very few complaints from firms. Thompson said she believes that the problem of resume inflation is more prevalent among young associates moving between firms. She noted that most complaints she has had have been about activities in which students claimed to participate.

Thompson said that these have been misunderstandings — where the student thought he or she was a member or was involved by simply signing-up at the beginning of the semester.

Thompson said that the Placement Committee plans to formulate a policy which would specify Ad Board and Placement Committee positions on various situations. She said the Administrative Board has advised the Placement Committee to distribute information in the placement materials specifically addressing student candor when dealing with law firms.

Eviction-Free Zone Proposed

(Continued from Page 2)

displaced people, she says, have nowhere to go.

Pope also discussed the efforts of the LSC to instruct residents on what their legal rights are and to increase residents' awareness in the development of their community.

The Housing Workgroup at the LSC has targeted an "eviction-free" zone that included Dudley Street and Dudley Square and borders on the South End and Roxbury. According to Pope, black people who have lived here for years are being displaced by the city, and are not being adequately compensated.

Besides representing residents in Housing Court, the LSC works on

providing community legal education. The Housing Workgroup tries to ensure not only that residents are protected, but also that they have input into how their neighborhood is developed.

Pope said he believes the Orange Line Project will benefit the community by providing increased transportation to Jamaica Plain and Roxbury. At the same time the project will hurt residents who can no longer afford to live there. Pope would rather see the city work together with the residents on the improvement of the community, so that projects like the Orange Line would be beneficial to all.

Quincy Street Revisited

The second situation addressed in the *Adviser* was the vote by the Board in May 1985 to issue a warning to the ten students involved in a divestment sit-in at 17 Quincy Street, the headquarters of the Harvard Corporation. The Administrative Board noted "that such conduct, however well-intentioned, is an unacceptable form of protest and a clear violation of the University's Resolution on Rights and Responsibilities."

The University's resolution on Rights and Responsibilities states, in part:

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Ramirez Speaks On U.S. And World Court

By John Capin

Calling on the Harvard community to pressure the U.S. government to respect international law and abide by the World Court decision in *Nicaragua v. United States*, Nicaraguan Vice President Sergio Ramirez spoke in Ames Courtroom last week. "If the United States really wants a law-abiding and democratic society in Nicaragua," Ramirez said, "let it demonstrate its commitment to the rule of law and stop this illegal war against our people."

Ramirez's visit to the U.S. is the culmination of a six-year effort to obtain an entry visa which the government has until now denied. The lecture focused on last summer's World Court decision in a case involving U.S. policy toward Nicaragua.

International law, Ramirez said, guarantees each state the right to self-determination and territorial integrity as well as the right to choose its own economic, political and social systems without the interference or intervention of any other state. To violate these guarantees, Ramirez argued, is to encourage disrespect for international law.

The World Court decision was handed down on June 27, 1986, following a twenty-six month trial. With the U.S. judge as sole dissenter on several of the principal findings, the court held, among other things, that the U.S. violated international law by:

- 1) training, arming, equipping, financing and supplying the Contra forces or otherwise supporting military and paramilitary activities in and against Nicaragua;
- 2) carrying out air and naval attacks against Nicaraguan territory by means of U.S. armed forces and intelligence personnel;
- 3) laying mines in Nicaraguan territorial waters;
- 4) preparing and disseminating to the Contras a field manual entitled "Psychological Operations in Guerilla Warfare," thus actively encouraging acts of terrorism. (The

U.S. representative on the Court concurred in this finding.)

The Court held that there was no lawful justification for any of these activities. In doing so it rejected the U.S. argument that actions against Nicaragua constitute collective self-defense because, the U.S. alleged, Nicaragua sends arms to rebels in El Salvador and is thus engaged in an armed attack against El Salvador. The Court found that the U.S. failed to offer sufficient proof that the Nicaraguan government was responsible for any flow of arms to Salvadoran rebels.

The Court also rejected the U.S. assertion that Nicaragua's military build-up justifies U.S. activities in Central America. The decision points out that at the time the U.S. raised this argument, the U.S. was carrying out armed attacks against vital Nicaraguan economic installations and was mining Nicaraguan harbors.

No Right To Intervene

The World Court's decision states that U.S. dissatisfaction with Nicaragua's political, social and economic system can never give rise to a right to intervene in Nicaragua's internal affairs. To hold otherwise, the Court stated, would make nonsense of the fundamental principle of state sovereignty upon which the whole of international law rests.

The Court ordered the U.S. to cease and desist all illegal activities, and pay reparations to Nicaragua for losses incurred. According to Ramirez the war has cost Nicaragua 35,000 lives and more than \$2 billion in damage to the economy.

Anticipating questions about the current state of emergency in Nicaragua, Ramirez claimed that the restrictions on civil liberties imposed by his government are mild compared with measures "employed by Abraham Lincoln when faced by an insurgency that was not directed by a foreign power." He went on to describe the recently approved Nicaraguan constitution which, according to Ramirez, guarantees

freedom of speech, religion and assembly; freedom of the press; due process; political pluralism; the right to private property; and basic social and economic rights, i.e. housing, health care, employment and education. Ramirez asserted that restrictions on these rights are temporary and will be lifted when the war ends. The constitution also calls for the separation of powers and military non-alignment, Ramirez said.

The question-and-answer period was dominated by a number of pointed questions addressing allegations of human rights abuses and the suspension of civil liberties in Nicaragua. Ramirez defended his country's human rights record by claiming that no report by an independent, international organization has found in Nicaragua "systematic violation of human rights on the scale of abuses by other countries in Central America." He called one organization, cited by a questioner, "a group financed by right wing North American organizations."

Referring to recent revelations about possible violations of U.S. law by government officials in pursuit of foreign policy objectives, Ramirez said that "[w]hen a government disrespects international law, it is a short step to disrespect for all law, including its own domestic law." He went on to say that, in pursuit of a policy aimed at overthrowing the Nicaraguan government, the U.S. has violated its own as well as international law. "If the United States, the most powerful nation on earth, rejects the rule of law," Ramirez asked, "why expect anyone else to behave better?"

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Edley Finds Harvard Nicer

(Continued from Page 1)

Asked about his reaction to the decision made last spring to deny tenure to Daniel Tarullo, Edley said, "I was very sad and angry, very sad, and I continue to be, both personally — because Dan is a friend — and because I think it reflected very badly on this institution."

Amazing Summer?

Commenting on Professor Derrick Bell's statement to the *Harvard Crimson* that he is optimistic about the prospects of this year's candidates because "the faculty is a little wiser, and a little more humble about what it is we are doing."

Edley said that "it would be nice if it were true, but if it's true, it must have been an awfully amazing summer, since most of the same folks were here last year."

Edley also stated that it would be overly optimistic to assume that this string of tenure approvals indicates that the divisions in the faculty have healed, adding that "it is just as likely that this is the calm before the storm. The faculty tends to get uglier in the spring, over the last several years . . . not necessarily just in faculty appointments matters, but in general tempers get worn thin in the spring."

No Changes Planned

Asked whether he thought the tenure offer would lead him to blossom into more radical politics, Edley stated "I don't know. I do feel much taller, so anything could happen," He added, however, that he hadn't had the sense of "trimming his sails" very much in the last few years, and doesn't plan to make any big change in how he spends his time.

Yard No longer Dump

Pointing out that a tenure offer can make Harvard seem a much nicer place, Edley said "It's amazing. I used to think Harvard Yard was an ugly looking dump. It looks substantially more attractive now."

Edley currently plans to take research leave next fall and to teach both a basic tax course and a course in legislation, lobbying and advocacy next spring.

Meltzer on Tenure: "No Comment"

Meltzer has been teaching at HLS since 1982, having graduated from Harvard College and then HLS in 1975. Immediately after graduation he clerked on the D.C. Circuit for Judge Carl McGowan, and then in

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DAUNA WILLIAMS

Smoking On HLS Campus Addressed

By Michael Reilly

In a November 24 memorandum addressed to the entire law school community, several members of the administration and faculty announced the creation of a committee which will evaluate the smoking policy at HLS. The first step — soliciting opinions from faculty, staff, and students — could be the prelude to more radical measures, such as banning smoking in all HLS buildings.

Citing increasing evidence of disease from "passive" smoking, allergic reactions in some individuals, and the general unpleasantness experienced by many, Administrative Dean Simone Reagor, one of the authors of the memorandum, said that the law school "ought to at least consider the matter." An ex-smoker, Reagor said that plenty of options were open, and that the committee would be allowed to investigate the various possibilities and then report back to Dean Vorenberg.

HLS would not be the first school at Harvard to consider anti-smoking measures. Reagor said that the Kennedy School already bans all smoking in its facilities, and that the School of Public Health has invoked similar measures. While the University has a general policy against smoking, a Kennedy School study persuaded university officials to permit each branch to determine its own substantive guidelines.

Reagor's initiative coincided with Associate Dean Andrew Kaufman's drive to re-open the smoking issue, which had been considered and tabled before. They enlisted the aid of Dr. Preston Munter, director of HLS Health Services, in writing the widely-distributed memorandum. The anti-smoking trio said that they "are interested in receiving comments on other specific problems [related to smoking] as well as views as to what the school's policy should be."

So far, only one response has been solicited. Reagor said that he hopes that more responses will come in

before the December 10 deadline.

Due to anticipated student apathy in responding to the memorandum, Reagor has charged Dean Mary Upton with initiating contact with student groups such as DSAC and the Law School Council. Reagor and Kaufman will recommend that Vorenberg appoint a "broadly representative advisory group" to consider the problem.

Of all groups at HLS, Reagor stressed that the staff and its concerns must be addressed by the committee. As most secretaries

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Fogg Arrests

(Continued from Page 1)

including such fortification as extra police and a Cambridge SWAT team.

Although Steiner has stated that Harvard will not drop the charges against the arrested students and alumni, he has not yet commented on whether Harvard would also pursue internal disciplinary proceedings.

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Pound Society Tries To Help Older Students

(Continued from Page 2)

lege, Hartman said, apparently because law firms believe younger students advertise the firms where they have worked more effectively among the predominately young student body.

"They want to hire people who they think are a part of the crowd and who are going to go back and talk up their firms," he suggested.

Older second year students, by contrast, he said, apparently have no more trouble finding jobs than their classmates, and often find their prior work experience "may be an advantage" in landing job offers.

About 75 students, ranging in age from 30 to over 50, attended the organization's opening reception of the year last month, said Hartman,

who estimated that 30 to 40 members of each class are over 30. Students at HLS have had varied careers as scientists, college professors and police officers, he added.

The group hopes to elect a governing board this month to plan activities for the spring. Hartman said he wants the group to hold social functions and to "do something to contribute to the Law School community."

Older students successfully lobbied administrators two years ago to change a financial aid policy that had denied assistance to students whose parents could afford to pay their way, no matter how long the students had lived independently. Students who have supported themselves for seven years now no longer have to include their parents' assets and income in the resources they report when they apply for aid.

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Koby Antupit

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Ad Board Uber Alles

Lest we forget the presence on campus of a particularly annoying festering boil, HLS's very own star chamber recently belched signs of life. It was hard to miss; its evil dross covered almost the entire front page of the November 29 *Adviser*. Apparently lacking fodder for a new attack on basic decency, the Administrative Board nevertheless felt compelled to remind us of the untethered discretion it possesses to crush any expression of feeling or belief that somehow does not fit its notions of "acceptable forms of protest."

According to the Board, it was writing in response to some questions raised by students concerning "*permissible limits of protest activities at Harvard University*" (a sentence which itself becomes more frightening with each rereading). Yet instead of listing whatever types of speech and expression it felt inclined to suppress that day, the Ad Board answered these "student questions" in a manner clearly intended to chill any kind of protest on campus. The Board gave a one-sided synopsis of the Quincy Street sit-in of last year, and then, in excruciating detail, gloried in the punishment it doled out in May of 1985. It then ended this flexing of its muscles with a blatant threat: any student failing to express his or her views through party channels "may face serious disciplinary sanctions rather than [warnings]." You vill obey, or you vill be shot.

Insulting as it is to be treated like children by an entity hopelessly lacking the spark and drive that causes one to cry out and take action when confronted by injustice, the Ad Board's little question and answer session may well prove beneficial. The query posed by the phantom students was: How may we protest? The answer consisted of what is not allowed: ten students gaining entry to a building and remaining in it for eight hours, disrupting the normal functioning of the University. All else, apparently, is within "permissible limits of protest activities."

So the next time a group wishes to protest Harvard's morally bankrupt policy on South Africa, the group should let the Ad Board's answer guide it actions. Make sure the protesting group consists of nine or eleven students, never ten, remain in the occupied building for more or less than eight hours, and disrupt the *abnormal* functioning of the University. The opportunities for creativity are endless. Let us, for once, take the Ad Board *at its word*.

— GMB
— RJP

HARVARD LAW RECORD

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Fenno

Fenno had been proud of himself. Instead of waiting for the last minute to make his Thanksgiving travel reservations, he had called the helpful folks at Crimson Travel a whole week beforehand.

The receptionist put him on hold. A voice cooed in his ear: "Because of the unique, money saving service we offer our customers, all our agents are busy. . . ." Fenno stayed on the line, and eventually a live person picked up the phone.

"I'm sorry for the delay. Would you like to leave your phone number? I'll have an agent call you back as soon as one is free."

It was an empty promise. Fifteen hours and four sixpacks later, Fenno's phone was still silent. He called Crimson again and found himself back on eterna-hold.

It was as he had always suspected. Making reservations was for wimps who had all day to sit beside the phone, forgoing exciting campus events such as "Thriller Nite with Mary" at the Pub. Real men flew standby.

On Wednesday night Fenno presented himself at the Peoples Distress ticket counter. The man behind the counter sold him a ticket to Detroit, where his family was gathering for the holiday, via the airline's hub in Newark. By 7 P.M. he was happily ensconced in a plane on the runway, drinking bourbon and Cokes at \$2.50 each and congratulating himself on having a window seat. At 9 A.M. he had depleted the airline's supply of Old Factory Whistle bourbon and was still on the runway, looking out at the line of People Distress planes in front of his . . . the 7:30, 8:00, 8:30, and then 9:00 A.M. flight to Newark.

By the time Fenno got to Newark the morning flight to Detroit was long gone. An angry mob surrounded the check-in counter, yelling obscenities and throwing wadded up indestructible metallic wrappers from fifty cent bags of People Distress peanuts.

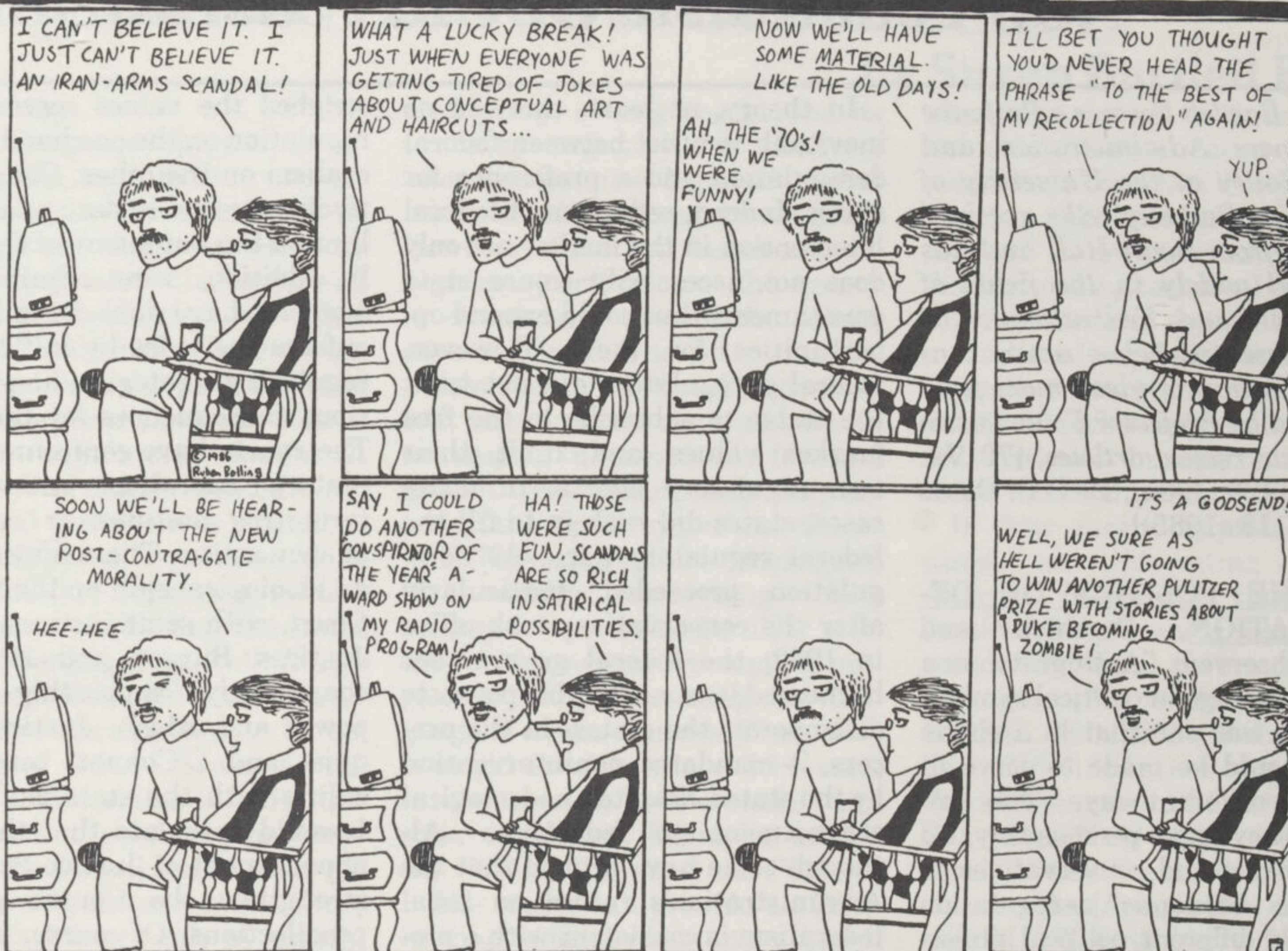
Incited, the mob swept forward, swarming over the check-in desk, toppling the still-smiling clerk from his seat. He hit the floor with a horrible shattering sound. Circuitry and wiring went everywhere. The crowd drew back in horror. On the floor, the lips of the clerk-thing were mouthing "I'm afraid we've overbooked this flight . . . overbooked this flight . . . overbooked this . . ."

The tumult subsided. The gate area become deserted. Looking at his Mickey Mouse calendar watch, Fenno realized with dismay that it was 2 P.M. Thursday. In Detroit, the Thanksgiving meal had passed, and Fenno's share had been given to his sister, the scraps thrown to her pirhanas.

Fenno staggered to the terminal, where he grabbed a beer and a stale doughnut before catching the bus back to Cambridge. This Thanksgiving, Fenno was glad just to be alive. He wasn't about to endanger that by trying to use the other half of his round trip ticket.

TOM THE DANCING BUG

BY
RUBEN BOLLING



Letters to the Editor of the Record

Love It Or Leave It

To the Editors:

The more I read your publication the more I am dismayed by the apparent unhappiness of so many people at the Law School.

As a graduate in 1949 and having come from the war to the Law School, I assume that my contemporaries were too busy wanting to get out into the world and get started to have the same disillusionment and apparent hatred for the Law School.

Lord knows we did not love the Law School, but that is probably to the credit of the school. Love was not the motive for our going to the Law School, nor was it the motive of the Law School in treating us. We were there to become lawyers and by in large the Law School did a fairly good job at that. We were taught that we were in a competitive world and it was up to us to compete and that those who did not wish to compete should leave or would fall by the wayside. I have found this to be true in my life. Perhaps it will not be true in yours.

The reason I am writing this letter, is that if there are so many people who are so unhappy with the Law School, why don't they leave. There are many other law schools in the country and I am sure that they can find a law school whose attitudes and teaching will reflect their own. I cannot imagine

why so many of these people who apparently suffer so much at the Law School continue to stay there. In life we have many choices and it would seem to me, this is one time where if you are dissatisfied with your situation, you can exercise your right of choice and leave. Certainly reasonable advocacy of any change is to be encouraged, but such hatred as appears in your publication seems to me to go beyond any rational criticism to something which is ugly and which I cannot understand. I probably should conclude in saying that there are very few, probably of the Law School Alumni who love the school. I believe there are a great majority of the Law School Alumni who respect it. Which is the desirable attitude, I do not know. That must of course be an individual judgment. For those who do not respect it, and continue at the Law School, I must admit some contempt. A rational attempt to change it seems justified. An irrational attitude towards everything about the Law School seems to me to be tragic.

Sherman R. Slavin, '49
Watertown, Connecticut

Let Students Make Decisions

To the Editors:

The efforts of student leaders to change the student organization funding process are

long-overdue and badly-needed.

I am sure that Dean Upton does her best to distribute funds equitably. But that is beside the point. The problem is the *potential* for abuse. The Dean of Students has some control over which events are held when and where, on what terms, with how much security, and under the leadership of which

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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.

New Federalism Or Old Federalization:

Susan Bartlett Foote is a Professor of Business Administration and Public Policy at the University of California, Berkeley. She received her J.D. from Boalt Hall and has published widely in the fields of Regulation and Federalism. The views presented below are a condensed version of ideas more fully developed by Professor Foote in two recent law review articles, [70 Va. L. Rev. 1429 (1984), 19 U.C. Davis L. Rev. 113 (1985)]

In THE POLITICS OF DEREGULATION, Derthick and Quirk observed: "Ambiguity is a great advantage in political symbols and here was one that in a single phrase could be made to serve in two quite different ways." This ambiguity, they argue persuasively, led both liberals and conservatives to integrate economic deregulation into their different political philosophies. Conservatives, they believe, were attracted to the idea because it affirmed the traditional values of competition, free enterprise and limited government. On the other side, liberals saw economic deregulation as part of their pro-consumer philosophy because deregulation of rates and fares arguably would lower consumer prices and end federal protection for powerful "special interests" like airlines and railroads.

There is another ambiguity surrounding deregulation that has been relatively unexplored. In addition to the strongly held belief in free markets that deregulation fostered, conservatives also expressed a powerful preference for states over the federal government. As later articulated, Reagan's "new federalism" included the principle that "in establishing or revising regulatory programs, the Administration emphasizes the return of regulatory authority to the states and localities." In other words, limits on federal government were necessary and, if any government intervened, the preference was for state and local control.

In theory, at least, there is no inevitable conflict between federal deregulation and a preference for states. Indeed, reduction of federal intervention in the market not only does not necessarily injure state governments, but could expand opportunities for them. However, federal deregulators did not trust the states to subscribe to the free market values and limit their own regulatory efforts. In many cases, states did rush in to fill the federal regulatory gaps. As deregulation proceeded, particularly after the conservatives took office in 1980, the federal government harnessed its considerable power to disempower the states. In the process, it mandated nonintervention by the states, despite an ideological commitment to federalism. Although some have argued that the Administration's record on fiscal federalism is consistent with a pro-state philosophy, in the realm of deregulation, the new federalism looks much like the old federalization.

Liberals were not caught in this ideological bind. They were far more pragmatic with regard to federal/state relations and exhibited no ideological preference either for the free market or for state government. Because their common theme was consumerism, they supported both economic deregulation in some cases and increased health and safety regulation in others. They believed that the marketplace and the states had both failed to protect consumer interests in health and safety. Liberals devised creative ways to use the states to accomplish their goals, sometimes centralizing power by reducing states to mere enforcers of federal policy, sometimes encouraging state intervention through forms of dual regulation in the consumer interest.

This discussion unmasks some of the intergovernmental implications of deregulation, which I have chosen to call deregulatory federalism. It will explore how the three branches of the federal government have

weighed the values served by deregulation on the one hand and federalism on the other. Congress actively engaged in deregulation and limited the autonomy of the states. In addition, some administrative agencies have done far more than enforce the rules by initiating deregulatory strategies, also with serious consequences for the states. The courts have confronted deregulatory federalism issues in interpreting statutes or reviewing agency action. There appears to be an ideological split on the Supreme Court, with some justices, notably Justices Burger and Blackmun, consistently supporting federal power and others, Justices Rehnquist and O'Connor, consistently siding with the state challengers. I would speculate that the recent appointment of Justice Scalia will strengthen the Court's pro-state predilections. Of course, a note of caution is necessary. As anyone familiar with federalism scholarship might guess, the forecast for the future of deregulatory federalism is itself ambiguous, but perhaps some new light can be shed on the issue.

Congress, of course, played a major role in the progress of deregulation. The bi-partisan support for economic deregulation in the late 1970's and early 1980's led to deregulation of transportation such as air, rails, and trucks as well as natural gas. The manner in which Congress acted is predictable, although the federalism implications of congressional action have been generally overlooked.

Congress is the primary arbiter of federal-state relations through the Supremacy clause. If Congress acts pursuant to its enumerated powers, its legislation can preempt state laws. Congress was granted the constitutional authority to preempt, because it alone of the three branches of the federal government represents the states as states. The other branches have few formal or informal mechanisms to protect state interests in federal

Deregulation And Power Of The States

by Susan Bartlett Foote

policymaking.

When Congress began to deregulate in the late 1970's, express preemption provisions had become commonplace. Congress used its preemptive power to insure that a free market would exist when it left a field. The ultimate form of deregulation, from the perspective of the states at least, is what I have called the regulatory vacuum. A regulatory vacuum is created when the federal government abandons an area of federal regulation, such as rate and fare regulation for airlines, and mandates that the states remain disengaged as well. States cannot regulate and the federal government chooses not to do so. This use of federal power at the expense of the states is quite different from the *status quo ante* when, if the federal government did not intervene, states remained free to regulate, limited only by judicial protection of the free flow of interstate commerce. Given judicial deference to the historic police power of the states, subnational governments had considerably more clout than they do under these forms of deregulation. Examples include the Airline Deregulation Act of 1978, the Staggers Rail Act (1980), and the Natural Gas Policy Act (1978).

As a matter of national policy, one can decry this use of federal power, but it is clear that Congress has the constitutional authority to do so. Whatever the political motive, it is also obvious that the states lost power in the wake of deregulation.

Congress was not the only branch of government to encourage deregulation. Congress has the authority to delegate power to the executive branch of government and the courts have generally upheld very broad delegations. Using their discretion, some executive branch agencies have played a significant role in the initiation as well as the progress of deregulation. In the case of airline deregulation, for example, the Civil Aeronautics Board initi-

ated policy, even going beyond its statutory authority, but Congress later passed new legislation that institutionalized deregulatory goals. However, in other instances, deregulatory activities at the agency level persisted despite the reluctance of Congress to act.

Some agencies, like Congress itself, assumed that the states would not respect the merits of a free and competitive marketplace. They asserted their preemptive muscles as well. They accomplished their goals by broadly construing their preemptive power under older statutes with unclear preemption provisions or by stretching the language of newer statutes. Thus, they engaged in efforts to reduce state involvement in both economic and social regulation. Examples include the FCC, OSHA, and the FDA.

The courts can provide an institutional safeguard against abuse of the federal system, particularly when federalism balancing is performed by nonrepresentative federal agencies. Courts are not representative of state interests. However, neither are they directly tied to the political pressures of the legislative and executive branches. When the nonrepresentative administrative agencies promote the politics of deregulation, for example, the courts, with greater concern for protection of the fundamental constitutional structure of government, should protect the interests of federalism.

One important question is how deferential should the courts be to agency interpretations of their preemption power. It is clear that when federalism issues are decided by an agency, the traditional theories of deference to agency decisionmaking must be understood in that light. It is true that the Supreme Court has held that deference is not a "device that emasculates the significance of judicial review." Deference analysis is appropriate when the agency is exercising its technical expertise. Additionally, some deference may be appropriate

when an agency is interpreting terms in its own statute. Indeed, courts have been less likely to defer when an agency is interpreting the scope of its own authority rather than exercising technical expertise. However, federal agencies have no institutional expertise in balancing federal and state interests, and no structural stake in federalism. They are national bureaucracies that make national policy.

In four recent Supreme Court cases, an interesting pattern emerges. In three of those cases, Justices Burger and Blackmun favored the federal government's arguments. [*Transcontinental Gas*, 106 S.Ct. 709 (1986); *Silkwood*, 104 S.Ct. 615 (1984); *Louisiana Public Service Comm'n v FCC*, 54 LW 4505 (May 27, 1986)] In the fourth, the opinion was unanimous on the state's side. [*Pacific Gas and Electric*, 51 LW 4449 (April 20, 1983)] Moreover, Justice Rehnquist favored the pro-state arguments in all four cases. Justice O'Connor did the same in the three cases in which she participated. The views of the other justices did not appear to turn in federalism issues. It's ironic that justices appointed for their conservative philosophy appear to diverge from conservatives in the political branch when federalism clashes with free market values.

Deregulatory federalism raises critically important issues for law and politics. In pursuit of free market values, both Congress and some administrative agencies avidly engaged in the politics of deregulation. Preemption was a powerful tool. Congress is a national institution that is both representative of the states and accountable to them. Administrative agencies receive their power from Congress and are staffed by political appointees. They are politically motivated but not directly politically accountable. Preemption in the hands of nonrepresentative agencies is fraught with danger for the states. The restraints inherent

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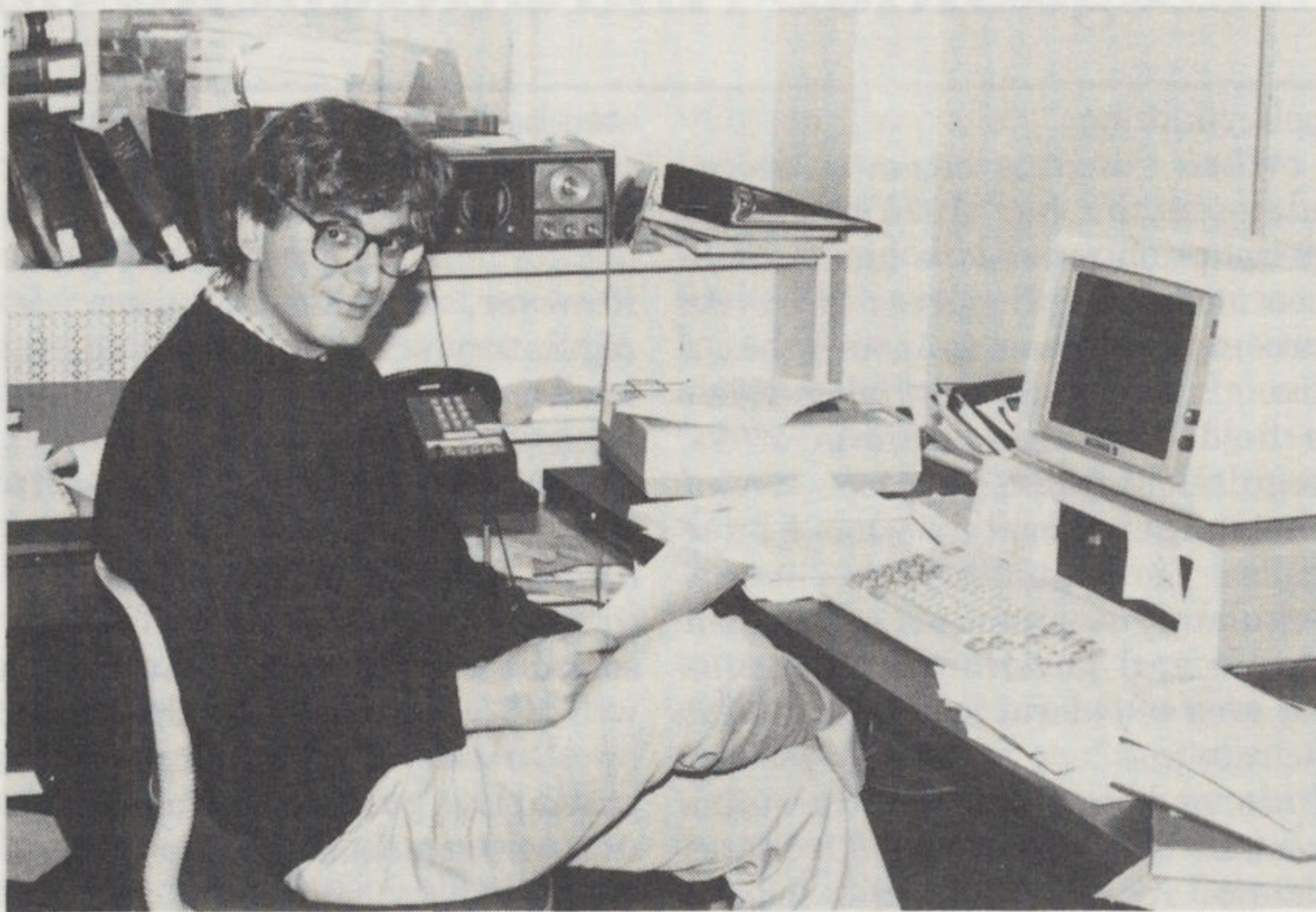
Tenure: Are The Battle Lines Drawn?

(Continued from Page 5)

the Supreme Court for Justice Stewart. Meltzer's specialty is the areas of Criminal Law and Criminal Process.

When asked about his response to the tenure decision, Meltzer stated that as the matter is confidential until the vote of the board, he had no comment to make.

Of the three tenure decisions still forthcoming, it is speculated that the easiest decisions have been made, and the battlelines will be drawn with the Dalton and Kennedy decisions. Both have ties to the Critical Legal Studies movement. Nobody contacted would speak about the upcoming tenure decisions, including Dean Vorenberg, who said he was bound to silence until the decisions were approved by the governing board.



Sal Casente

Assistant Professor Daniel Meltzer

Off the Record continued

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in congressional structure are severely weakened, if not severed, upon delegation to administrative agencies, particularly independent ones. Periodic oversight by Congress is a brittle bough on which to hang the integrity of the states. The judiciary is the least political of the branches of government and, by its nature, is concerned directly with the values of federalism and the structures that ensure its survival. Courts can, and should, provide a brake on the political impulses of the other branches when those impulses threaten the constitutional structure.

What the brake should be and when it should be applied is a pressing and difficult problem. The decade of controversy generated by

Usery v. National League of Cities, 426 U.S. 833 (1976), and *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005 (1985), reveals the depth and complexity of the issue. At the very least, when preemption is in the hands of administrative agencies, the judiciary's institutional perspective is essential. The experience of agency deregulation described herein illustrates the necessity of that role.

Speaking more generally, deregulatory federalism illustrates an even broader concern. American federalism is at a crossroads. Much of our jurisprudence depends upon the integrity of our institutional structures. Is Congress truly accountable to the states so that it can serve as a "built-in" restraint as *Garcia* described? The recent Supreme Court appointment process

revealed tension between politics and jurisprudence in the judicial branch. And, in considering the separation of powers issues involved in the Gramm-Rudman-Hollings Act, the court implied, in *dicta*, that there may be constitutional infirmities in independent agencies. As long as our federal institutions are structurally sound, politics, including the politics of deregulation, can proceed.

The future of deregulation is political and therefore ambiguous, but the fundamental structure of the federal system must never be.



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Reader's Forum

Kudos To Crime-Busters; Shultz Was Right

By Joe Rzeppa, 3L

On a rainy afternoon not too long ago, a law student was walking near the corner of Mass Ave and Everett Street when two young males came up from behind her and snatched her purse. The perpetrators of this cowardly crime took off down Everett with the victim chasing after them and screaming, "Stop those guys who stole my purse!"

Four vigilant HLS residents of the Walter Gropius Housing Projects heard the woman's plea for help and immediately poured out of their rooms and booked down the street in determined pursuit of the [purse snatchers]. These students eventually cornered and detained the young punks in an alley near Lesley College until duly-sworn officers of the law arrived on the scene.

The four student crime-busters — 1L's Jeff Dunlap, Jim Lowe and Rod Rosenstein, and 3L Michael Christian — deserve hearty praise and acknowledgement for a job well done. These gentlemen have made an outstanding contribution on behalf of decent, law-abiding citizens in the ongoing battle with the criminal element over control of America's streets.

Again, congratulations to these students for their courageous show of good citizenship.



By Alex Naimon, '50

Nothing is settled until it is settled right! There is a clear consensus among knowledgeable persons that President Reagan's

bargaining for hostages, notwithstanding contrary advice from Secretary of State Shultz, was a big mistake.

It would be a tragedy for the country and for the civilized world which believes in our announced policy against terrorism if, instead of the persons who proposed and managed this big mistake, the wrong man was forced to resign. — Yes, I mean Secretary of State Shultz, who has correctly and steadfastly adhered to the Administration's sound public position for the last six years of refusing to bargain with terrorists for hostages.

All public officials know the continuing dilemma of balancing loyalty to their supervisor with loyalty to the public interest. What is not as clear is that public officials who give unquestioned loyalty to their supervisor, whatever his error and however significant such error, deprive both the supervisor and the public of the opportunity to deal with and thus correct such error in timely fashion. Those supporters of President Reagan and members of the media who suggest that media attention to this error will go away either with the passage of time or by the occurrence of some large event have not learned that big mistakes don't go away till they are settled correctly. Even Henry Kissinger has missed a beat in suggesting it is the Secretary's duty to "please the President" and not vice versa; more correctly, the Secretary's duty is to his oath of office, which calls for him to balance his loyalty to the President with his duty to the public interest. By steadfastly adhering to his and the President's approved policy against bargaining with terrorists, urged through dip-

lomatic channels on some 150 countries for six years, Secretary Shultz gives the President a chance to correct a big mistake before it festers to the point of malignancy.



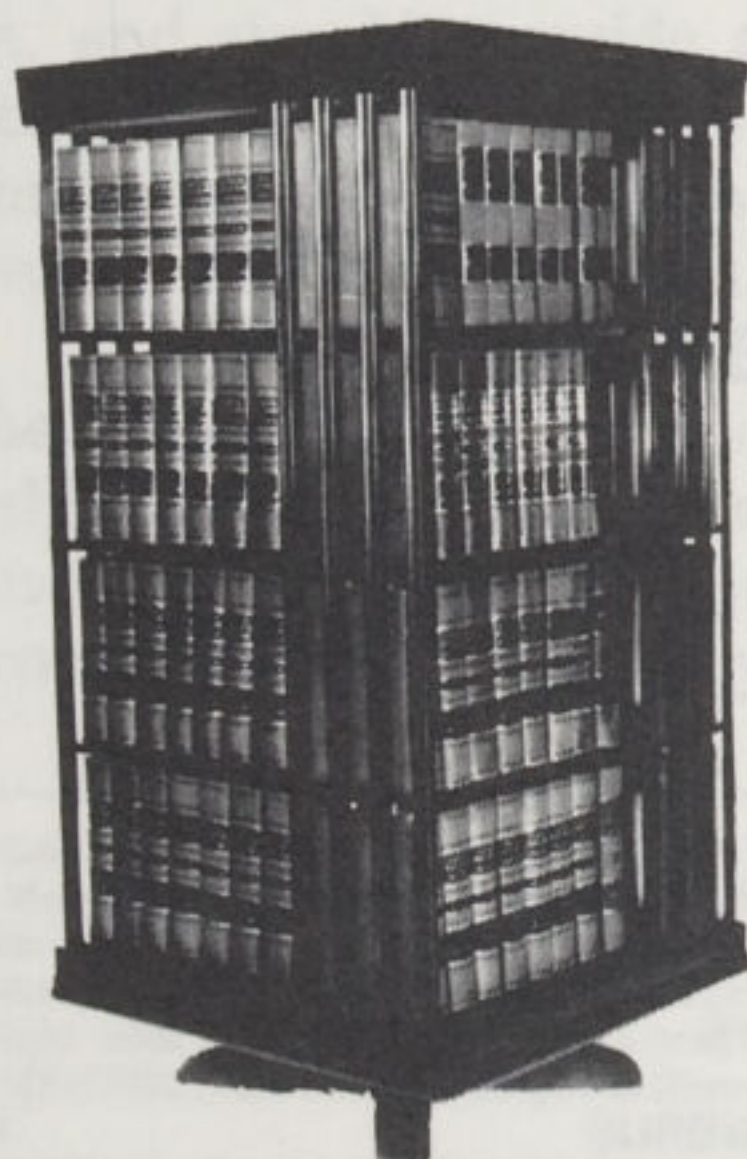
HLS Smoke-Out

(Continued from Page 6)

share office space, a rule restricting smoking to offices, for example, would discriminate against support personnel. Dormitories provide further difficulties, Reagor said.

Above all, Reagor urged, no changes will occur without input from faculty, students and staff.

Reagor said that all deliberations may be moot should the Cambridge City Council decide to pass an anti-smoking ordinance that it is now considering. The passage of this law, which would ban smoking in all public spaces, would supercede any resolution adopted by HLS or the University.



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Letters to the Editor (Continued)

(Continued from Page 9)

students. She also plays a key role in the HLS discipline system.

Given this power over student organizations, she should not control the funds as well. Some organizations may want to criticize publicly one of her policies or decisions. Under the current system, they can only do so at the risk of a reprisal in the form of decreased funding the next year.

As a recent graduate who was involved in several organizations, I know that such fears are widespread among student leaders. Not only are activist political groups affected, either. When I was a member of the Forum board, we hesitated several times in inviting controversial speakers because we knew that Dean Upton would disapprove. We could not jeopardize the partial funding provided through Dean Upton simply to bring a provocative lecture to campus. In my Con Law class, Professor Kaufman had a term for that: chilling effect.

Dean Upton claims she has heard no complaints about the budget process. Her memory is short, indeed. At a meeting with Deans Vorenberg and Upton in the Spring of 1985, I raised the issue. Subsequently, I discussed it with her several times.

There is often talk of alienation and dissatisfaction among students. I came to believe that these negative feelings toward HLS are a product of the Administration's refusal to treat students as adults who can govern themselves responsibility. HLS is a place virtually devoid of public democracy. Students should demand that something as basic as the student funding process lie in student hands. Maybe if the Administration gave students control over this simple area, they would learn that HLS students can make

choices effectively.

One final note. I believe that my point about the absence of democracy at HLS is proven by the last line of Ms. Richard's October 20 article on the budget process. She notes that Dean Vorenberg alone can change the HLS system. You see, at HLS, unlike most schools, the *faculty* does not even have a major policy-making role.

Someday, Harvard will see its way out of the paternalistic past. While I am not holding my breath, I believe that students can effectively press for institutional change. Messrs. Quinter and Ward deserve full student support for their budget proposals.

Doug Hagerman, '86
Waukesha, Wisconsin

Disability Is Protected

To the Editors:

I appreciate the article on the Cambridge Human Rights Commission that appeared in the Oct. 3 RECORD [Vol. 83, No. 2]. One error needs to be corrected. Your reporter quoted me as saying that the inclusion of sexual orientation and disability in our local anti-discrimination ordinance was important since neither of those factors are protected under state or federal law. I had made that point only about sexual orientation since discrimination on the basis of disability is quite clearly protected under both state and federal law.

Sarah Wunsch
Executive Director
Cambridge Human Rights Commission
Cambridge, Massachusetts

Behavior Addressed By Board

(Continued from Page 3)

"[A]lthough the administrative processes and activities of the University cannot be ends in themselves, such functions are vital to the orderly pursuit of the work of all members of the University. Therefore, interference with members of the University in performance of their normal duties and activities must be regarded as unacceptable obstruction of the essential processes of the University."

According to Sander, the Board "tries to delineate what are the dividing lines of acceptable and unacceptable behavior." He noted that the Board takes cases as they come and "a lot depends on the circumstances," but he offered examples of the two extremes of acceptable and unacceptable behavior: peacefully picketing, Sander said, is "clearly a form of protected free speech," whereas preventing a speaker from exiting or entering by force is "unacceptable."

Sander said that if, from the *Advertiser* statement, "students can learn something about what is expected of them in terms of candor and integrity, it would be a good thing."

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