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25 CENTS

Kennedy, Fallon Voted Tenure

By Vincent T. Chang

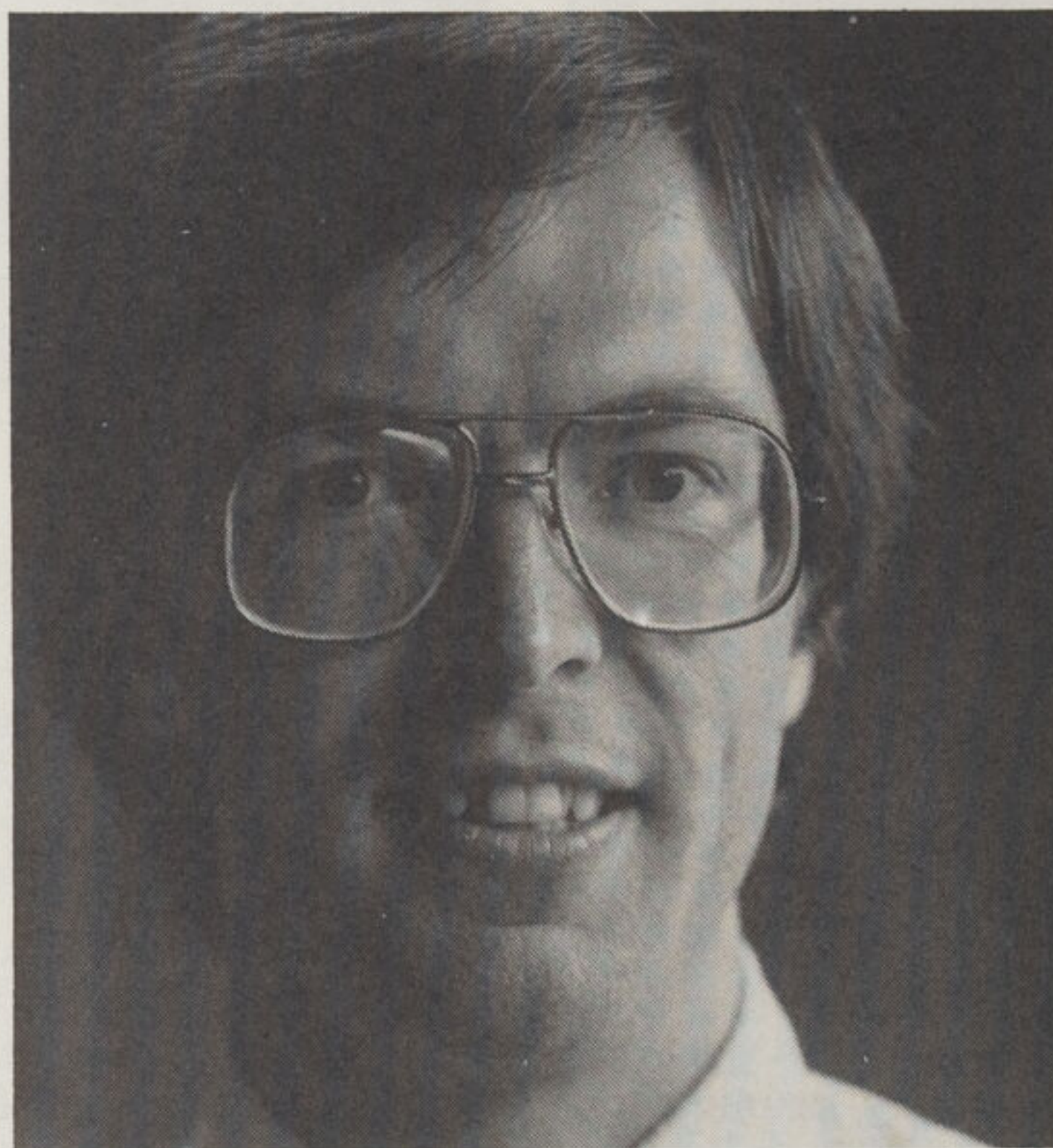
Ratifying votes taken of HLS's tenured professors during the fall, a committee of Harvard's two Governing Boards on January 12 promoted four HLS faculty members from junior faculty to full professors, Harvard Law School Dean James Vorenberg '51 announced the next day. The appointments of Christopher Edley Jr., Richard Fallon, Louis Kaplow and Daniel Meltzer were approved at that time and will take effect July 1.

In addition, Assistant Professor David Kennedy — an International Law and Institutions and Evidence professor — was recently granted tenure by a unanimous vote of the HLS faculty, making him the fifth professor to whom the faculty has offered tenure this year. His appointment now awaits approval from the Governing Board, which has in recent years ratified all appointments recommended by the HLS faculty.

Commenting on the four appointments ratified by the Governing Boards, Vorenberg said, "I am very pleased at the qualities that these...appointments bring to our faculty...these scholars contribute new insights to the understanding and development of law. They also add strength to the School's teaching in their diverse fields."

That all five appointments were decided in one semester may indicate that Vorenberg has decided to place tenure decisions in an expedited schedule. Indeed, most observ-

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Yearbook

Richard Fallon

Box Move Begins Hark Changes

By Michael Reilly

HLS students returned from the Christmas vacation to discover their mailboxes relocated from the Harkness Commons corridor to downstairs in the building's television lounge. The mailbox move marks the beginning of a major effort by the Law School to redesign the Harkness space to better serve the needs of HLS students, students and administrators say.

Scott Jacobs, 2L, a member of the Dormitory and Student Affairs Council, said the mailboxes were moved to improve traffic flow through the corridor as well as to attract student use of the lounge. Jacobs, together with fellow DSAC executives Karen Leili, 3L, and Raul Carrillo, 2L, and HLS Deans Simone Reagor, Paul Upson and Mary Upton comprise the admin-

istrative committee overseeing the Harkness project.

Jacobs stressed that the actions of the committee are "not a plan to get rid of the Pub." Instead, the committee will "attempt to integrate the Pub into its plans and use the space well," he said.

Currently, the committee is considering several plans proposed by an architect retained by HLS. The committee will attempt to produce a solution "for a more effective use of the Pub" and "get the building more in line with the way it was originally designed," Jacobs said. As the project continues, more student input — from individuals as well as other student groups.

The next major change in the Harkness scenery will be the opening of the DSAC coffeeshop in the

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HLS Professors Analyze Boesky Scandal

By David Snouffer

Four HLS specialists in corporation law who have been watching the Securities and Exchange Commission (SEC) investigation of Ivan F. Boesky say they are waiting to find out which stock traders and others will be able to collect damages from the New York investor for his insider trading. The four — Professor Robert Clark '72, Visiting Professor Reiner Kraakman, Professor Emeritus Louis Loss and Professor Detlev Vagts '51 — suggested in separate interviews last week that what private actions courts allow against Boesky could produce the most important new law to develop from the case.

The SEC announced in November that it had agreed with Boesky to settle charges, which the agency disclosed at the same time, that Boesky had violated insider trading laws. The agency said Boesky had received secret information from an investment banker about various companies' plans to merge with other companies, try to buy other firms or buy some of its own stock from private investors. Boesky profited, the SEC charged, by using the information to have companies he controlled buy stock in those or other companies that the secret plans involved, including Nabisco Brands, Union Carbide and General Foods, stock whose value rose when the mergers, takeover bids or stock buybacks were revealed publicly.

The agency also accused Boesky of promising to pay a 5 percent commission for some of the tips he received to the banker who had supplied them, Dennis B. Levine,



Suzanne Jackson

Professor Robert Clark

who was then the managing director of Drexel Burnham Lambert Inc., a New York investment house.

As part of the settlement, Boesky has paid the government \$100 million, including a \$50 million civil fine and \$50 million in disgorged profits that can be used to compensate victims of his unlawful dealings. In addition, the SEC has permanently barred Boesky from securities trading in the United States after April 1988, and he has agreed with Rudolph Giuliani, the U.S. attorney for Manhattan, to plead guilty to one felony count for breaking securities laws. The SEC had charged Boesky with violating its Rule 10b-5, which bars people from using certain kinds of deception when they or others buy or sell stock.

A federal judge could sentence Boesky to up to five years in prison for his crime, and four days after the settlement was announced, *The New York Times* argued in an editorial that he should receive a jail term to deter insider trading and

to enhance public confidence in the stock market.

If the SEC had taken Boesky to court, a new law passed in 1984 would have allowed a judge to charge Boesky a civil penalty of up to three times any unlawful profits the agency could prove.

The four professors all condemned Boesky, but for somewhat different reasons. They agreed that Boesky and other risk arbitrageurs, who buy stock in firms that they think may merge with or be taken over by other companies, provide a useful service by taking the risk of a merger or takeover from ordinary shareholders.

Successful mergers usually cause the price of a target company's stock to rise, Clark said, while a foiled takeover attempt generally drives down the price. So when risk arbitrageurs buy stock in companies that may merge, they assume other stockholders' gamble that the stock price will rise.

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Duncan Kennedy Addresses HLS Audience

By Wilson McLeod

Closing out the Board of Student Advisers' fall speaker series Dec. 4, HLS Professor Duncan Kennedy demonstrated why the student group titled his speech, "With Horns and a Tail through Harvard Law School."

Kennedy's comments on hypocrisy, intra-class conflict and the role of self-righteousness in politics assailed just about everyone, from counter-hegemonic Leninists to suburban liberals to scions of inherited wealth.

Although fliers posted on walls around HLS said a group called the Alliance for Corporate Interests would protest the speech, no demonstration materialized.

Kennedy described his basic purpose as a critique of the argument that as "an established member of the American ruling class," he is a hypocrite to advocate radical political change. Although he conceded that he was born into "impoverished gentry," educated at Andover, Harvard and Yale, pulls down an \$80,000 a year salary and has a family where "the prevalence of ruling-class nicknames is overwhelming," Kennedy stressed that he does not own a BMW — only a Nissan — or a yacht.

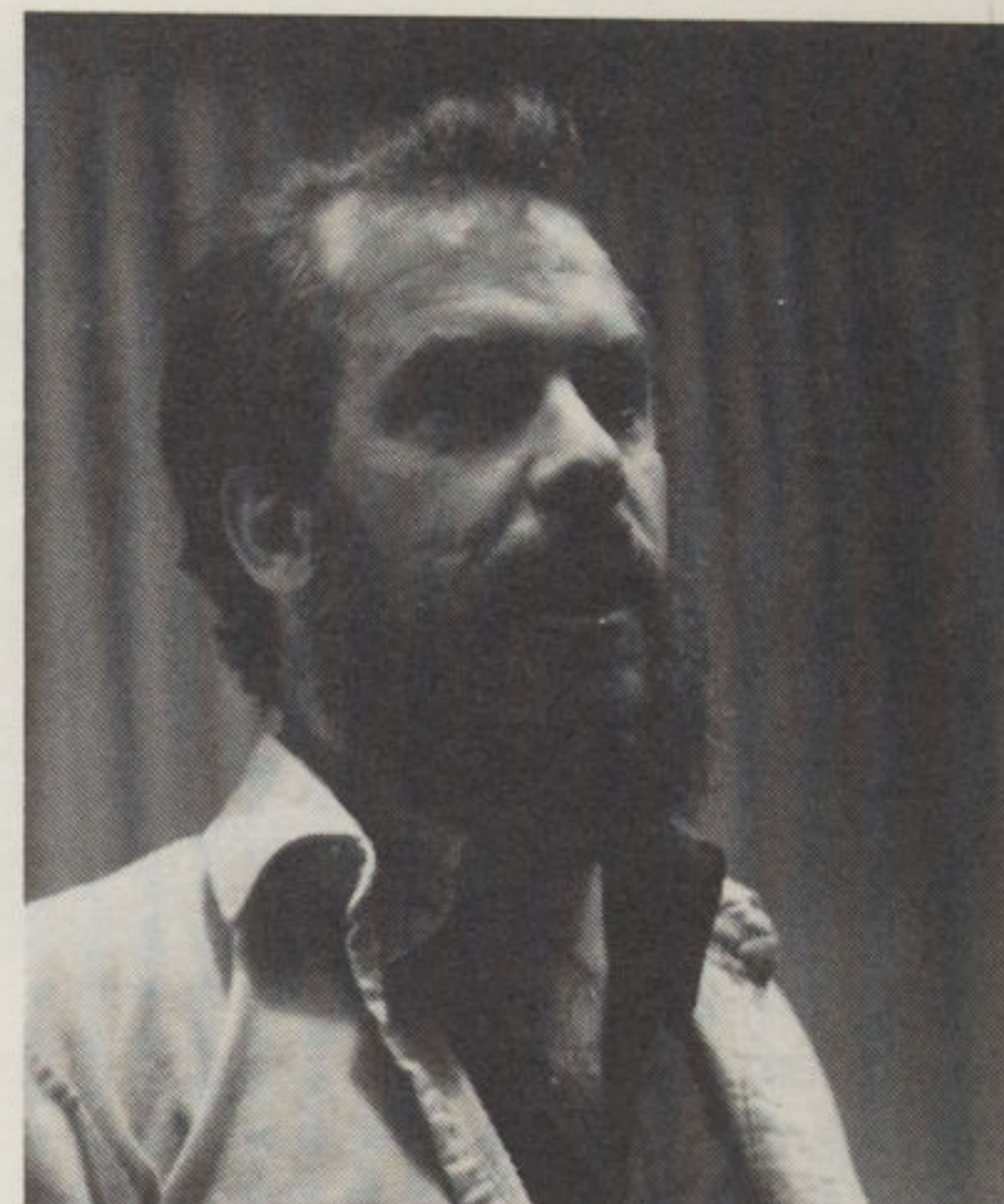
Kennedy traced attacks on how he has combined a comfortable lifestyle with scathing criticism of the U.S. establishment to what he called the pathology of the nation's ruling class. Characterizing himself as a product of "inherited wealth," he said he gets the most criticism from "upwardly mobile" people, who find it "incredibly bizarre to bite the hand that feeds you."

The two groups — people of established wealth and the upwardly mobile — combine to form the ruling class, he said, and number about a million people. They have "an unbelievably large amount of power," he added, and control wealth and culture.

Kennedy said people who disagree with his assessment are "objectively wrong" and are deluded by "false consciousness."

He emphasized his enthusiastic acceptance of what he called the prevailing bourgeois materialist ethos. "I like money a lot," he said, and he rejected suggestions that he should give money away in vast quantities to vindicate his politics.

The notion that it "should cost me \$40,000 a year to advocate income equalization just makes me laugh," he said. "I would never claim to be a liver of the values I espouse," he added, stressing that a more im-



Suzanne Jackson

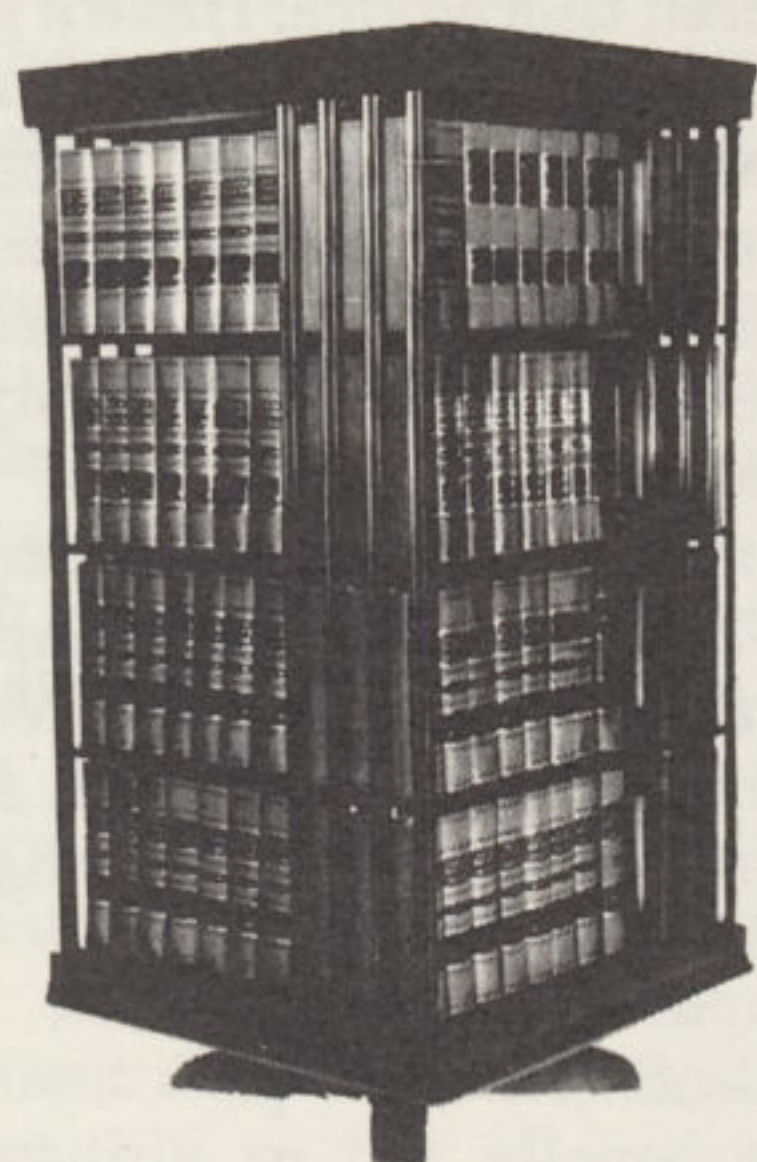
Duncan Kennedy

portant issue is whether he would vote to implement radical transformation.

To that, he said, his answer is definitely yes.

After dismissing attacks on his role, Kennedy presented a vision of a multi-faceted political opposition. He denied the ideas that leftists "are especially altruistic people" and suggested that everyone should do what he or she can, accept abuse from anyone who does more and remain free to abuse anyone "marginally on the right."

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Panel Focus On Problems In Black Music Industry

By Nancy Linnerooth

Four speakers who work in the black music industry portrayed their field as small and interdependent during a panel discussion held by an HLS student group Dec. 6.

Although "black music" includes music written and performed by both black and white artists, it is marketed primarily to the black audience, one panelist, music journalist Nelson George, explained to an audience of about 150 people at the event. The panel discussion, which was sponsored by the HLS Committee on Sports and Entertainment Law, drew amateur and semi-professional musicians, songwriters and producers, as well as law students. George is the black music editor of "Billboard Magazine" and author of *The Michael Jackson Story*.

The other panel members were: Norby Walters, president of Norby Walters & Associates, one of the largest independent talent agencies and the nation's most popular booking agency for black talent; Sunny Jo White, part owner, program director and disc jockey of a black-oriented Boston radio station, KISS 108FM; and Fletcher Wiley, managing partner of Budd, Wiley & Richlin, one of the largest minority law firms in the country, which represents performers, record companies, film companies and radio stations.

The panel focused on two major problems facing the black music industry today: a loss of the sense of history of black music among young black performers — "cultural amnesia," as George puts it — and the economic struggle of aspiring black performers for equality with their white counterparts. Major record companies are satisfied with a lower level of record sales for black artists who have not yet attracted attention in the mainstream market than for whites in a similar position, panelists said. The companies are not willing to put more money into promoting these artists because they believe the payoff from a new white



Julie Ross

Harvard University Music Industry Panel Participants (L to R): Cynthia Hickman, Panel Moderator and Harvard Student; Fletcher Wiley, Attorney, Budd Wiley & Richlin (Boston); Sunny Jo White, KISS 108FM Programming Director and Disc Jockey (Boston); Norby Walters, President, Norby Walters Associates (New York); and, Nelson George, Bestselling Author and Billboard Magazine's Black Music Editor (New York).

artist would be greater than that from a black artist, they added.

Still, there is a lot of money being made on black performers. Wiley belongs to two organizations, the Black Music Association and the Black Entertainment and Sports Lawyer Association, of which he was just elected national president, whose objectives are to get more of this money into the hands of blacks to be used for the betterment of black people.

Not only are record companies' economic decisions hurting black performers, but some shady dealing is also going on, Walters said. He advised aspiring performers to "always get professional advice."

For those who want to give that advice, Wiley discussed briefly the role of lawyers in the music industry: "Entertainment law really is a subset of business law. We're talking about contracts, torts, commercial law and so forth." What sets entertainment law apart, he continued, is the field's "extraordinary and interesting" clients.

If you aren't already in the business, Wiley suggested two models to follow:

(1) Get into a large entertainment complex, such as RKO, as a lawyer then move to the business and production sides, or

(2) Use various entertainment organizations, such as BMA, to build up a contact base. You can use this approach even if you are in a law firm which doesn't have an entertainment practice.

How to break into the music industry as a performer? George offered this advice: Have a good song.

The panel didn't give a "how-to" for law students interested in breaking into the field. Instead, they were there to "give a feel for what people do in the industry — the interlocking nature of it," commented Cynthia Hickman, the CSEL member responsible for organizing the event. "People have the impression it's such a large industry. Actually, it's small, with a few key players."

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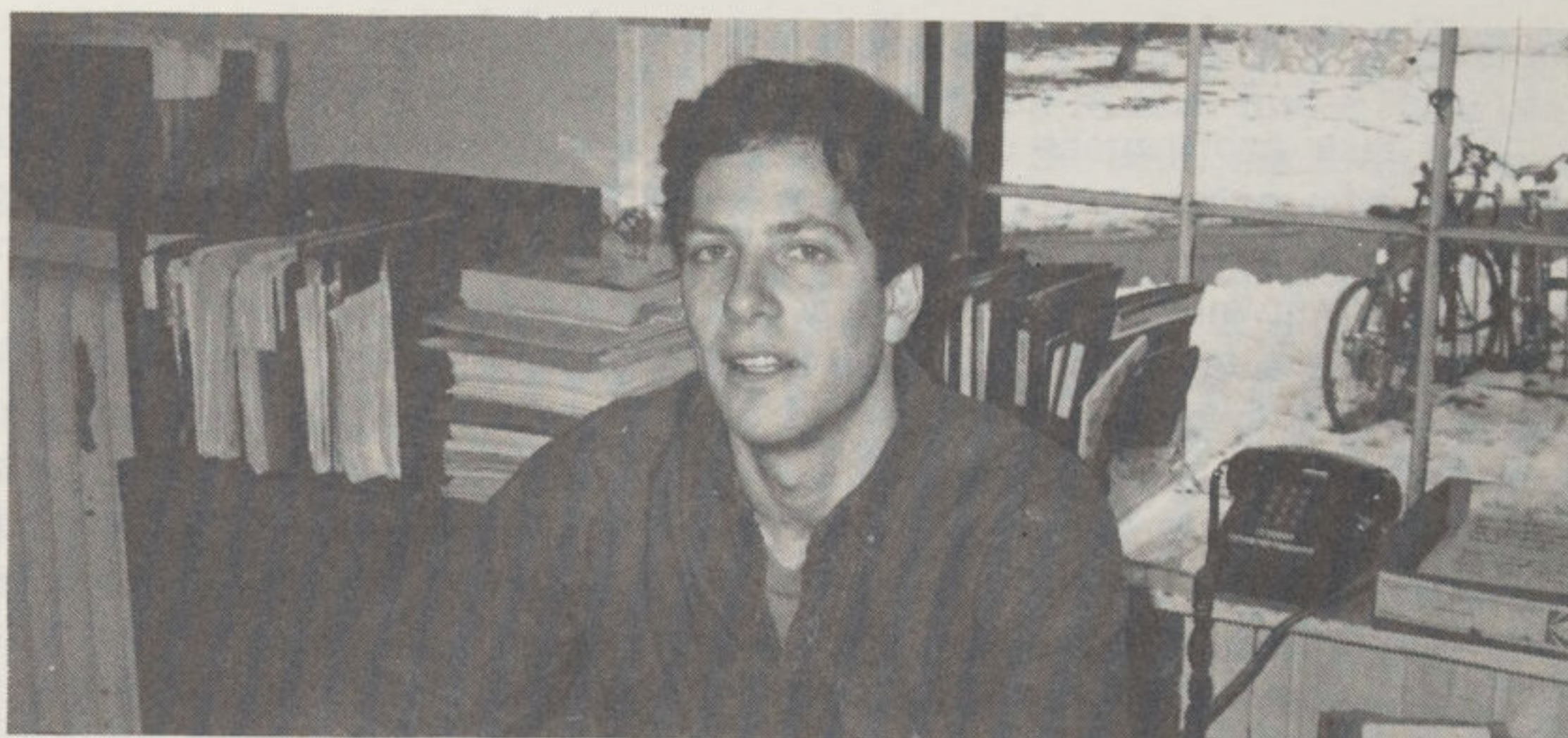
Legal Aid Bureau Represents Tenant Group

By James Hoffman

The Harvard Legal Aid Bureau is currently trying a class action suit whereby hundreds of tenants of Fresh Pond Apartments in Cambridge are suing the Federal Management Corporation of Boston for illegal eviction for nonpayment of rent that allegedly was not owed by the tenants. The case is scheduled to go to trial in Massachusetts Superior Court in March.

According to Bureau President Pat Horvath, 3L, students working in the Harvard Legal Aid Bureau noticed a pattern of evictions in 1983. In 1983 the Bureau had several clients come to them to deal with actual and threatened evictions from Fresh Pond Apartments in Cambridge. The factual situations of these cases were very similar. After some investigation, students at the Legal Aid Bureau found that the management would not credit certain tenants' rents to their accounts even though the tenants had paid in full. Then the tenants would get notices to quit their apartments. When the tenants questioned management about these notices, the management would say it was a computer error. Then the management would turn the notice into a summons and complaint and have it served upon the tenants by a constable. The summons and complaint would instruct the tenant to appear in court on a certain day. When questioned again by the tenant, the management would say it was another mistake and instruct the tenant not to go to court. The management would then go to court, get a default judgment, and in several cases, turn the default into an executed judgment.

After discovering this pattern of evictions in 1983, the Bureau a temporary injunction in the Middlesex Superior Court. This injunction prohibited the Federal Management Corporation of Boston from engaging in the alleged activities and took the unusual step of allowing the Bureau to inspect the eviction notices of the defendant every month.



Karen Russell

Harvard Legal Aid Bureau President Pat Horvath, 3L

According to Horvath, this information allowed the Bureau to ask eligible tenants threatened with eviction if they would like to be represented by the Bureau. This resulted in many individual cases which were separate from the class action. While most of these cases were settled, four or five have gone to trial and the tenants have won all of them. These trials have resulted in damages of \$2,000 to \$6,000 apiece for the tenants, usually awarded as a reduction of rent for bad conditions in the apartments. These poor living conditions included broken elevators (in buildings of over 20 stories), no hot water, mice, roaches, and a broken incinerator which caused smoke to enter apartments, setting off the fire alarm which in turn set off the automatic sprinklers and flooded the tenants' apartments. In addition to the damages awarded the tenants, the Bureau was also awarded attorneys' fees ranging from several hundred dollars to \$3,000 per case.

The pending class action case, as distinguished from the individual defense cases, is an affirmative suit where the Bureau is attempting to obtain damages or permanent injunctions for a certified class consisting of all tenants who lived in the building as of August, 1982 who were, or could have been, threatened with eviction. This class consists of about 300 people, six of whom are named plaintiffs.

Horvath said that while discovery was proceeding in the class action, the Bureau found "incredibly in-

criminating evidence" that "management had decided they wanted to evict certain kinds of people and drew up 'hit lists' to evict minority tenants and large families.

Horvath said, "Our investigation of corporate minutes revealed deliberate decisions to replace our clients, often Haitians and Puerto Rican families...they thought elderly and handicapped people would be easier to manage."

With this information, the Bureau was able to file a separate discrimination lawsuit with the Massachusetts Commission Against Discrimination. This Commission found probable intent to discriminate and the Bureau is going along with a full trial here also.

In the class action suit, co-counsel in this case are Dan Hefferman, 3L, and Leslie Brueckner, 3L. They are being helped by about ten other members of the Bureau. Both have special exemptions from the 1987 winter term, and each of them is putting in about 50 hours a week in preparing for the March trial.

Massachusetts Supreme Judicial Court Rule 3:03 allows second and third year law students to represent indigent clients in civil matters if they are supervised by an attorney. Paul Collier, a partner at a Boston-based, low-income law firm is a paid, half time employee of Harvard who is required to sign the pleadings and appear in court with the students, although Bureau members will actually conduct the trial.

The class action suit is expected to result in a 2-3 week trial.

A Variety of Plaintiffs' Private Actions

(Continued from Page 2)

But risk arbitragers don't need inside information to perform their service, the professor said.

Boesky may not have hurt anyone he owed a special duty of trust when he traded information Levine had acquired, Clark said. Nevertheless, he added, Boesky knew someone else had breached a duty of confidence in getting the information to him, and Boesky therefore took part in breaking down certain corporations' "very legitimate information security systems," Clark said.

When Boesky bought stock in companies that were secretly planning to merge or buy back their stock or that other firms were secretly planning to take over, he paid the stockholders who sold to him a lower price than he would have if they had also known about the merger or buy-back plans, Clark explained. And Boesky's stock buys in firms that other companies wanted to bid for may have forced these bidding companies to pay a higher price when they acquired their targets, he added.

Kraakman said insider trading may not hurt other investors, at least if they hold diversified stock portfolios, because they expect it to occur and pay lower prices for their stock than they would have paid if they did not anticipate insider dealing. Instead, he faults insider trading for providing secret additional compensation to corporate managers, who can profit from it even if their enterprises are faring badly and losing stock value.

But Clark questioned how accurately stock investors discount for insider dealing that may occur and said even accurate discounting would not justify insider trading.

Insider trading is "anti-free enterprise," Loss said, because it poses a "great danger" to businesses that rely on selling stock to raise money.

"A capitalist system requires people to invest in industry," he said. "If people become disenchanted [with the stock market], they're less likely to participate. You wouldn't want to play cards with me if I had

a marked deck."

"Apart from England," Loss said, "no European country has a really broadbased interest in stock ownership as in the United States, and that's probably due in part to a widespread belief that the [European] public cannot play the game on a par with corporate managers."

Since the 1930s, when Congress passed two major securities laws, "we've committed ourselves to a different game," Vagts said.

The professors agreed that the penalties Boesky has accepted should significantly deter others from engaging in similar practices, at least for awhile. The settlement, which *The Times* said may have left Boesky with a net worth of \$200 million after paying the penalty, probably does not provide "optimal deterrence," Clark said, "but it's something." And he said the SEC may have handled the case appropriately by settling if it can use Boesky's cooperation to catch "many" other insider dealers.

"Boesky probably wouldn't have gotten off as lightly if he didn't have someone else to sell," Vagts said. The risk arbitrager awaits sentencing for his admitted criminal offense.

Insider trading is "a bit like drugs," Loss said. "There's so much money involved that people are liable to take a big risk."

The case's deterrent effect will probably wane after a few years, he added.

But the professors predicted that private damage lawsuits will cost Boesky a lot more than the \$100 million he has already paid. If Boesky ends up owing plaintiffs more than the \$50 million the SEC has already collected from him to compensate victims of his insider trading, the balance must come out of his own pocket, Loss said.

"I doubt if Boesky will have much left," Kraakman said.

What theory stock investors who claim Boesky's trading hurt them can use to sue him depends on where Boesky's secret information came from, the professors said. Where Levine obtained Boesky's infor-

mation from people associated with the same companies whose stock Boesky bought, people who sold that stock at the same time Boesky was buying could sue him under the SEC's Rule 10b-5, they said.

In one case, the SEC said Boesky received secret information from Levine provided by someone associated with Nabisco Brands about its planned merger with R. J. Reynolds and then traded in Nabisco stock. In another, the agency said he received word via Levine from FMC Corp. about its secret plans to buy back its own stock and then bought shares in FMC. Loss called these "classic 10b-5 cases."

But in other cases, the SEC said Boesky's information about a company's intention to take over another firm came originally from the bidding company, not the target firm whose stock Boesky bought, as when Levine told Boesky about Internorth Inc.'s plan to take over Houston Natural Gas Corp. Boesky then bought stock in Houston Natural Gas, according to the SEC.

In such a case, courts could allow a private action under Rule 10b-5 only by adopting a reading of it that then-Chief Justice Warren Burger championed unsuccessfully in a 1980 U.S. Supreme Court case, Clark said. Under Burger's interpretation, the rule would require anyone who has "misappropriated nonpublic information" to disclose it before trading.

And even if a court accepted Burger's view, Clark said it might not hold Boesky liable as the person who did the misappropriating.

So traders who sold stock to Boesky in companies other than those that provided the insider secrets he used may only be able to sue him under a different SEC rule, the professors said. They said Boesky effectively has admitted violating SEC Rule 14e-3, which requires people to disclose non-public information about a pending bid before they trade on it, if they have reason to know the information came from either a bidding company or its target.

But unlike for Rule 10b-5, they

May Exceed Boesky's Entire Net Worth

said, the courts have not yet determined whether Rule 14e-3 lets anyone besides the SEC itself use the rule to sue Boesky.

Clark said the language of Rule 14e-3 should mean that since Boesky chose to buy stock in certain companies because he knew that other firms secretly planned to bid on them, people who were selling stock in the targets at the same time Boesky was buying it ought to be able to sue him for profits they could have shared if they had known about the pending bid too.

But a court could find Boesky owed no duty to other traders under the rule and therefore does not owe them any compensation now, Clark said, and the Supreme Court has been "rather stingy" in recent years about letting other traders sue inside dealers.

People who can show Boesky bought the actual shares they sold stand a better chance of collecting from him, Vagts said. The professors said the target corporation itself might also have an action under the rule.

Clark and Kraakman said Rule 14e-3 could also give an action to a bidding company on whose infor-

mation Boesky traded, if Boesky's purchases forced the raider to pay a higher price for the target company it sought to acquire.

"The irony is that acquirers often like to have information out," Kraakman said. Companies that are trying to buy other firms often rely on risk arbitragers like Boesky to help them by making large blocs of stock available quickly, he explained, because securities laws require potential bidders to reveal their holdings publicly once they own 5 percent or more of a target company's stock.

When bidders know risk arbitragers hold stock they will be able to get quickly, they can put off buying fully 5 percent of their target and having to announce their plans, he added. At times, he said, bidders even leak their plans to risk arbitragers.

Nevertheless, Kraakman said, bidders may well sue Boesky "if there's something to be gained."

But Loss said a 1977 Supreme

Court case might preclude a bidder from suing Boesky under Rule 14e-3. If so, he said, such an offeror could still try suing Boesky for committing the common law tort of interfering with an advantageous economic relationship.

Several other potential plaintiffs could also advance plausible arguments why Boesky should pay them something, as well, Kraakman said. The limited partners in Boesky's investment company might sue him for breaking his fiduciary duty of trust to them as general partner, and Levine's employer, Drexel Burnham Lambert, could claim that Boesky corrupted its agent, Levine.

In the case's first civil suit against Boesky, filed in New York less than a week after the SEC announced the settlement, a New Jersey man seeks to represent a class of plaintiffs who held stock in several major corporations in which Boesky bought stock, including Nabisco,

(Continued on Page 16)

Johnson To Quit

Renda Johnson, Director of Financial Aid at HLS, will resign her position effective June 30 of this year, according to a December 30, 1986 memorandum to faculty and staff circulated by Administrative Dean Simone Reagor.

Johnson has decided to pursue a career change in a field other than financial aid, according to the memorandum.

Johnson has worked in the area of financial aid for twelve years, four of them at HLS. More specific information about Johnson's departure and future was not available.

Johnson declined to be interviewed at this time. Attempts to contact Reagor were unsuccessful.



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Kennedy

(Continued from Page 3)

The political left, he said, is "overwhelmingly self-righteous" and "totally oppressive," gripped by the idea that "if you take one sip of the poisoned [corporate] chalice, you've had it."

Such a self-conception leads to destructive and "self-indulgent self-isolation," he said. Leftists should instead realize there is "no moment at which you have taken the fork" what he described as irreversible co-optation and paralysis with mainstream society, he added.

"Tying up the revolution" at the New York law firm of Cravath, Swaine & Moore or becoming what he called a pro bono firm "mascot" remain valid enterprises, he said. Similarly he said his own eight-hour-a-week job "training the Hesians" doesn't destroy a project he said he is undertaking of "organizing yuppies" and "filling the flagships of the ruling class with rats."

Kennedy characterized his politics as "nihilistic and despairing," premised on a belief that U.S. society is "incredibly stable."

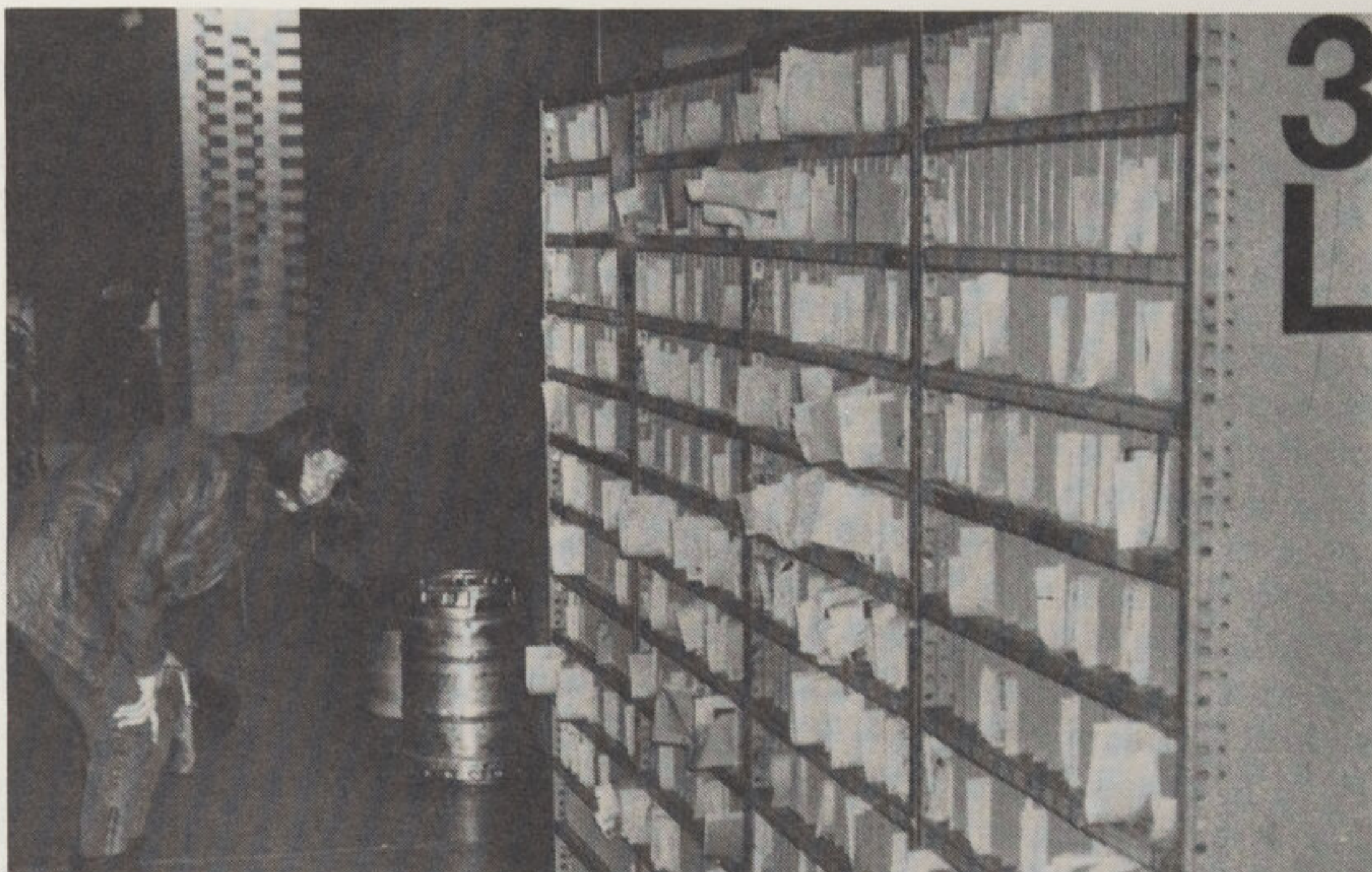
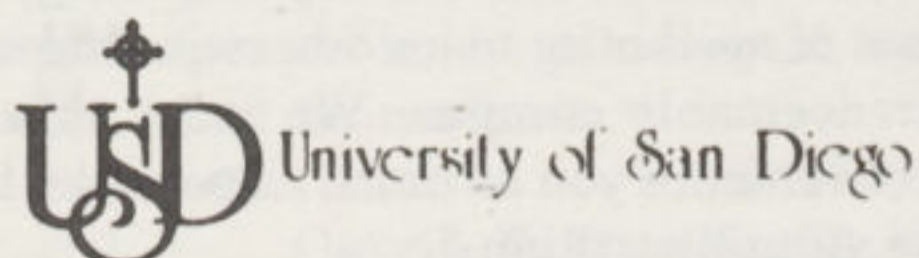


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Karen Russell

HLS student checks her Hark box at its new location.

Hark To Boast Coffee Shop

(Continued from Page 1)

room occupied by DSAC's thrift shop and video games. The coffeeshop will open for business during the first week of spring semester. Counter service, tables and chairs will be open to students during the hours of operation: 8 to 11 a.m., 2 to 5 p.m., and 9 p.m. to 1 a.m. In order to serve the needs of dormitory residents the coffeeshop will be open on weekend mornings.

"Quality," Jacobs said, "shall be a main emphasis" of the new coffeeshop. Fresh products will be brought in on a daily basis — bagels, pastries, muffins, brownies and other baked goods. The coffeeshop will "get away from the prepackaged garbage" currently available at the breakfast stand in the Harkness corridor, Jacobs said. Other snack

food items will be served; another novel item included in the shop's menu will be hand-scooped Sedutto brand ice cream. Should the coffeeshop prove successful, DSAC will use profits to purchase cappuccino and espresso machines. Fresh-ground and brewed coffee will be available from the shop from the day of opening.

The goal of the coffeeshop will be to give students a place where they can socialize that is less institutional than the upstairs dining hall. Like the Pub, the coffeeshop will sell its goods near cost, with a slight markup to provide student jobs, buy better equipment and facilities, and fund other student events. As in prior DSAC projects this year, a major effort will be made to facilitate contact between faculty and students outside the classroom.

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Of Zombies And The Winter Term

Suddenly in January hundreds of HLS students have adopted habits reminiscent of Bram Stoker's Dracula. They rise in the waning light of the short winter days; they work long into the night. Their eyes are overbright, their coloring frequently flushed. This feverish intensity characterizes those afflicted by two far different conditions: first year exams, and Trial Advocacy Workshop. Second and third year students involved in Trial Advocacy can be distinguished from suffering 1Ls by these additional traits: 1Ls get shabbier as the exam period progresses and their last trip to the laundromat recedes into dim memory, while workshop students — faced with the threat of videotaping — become exceptionally well dressed; and 1Ls sport an air of grim determination and mutter things like "I can't believe I let myself in for this", while workshop students appear irrationally pleased with the world and proclaim gleefully phrases such as "I can't believe I let myself in for this."

In, around, under, and in the midst of all this fervor, many HLS students unaffected by it display other symptoms. In an unappealing contrast, they closely resemble the title characters in George Romero's *Night of the Living Dead*.

Glassy-eyed, they lumber from lecture hall to Hark to home. It is clear that they would rather be skiing in Vermont. Or surfing in Malibu. Or sunning on Martinique, shopping in Paris, chasing children at home, poisoning pigeons in the park . . . anything but doing what they're doing where they're doing it — here.

There is a tendency to respond to this division between those who are bored stiff and those who are having too much fun for their own good by looking for a place to dump the blame. It's the fault of the weather, the administration, the professors, the students. The more interesting question is, having come to this situation, what do we do?

For starters, we have one suggestion: that HLS institute a legal writing workshop modelled after Trial Advocacy, with the same emphasis on nitty-gritty detail, the same high faculty-student ratio, and the same commitment to quality. We want a Legal Writing Workshop staffed with legal luminaries; we want to be able to hear what a judge looks for in a brief from a judge, not a theorist. George Gopen and Steven Stark are very good at what they do, but what they do — trying to teach to huge classes of students what is most effectively taught one-on-one — is not good enough.

—R.J.P.

—G.M.B.

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Fenno

Fenno was bored, but that was redundant. He was, after all, an HLS student. It was a few days after New Year's, and he was already back in Boston. He had little to do. *The Boston Globe* was no longer publishing those convenient little special sections about the Irangate scandal. Doonesbury had reverted back to jokes about bird calls. *Rambo 17: Tired Blood* had stopped playing at local movie houses. If something didn't come up soon, Fenno might, out of desperation, actually consider attending his winter term class: "Business Planning: Why Hostile Takeovers Are To The Economy What Mud Wrestling Is To The Performing Arts."

As he staggered through the living room of his spacious Somerville flat, Fenno's bloodshot eyes noticed that the light was flashing on his Christmas gift, a yuppie-special telephone answering machine.

"Somebody loves me!" he exclaimed as he lunged for the machine. Excitedly, Fenno hit the playback button.

"Fenno, you hunk," the incredibly seductive voice purred from the speaker. "Why haven't you gotten in touch with me? I've been lusting for your knockout body ever since I met you on that flight to Boston last week. I hope all of those things I suggested we do together in the letter I dropped off in your mailbox at Harvard Law School didn't shock you. I know some of them are pretty kinky, but I thought you were the type who would be interested in fruit-flavored body creams. Please get back to me today, or I'll just have to find someone else. You have my number: it's in the letter. Bye-bye big boy — I hope to hear from you soon!"

Fenno was out the door before the answering machine clicked off. He raced like a maniac to the law school campus. It wasn't that he was desperate, but his last interaction with a female of his own species was two years ago, when a McDonald's employee dropped a Big Mac on his lap and then laughed at him.

Fenno was at the Hark within a matter of minutes. Bursting through the doors, he didn't even notice the ever-present stench hanging in the hallway. Knocking down several 1Ls, Fenno clawed his way to his box.

Suddenly, he stopped dead in his tracks. Instead of an overflowing mailbox with his name not where it should be, Fenno stared at a blank wall. He was dumbfounded.

"Where is it?!" he shrieked. "Where!?"

Fenno felt himself starting to panic. Then he saw a sign on the wall.

"From now on, student mailboxes will randomly be moved to various locations around the University campus. This is being done in a desperate attempt to bring some sense of aesthetics to an otherwise hideously unredeemable campus. We trust this will inconvenience you as much as possible. Love, The Administration."

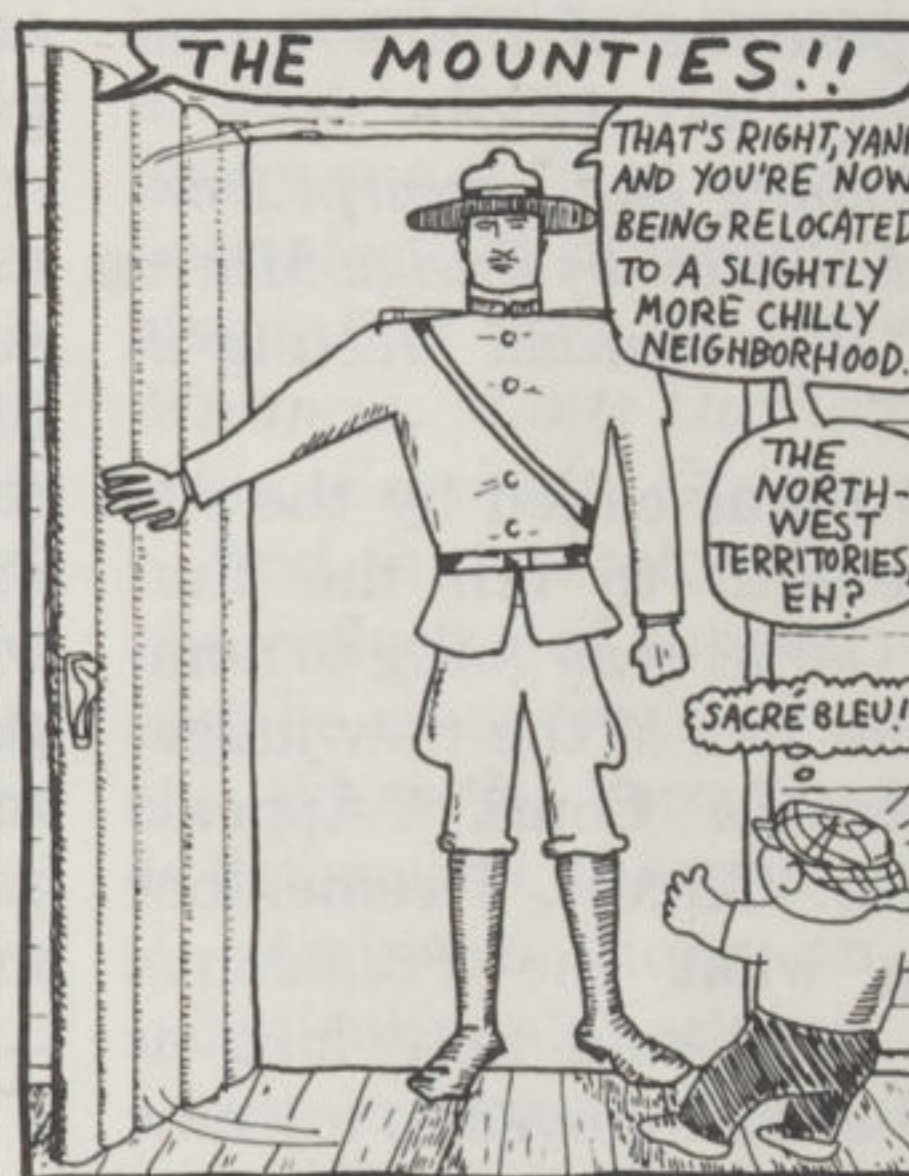
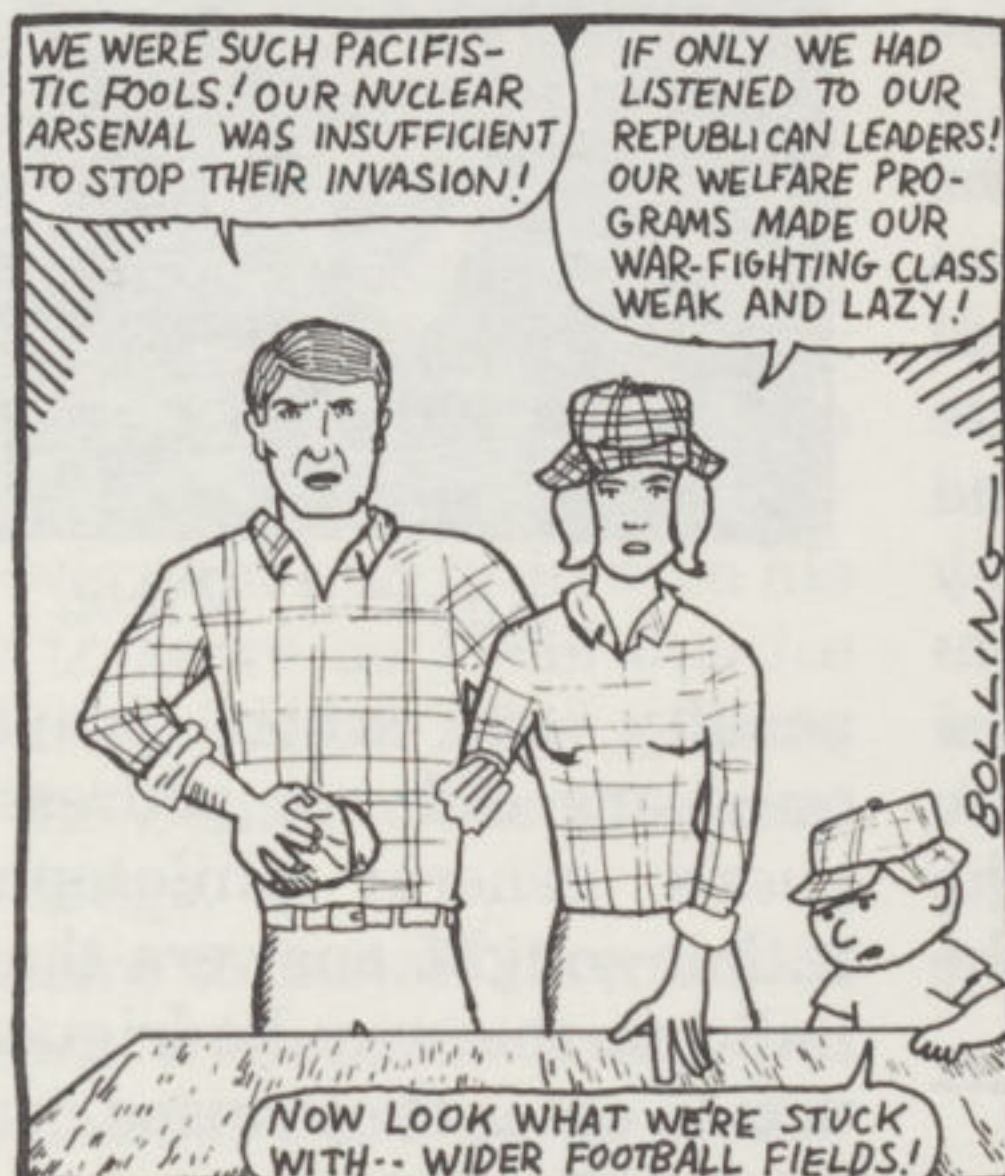
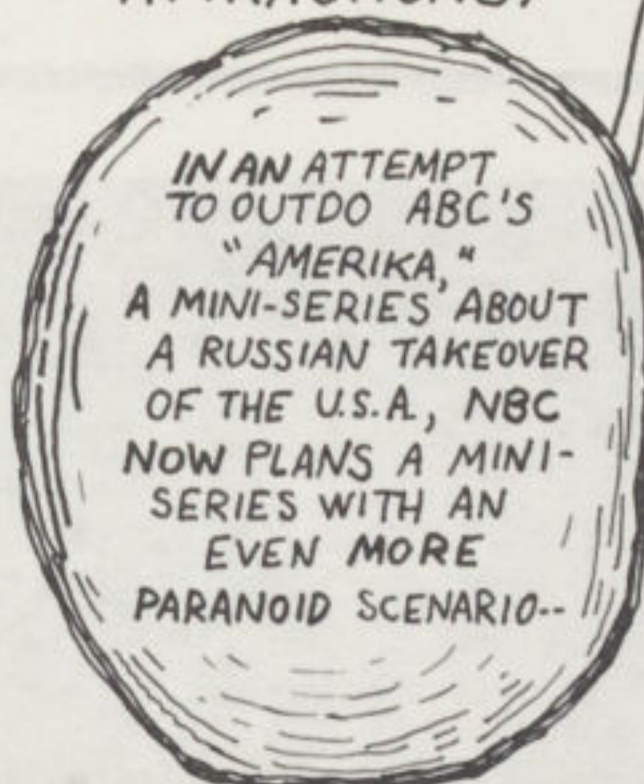
Fenno slumped to the floor and cried. ☹

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COMING ATTRACTIONS:



Letters to the Editor of the Record

Rehearing the Redenial?

To the Editors:

The ongoing logomachy (vide *Tribe and Dershowitz vs. Meese*, Harvard Law RECORD, Vol. 83, No. 6, October 31, 1986, page 1), in re "the supreme law of the land" reminds me of the fluidity of what is called "supreme".

In the case of *Gondeck vs. Pan American World Airways, Inc.*, 382 U.S. 25, 86 S.Ct. 153 (1965) a second petition for rehearing from a denial of a petition for a certiorari rendered on October 8, 1962 was granted, and the Court said:

"We therefore grant the motion for leave to file the petition for rehearing, grant the petition for rehearing, vacate the order denying certiorari, grant the petition for certiorari, and reverse the judgment of the Court of Appeals."

If, as was done in that case, a judgment that for three years had been as final as any judgment could possibly be, is reversed, when does something that was undeniably "supreme law" deteriorate into something completely different? To paraphrase George Orwell ("The Animal Farm") it may be that while all "supreme" holdings are equal, some are more equal than others.

Calvin E. Hardin, Jr. '30
Baton Rouge, LA

"Little Shits" Out of Place

To the Editors:

I have been enjoying the Harvard Law RECORD for the past 38 years and, particularly, since my graduation in 1951. I may be behind the times, but the use of the language in the enclosed cartoon [RECORD, October 3, 1986 at 9] really seems out of place. Hopefully, it will not become common.

Walter A. Bobrow, '51
New Rochelle, NY

Kill the Dissenters

To the Editors:

I want to express my thanks to Sherman R. Slavin, '49, for his recent letter regarding the apparent unhappiness of so many current students. I would hope the admissions office could devise a means of identifying these malcontents before admission and spare them the misery of attending HLS.

Grissim H. Walker, '43('46)
Circuit Judge
Twelfth Judicial Circuit
Sarasota, Florida

Pro Slaughter

To the Editors:

Speaking about "heinous crimes," have you ever editorialized about the Soviet slaughter of a substantial part of the Afghan population?

William A. Seavey, '55
San Francisco, CA

(Continued on Page 20)

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.

Senate Should Not Subject Judicial Nominees

Abner J. Mikva was sworn in as a Circuit Judge on the United States Court of Appeals for the District of Columbia on September 27, 1979.

Prior to going on the bench, Judge Mikva served in the United States House of Representatives for five terms, representing districts that included portions of Chicago and Cook County.

The following is an excerpt from a speech delivered by Judge Mikva to the D.C. Bar Annual Meeting in 1985.

In 1979 I was called by the Attorney General to tell me that President Carter was going to nominate me for one of the new judgeships on the U.S. Court of Appeals for the D.C. Circuit. I remember wondering what the President's timetable was, and how long it would be before I moved to my new offices down the street.

What naivete! At the time I thought the only cause for delay would be the period of time required for the ABA and the FBI to review my credentials and past. I saw no reason for worry.

My naivete began to dissipate when a friend advised me that the National Rifle Association was considering opposing my appointment. My first reaction was puzzlement — not that the NRA and I had not previously clashed. We had on many occasions. But I could not understand why the NRA would rather see me stay in Congress where I could raise their hackles than go to the court where I would have no influence or voice about the policy issues of gun control. The NRA began pressing its views. In May of 1979, the executive director of the NRA's lobbying arm announced I was "unfit for judgeship," that my views were "those of a Fascist," and my attitudes those of a "tin-pot dictator." It began to appear that he was not really for me. While I continued to receive support from the media and from friends on the Hill, the NRA was producing results. One Senator who earlier had

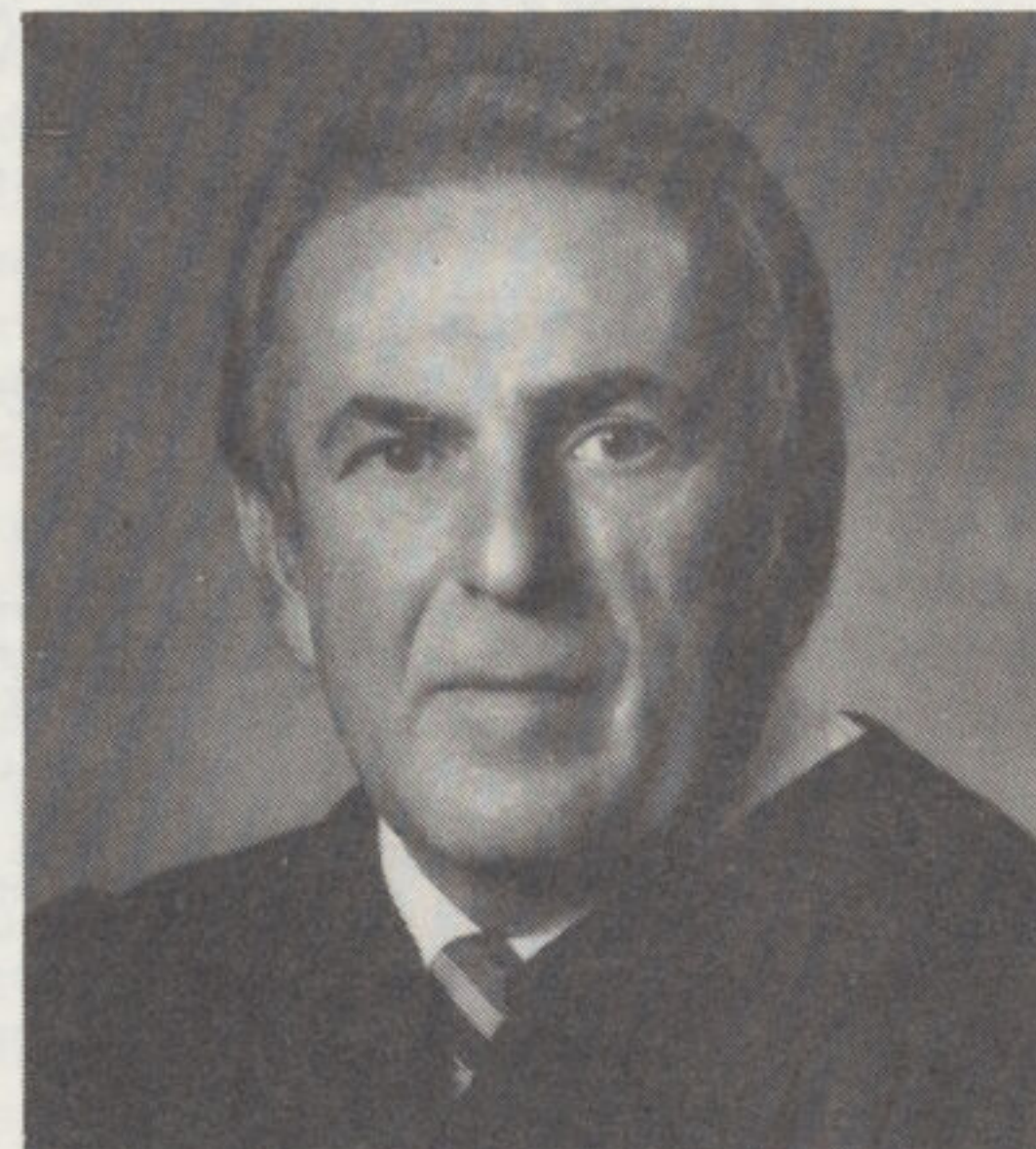
volunteered his support, embarrassedly explained that he had not been aware of the NRA's opposition, and told me there was no way he could support me. The same scenario unfolded in Senate office after office. I became a household word in little towns in Mississippi and Montana and Idaho — and the word was not good.

The story came out all right for me. The Senate gave me an enthusiastic sendoff, by a vote of 58 to 31 — I was confirmed. Not quite the overwhelming plurality I had anticipated — but better than my constituents had given me in Congress. The NRA reportedly spent a million dollars in their effort to prevent my confirmation. But the memories of that battle, and the

**We do not want
judges who are
completely
devoid
of political
content . . .**

oddity of single issue opposition to a candidate for a nonelectoral role has remained close. Unfortunately, the process is neither new nor diminished. Indeed, the current political challenges to important constitutional cases — abortion, busing, prayer in the schools — have caused the selection of judges to become a hot political issue.

This new or revived attention is beginning to make a difference. Take, for example, Joseph Rodriguez, New Jersey's Public Advocate. Following his nomination, he was subjected to a test of his "liberal" philosophies. Some members of the Senate Judiciary Committee sent an eight page questionnaire to Rodriguez, asking him to spell out his opinions on the Equal Rights Amendment, abortion, the death



Abner J. Mikva

penalty and school prayer. The questions did not address Rodriguez's general philosophy, but rather sought answers that would indicate the way Rodriguez would decide cases that raised certain issues.

The Senators also sought a list of all political contributions Rodriguez had ever made as well as a list of all organizations to which Rodriguez had ever belonged. Rodriguez deftly filled out the questionnaire without answering a single question. Surprisingly, the Senators backed off, possibly sensing that the questionnaire raised more serious questions about judicial independence than about Mr. Rodriguez's qualifications. Rodriguez was eventually confirmed.

One local nominee was blocked, however, even though his professional credentials were impeccable, and even though he had performed brilliantly in a public office, building a deserved reputation as a hard-liner in the criminal justice field — because he had contributed to gun control organizations and financially supported pro-choice candidates for public office. Another potential judicial nominee was shot down early, even though both of his state's Senators supported him, apparently because he had served too well as a public defender.

Is this substantive screening by the Senate and by other political

To Simplistic Political Litmus Tests

by Judge Abner J. Mikva

forces a new phenomenon? Only since 1795. George Washington was unable to obtain the confirmation of one of his nominees to the Supreme Court for similar reasons. Washington nominated former Justice John Rutledge for Chief Justice of the United States. Unfortunately, a few weeks after his nomination, Rutledge attacked the Jay Treaty, which was designed by Washington. To the Federalists, who strongly supported the treaty, Rutledge's opposition called into question his views on foreign policy — whatever that had to do with his capacity to serve as Chief Justice of the United States. After a bitter debate, the Senate refused to confirm Rutledge.

The desire to install likeminded judges also transcends party and political labels. During the confirmation hearings of Justice John Paul Stevens, Senator Kennedy pressed Stevens for his views on numerous topics. At one point he asked: "As a private citizen, what are your views on the Equal Rights Amendment?"

Is this a politicization of the Court system? Is it bad? Is it new, or getting worse? Is it avoidable? The answers are as complicated as the interplay between the three branches of government, and I cannot give you any precise answers. Let me give you instead some highly *obiter dicta*.

First of all, the questions raise another question. What kind of judiciary do we want? The major pronouncements of our federal courts — the ones that most directly affect the social and economic life of the nation — those decisions unavoidably have political impact. Over 100 years ago, Alexis de Tocqueville commented that "there is hardly a political question in the United States which does not sooner or later turn into a judicial one." We expect judges to be impartial, but our courts are not isolated from the political domain.

We do not want judges who are

completely devoid of political content, for that means they have spent no time in the mainstream of American life and have no connection with the hearts and minds of the American people. Being detached from day-to-day partisan affairs is one thing; being wholly divorced from the world of real people is something else. Judges need to know something about legal theory, but they also need to know something about the real world.

If we acknowledge that politics and the judiciary have some enduring connection, why not use litmus tests — like abortion, prayer in the schools, the Equal Rights Amendment — to determine the political leanings of potential judges? Many people argue that lit-

What a president may not do is use the nomination process as a means to amend the Constitution . . .

mus tests are simply a new way of doing what Presidents and Senators have always done. The problem with litmus tests is that they aim at much more than just an assessment of political views or preferences.

A president may certainly nominate judges who share his world view. What a president may not do is use the nomination process as a means to amend the Constitution or recast important constitutional precedents. A President may want judges who start out sharing his values. What he ought not seek is judges who forget or are willing to forgo the anti-majoritarian purpose of the Bill of Rights.

The line we are concerned about in judicial selection is between a judge who constantly remembers who appointed him and a judge who remembers that popular decisions

can be made easily by the popular branches of government, but that his function is to protect minority rights from majority passions. By minorities I mean not only racial, religious and political groupings — I include every defendant in every criminal case. Think of any important criminal law precedent where a constitutional right was upheld. Every one of these cases would have been decided differently if the decision had been by referendum — *Miranda*, *Monte Durham*, *Mapp v. Ohio*, *Escobedo*, *Gideon*.

And that is why the Senate, as the reflector of popular will, must also be circumscribed in its inquiries. What the Senate ought not do is determine, through questioning, a nominee's views on emerging constitutional doctrine, on issues likely to face courts in the near future. Why? Because these questions are really a signal to a nominee that he will become a judge only if he promises to be obsequious, to be a yes man to the powers that be.

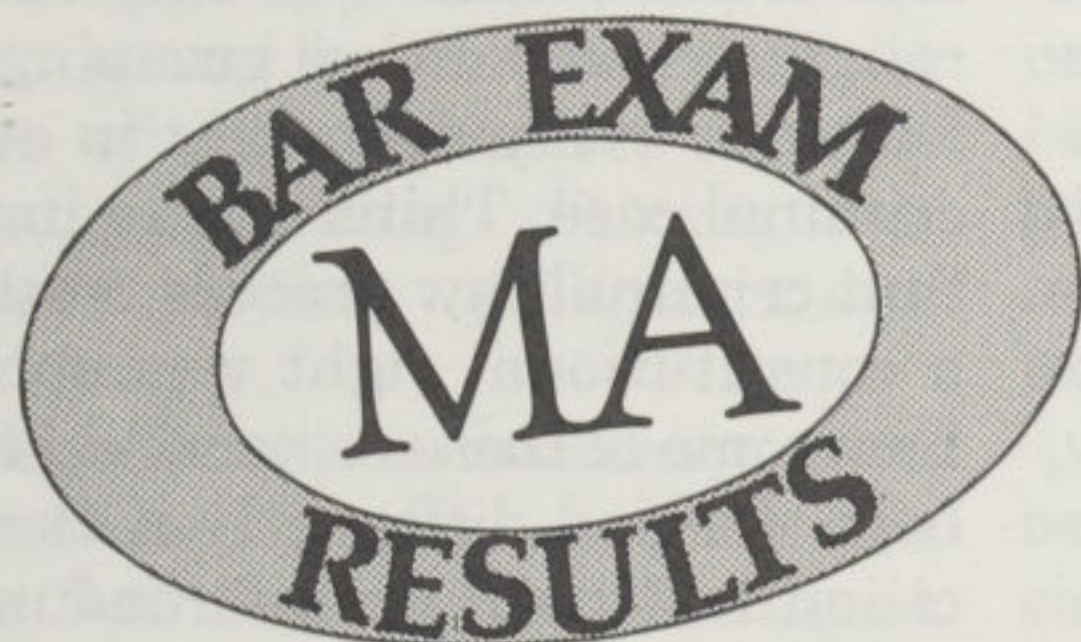
The Constitution clearly does not permit the judiciary to be a subdivision of the Senate, nor judges to serve as inferior officers to the President. Just as the President must not seek to influence the independent and frequently unpopular judgments of the judges, the Senate also cannot use its confirmation power to create judicial I.O.U.s

I am also disturbed by another message of these judicial I.O.U.s. I think that when we ask prospective judges their views on an issue likely to arise in the future, we are locking those judges into a position. Today's litmus tests tell nominees that when the question is abortion, the answer is no, and when the question is prayer, the answer is yes. Do we want judges who have decided the outcome of a case even before looking at its facts? Do we want judges who disregard statutes and regulations to reach a particular result?

(Continued on Page 19)

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Governing Boards Approve Tenure For Four

(Continued from Page 1)

ers believe only one more assistant professor is scheduled to be considered for tenure this year — Clare Dalton, whose decision was postponed two years ago until this year.

Additionally, the appointments signal the near end of the protracted disposition of tenure decisions on the large assistant professor classes appointed four to six years ago. Although six professors were in this year's "class," typically only one to three assistant professorship appointments are made annually. Fallon commented that the decline in assistant professor appointments will allow the law school to maintain its "generous promotion process" in which "the presumption" is that an assistant professor will receive tenure.

With more candidates, Fallon suggested, "excess strain" is placed on the promotion system. This strain, Fallon believes, will be alleviated as fewer assistant professors come up for tenure each year.

Indeed, next year only two professors are slated for consideration — Assistant Professors Randall Kennedy and Terry Fisher. Thus, it is possible that tenure decisions will become increasingly less controversial in the future.

Even now, the unanimous decision on Kennedy's appointment indicates that much of the furor over tenure questions has subsided. Some observers had predicted, apparently erroneously, that Kennedy would be identified with the left-leaning Critical Legal Studies (CLS) movement and that his tenure decision would consequently be hotly contested. Instead, Kennedy's appointment, particularly in light of the lack of division over the other four decisions, appears to vindicate Professor Derrick Bell's belief that tenure decisions will be less rancor-filled this year and his statement to the *Harvard Crimson* that the faculty this year is "a little wiser and a little more humble about what it is we are doing."

For each of the professors, the decisions mark the culmination of

a tenure process lasting roughly four to six years. During most of that time, a professor's scholarly and teaching abilities are intensely scrutinized by the faculty — with the result that a great deal of anxiety ensues, Fallon said.

Moreover, anxiety exists to a greater extent in the HLS faculty than in other Harvard faculties because of the generous promotion policy here. As Fallon notes, in most faculties, an assistant professor merely "hopes against the odds that he gets tenure" and is not surprised if he does not. At HLS, however, failure to receive tenure "is more along the lines of being fired; it's tougher to land on your feet if you don't make it," Fallon said.

Kennedy Appointment

The latest appointee, David Kennedy, is the John Harvey Gregory Lecturer on World Organizations. He was graduated from HLS in 1980 and received a Ph.D. from Tufts University's Fletcher School of Law and Diplomacy in 1984. Besides his stint at HLS, Kennedy has lectured jointly at the Institute for International Law at Kiel University and the Institute for International Affairs at Hamburg University in West Germany.

Since 1977, Kennedy has served as a consultant to various projects involving international law and international non-profit organizations, including work for the United Na-

tions High Commissioner for Refugees and European Communities Legal Service. Kennedy's extensive scholarship has focused on international law. Upcoming works include *Sources of International Law* to be published in the American University Journal of International Law, and a forthcoming book entitled *International Legal Structures*.

At HLS last year, Kennedy taught evidence and two international law courses. In Board of Student Advisors (BSA) reviews, students emphasized Kennedy's strengths in analyzing theoretical issues and responding to student concerns. According to the review of his evidence class, "student comments concerning Professor Kennedy's approach to the class were generally positive."

When asked about his response to the tenure decision, Kennedy stated that since the matter is confidential until the vote of the Governing Boards, he could make no comment.

A constitutional law scholar, Fallon has taught courses in constitutional law, constitutional theory, federal courts, and the First Amendment at HLS since 1982.

Fallon has published articles about the concept of "merit" and its relevance to antidiscrimination. He is currently at work on an article about how various types of constitutional arguments — for example,

(Continued on Page 17)

**Next RECORD:
February 6, 1987**

Have A Nice January!

Plaintiffs Plan Private Actions Against Boesky

(Continued on Page 7)

General Foods and Union Carbide, *The Wall Street Journal* reported in November.

Vagts said corporate takeovers, in which risk arbitrageurs often have participated, "have on balance probably generated some net value" by bringing more efficient managers to the helm of some firms, but he cautioned that "the price has been very high." Corporate resources have been wasted on fees to lawyers and investment bankers and on risk arbitrageurs' profits, he added.

"There is some evidence that the firms being taken over are above average performers" rather than the least efficient companies, he said, so even good managers suffer from "anxiety of takeovers."



Suzanne Jackson

Visiting Professor Reiner Kraakman

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Reader's Forum

Tax Letter Lets You Protest U.S. Policy

The following is a special New Year's gift from the Committee on Central America:

Tax Resister Kit

INSTRUCTIONS: (For students and others with low or no income.)

1. Obtain an IRS Tax Form (1040, 1040a, or 1040EZ)

2. Fill in your Name, Address, Social Security Number, Signature and Date on the tax form.

3. Place a large "X" over the remainder of the form and write: "See attached Letter."

4. Read the "Tax Resister" letter. Add to or delete from the letter as desired, include additional pages if necessary.

5. Expect to receive threatening letters from the IRS, but since you don't owe taxes you needn't worry.

6. Encourage friends, students and family to become conscientious tax resisters.

NOTE: This form of protest is not recommended if you expect a tax refund from the IRS.

LETTER:

January 1, 1987

Commissioner

Internal Revenue Service

Washington, D.C. 20001

Sir:

It is my sincere belief that during the past year the United States government has engaged in certain activities which constitute crimes against peace, breaches of international treaties, and violations of the Constitution. As I understand international law, if I now willingly contribute to my government's treasury — knowing that my government uses that treasury to commit the acts which I believe to be criminal — then I become a party to those crimes. Whereas my conscience forbids such participation in criminal conspiracy, I herewith notify you of my intention not to pay federal income taxes for 1986.

This action is not taken lightly, but follows considerable deliberation over its causes and consequences. However, I am a law-abiding citizen and, based upon my right and duty to oppose the government when it violates the Constitution, I believe this action to be one of civil obedience, not disobedience. Therefore, to support my claim that this action is reasonable and justified, I submit the following:

First, in any conflict between a duly enacted statute, e.g., the tax law, and the Constitution, the Constitution is the "supreme law of the land."

Second, under the Constitution, any international treaties ratified by the Senate and signed by the President are the "supreme law of the land."

Third, article 2(4) of the Charter of the United Nations, which has been ratified by the Senate and signed by the President, legally binds the leaders of this government to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence

of any state, or in any other manner inconsistent with the purposes of the United Nations."

Fourth, the only exception to this prohibition against the "threat or use of force" is "self-defense if an armed attack occurs."

Fifth, Nicaragua is a sovereign state enjoying full diplomatic relations with both the United States and the United Nations.

Sixth, the United States has never been attacked by Nicaragua and is not at war with Nicaragua.

Seventh, both the Congress and the President of the United States have authorized funds to arm, train and equip insurgents attempting to violently overthrow the government and the Constitution of Nicaragua.

Eighth, the International Court of Justice, on June 27, 1986, found the United States guilty of violating international law by arming, training and equipping Nicaraguan insurgents.

Tenth, one of the legally-binding purposes of the United Nations is to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."

Eleventh, under the principles established by the Nuremberg Tribunal and adopted by the General assembly of the United Nations, "individuals have international duties which transcend the national obligations of obedience imposed by the individual State" and may be criminally answerable for crimes committed by their government when acting as "organs of the State." That the individual is acting "pursuant to an order of his government or of a superior shall not free him [or her] from responsibility."

Twelfth, the United States adopted the Nuremberg principles in the U.S. Army Field Manual 27-10: "any person, whether a

member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment. . . . Complicity in the commission of crimes against peace, crimes against humanity, and war crimes [is] punishable."

Thirteenth, citizens who reasonably believe that their government is violating international law can absolve themselves of individual liability only by ceasing to act as "organs of the State."

Fourteenth, citizens act as "organs of the State" in the role of taxpayer.

Fifteenth, where a citizen acts as an "organ of the State" solely as a taxpayer, and tax revenues are funding criminal international activities, he or she must cease to pay taxes or be in violation of international law.

Sixteenth, in such a situation, the Constitutional duty to obey international law as the "supreme law of the land" supersedes the statutory duty to pay income taxes.

In summary, the United States government is currently financing an insurgency in Nicaragua. Since Congress has not declared war and the President has made no declaration of War Powers, our government's activities violate the political sovereignty of Nicaragua, the Charter of the United Nations and the Constitution. Such actions are crimes against peace. Under the Nuremberg Principles, as a citizen of a nation committing crimes against peace, I am personally liable if I am involved, in any way, in the commission of the illegal acts. Because I am a taxpayer and tax revenues provide the funding for the unlawful acts, I am involved. Therefore, to separate myself from the criminal acts of my government, I cease to serve as a taxpayer of the State until the criminal acts stop.

Sincerely,
(Signature)

✽

Fallon Dines At Ground Round

(Continued from Page 15)

arguments about the Constitution's framers' intent, about the meaning of prior judicial precedent, and about moral and policy values — fit together in a constitutional interpretation.

Fallon graduated from Yale Law School in 1980. In 1980-81, he clerked in the D.C. Circuit for U.S. Appeals Judge J. Skelly Wright. He then served as a law clerk to U.S. Supreme Court Justice Lewis F. Powell Jr.

BSA evaluations of Fallon's fed-

eral courts and constitutional law classes rate him as one of the best teachers at HLS. "Virtually all of those responding found Fallon to be a superb teacher, rating him anywhere from one of the best to the gem of the faculty," the guide declares.

Fallon professes to be both relieved and delighted at the news, but did not do much to celebrate the news. "I went to the Ground Round instead of Burger King so I could get a beer instead of a Pepsi," he said. "And then I went in to teach the next day."

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Off the Record Continued

Restraint Should Govern Confirmation Procedure

(Continued from Page 13)

The constitutional prohibition on advisory opinions tells us that justice is achieved by well-informed, concrete decisions, rather than by mere hypothetical speculation.

There is still another defect to the litmus test approach to picking and confirming judges. The test is always about a single ailment — a single cause. It tells you little about the rest of the corpus. What must be avoided is the selection of a nominee based solely on how he or she would decide a particular issue. Judges are appointed for life. No one can really predict what issues will be important in ten or twenty years. Andrew Jackson wanted to appoint a justice who would oppose the Bank of the United States. He found him in Roger Taney. Twenty years after President Jackson left office, Chief Justice Taney was still around to author the *Dred Scott* opinion. President Jackson's appointee almost succeeded in throwing out the Union with the Bank.

I would like to raise one last difficulty with the over-involvement of popular concerns and institutions in judicial selections. We can agree that judges and the appointment process are not without political content, but to be effective, courts must operate outside of the political sphere. The Supreme Court's mandates are obeyed not because of police in the streets but because of public perceptions of the Court's legitimacy. When the Court is perceived as an apolitical, wise and impartial tribunal, the American people have evinced a willingness to abide by its decisions. But if the Court is viewed as simply a Congress in black robes, the Court's ability to perform its constitutional function is threatened.

What should a wise President and a forbearing Senate do in the best of worlds? I believe close examination should be made of potential jurists.

It is perfectly fair for presidents

and senators to seek judges who share their view of the role of government in American life, who in the long run will do what presidents and senators believe is best. But to assess this compatibility, it is not merely unnecessary, it is patently offensive, to ask of a potential judge what he or she will decide in a future case. Nominees usually have made a public record, whether in past decisions, in writings, or in speeches.

The litmus test, then, of a good appointment and confirmation procedure is restraint. There ought to be executive restraint — while the President is entitled to appoint people he likes and respects, he ought not exact or expect any pledge of fealty to the Chief. Some of the best of Justices and judges have confounded their appointers, whether we talk of John Marshall or Earl Warren or William Brennan. There ought to be senatorial restraint. The Senators may have understandable curiosity about the candidate's views on the hot issues of the day. They can look but they better not touch.

And the nominees themselves must exercise restraint. Knowing which questions are properly posed to a nominee, and which are not, is perhaps the best litmus test of the qualities we want in a judge. What a nominee will decide in a particular case tells us nothing about the nominee's judgment. But the refusal to respond to improper questions, invoking, as Senator Ervin once said, the "judicial fifth

amendment," tells us that this nominee possesses the independence and courage we ought to want in our judges. And history tells us that when Senators display restraint and respect, and when nominees display good judgment, confirmation will not be denied. Felix Frankfurter, Sandra Day O'Connor, Thurgood Marshall, and Joseph Rodriguez all refused to answer certain questions; all were confirmed.

Mostly, we come back to the questions of the beginning. Do we really want a "popular" judiciary? Do we want a judiciary that has no strong views on anything, except the importance of being confirmed? I think not. What we want are women and men with integrity, with wisdom, with good judgment, and with the strength to take unpopular positions. I think that nominees who would answer the current breed of litmus tests lack these necessary qualities.

When Abraham Lincoln sought to appoint a Justice, he wanted a person with certain views, but he knew better than to ask. Instead, Lincoln said:

"We cannot ask a man what he will do, and if we should and he should answer us, we should despise him for it."

Lincoln understood the complicated process of judge-picking. ❧

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"BETTER BUYS AT BRINE'S"

Letters to the Editor (Continued)

(Continued from Page 11)

The University's Facts

To the Editors:

Recent editions of the RECORD contained articles about union organizing attempts at Harvard. There were a number of errors of fact in these articles, and I want to correct several of the more glaring ones.

1. The November 7 article stated that "Harvard secretaries earn in the upper-\$14,000 to \$15,000 range while those in private industries earn about \$18,000. . ." In fact, the average Harvard Secretary/Staff Assistant salary is over \$17,000.

2. The article identified as a "major issue" the need for "the establishment of a grievance system. . ." In fact, Harvard support staff has had the protection of a true grievance system for over a decade. Over 100 individual staff members have utilized the procedure, which includes access to impartial arbitration without cost to the staff member. Well over half of these cases were decided in favor of or resolved to the satisfaction of the staff member.

3. The article noted that "the annual turnover among clerical and technical workers is 40 percent." In fact, for the academic year ending last June 30, the annual turnover of support staff was 26.0 percent; in the Law School, it was 21.5 percent.

Daniel D. Cantor, Director
Harvard University Personnel Office

Lowly Outsider Hopes To Live

To the Editors:

Even though I'm [a] lowly outsider (Rutgers-Newark Law School '73) I feel called

upon to respond to your article on "passive smoking" (Dec. 5, 1986). I wonder if in this great land of ours we have a constitutional (pardon the pun) right to breathe. Apparently not. Hopefully some civic minded person cognizant of the Surgeon General's decree about the grave dangers of smoking, will press the court system to address the issue.

As one who has labored 10 years in a New York City office with a chain smoker, I applaud any effort to preserve life.

William A. Kanengiser, Esq.
West Orange, NJ

Upton Intends No Chill

To the Editors:

I will not respond to all the points raised in Doug Hagerman's letter. I do, however, want to go on record as stating that I have never prohibited any student group from inviting a speaker of their choice. I have raised issues about security but that was in no way meant to have the "chilling effect" to which Mr. Hagerman refers.

As a matter of fact, it is a clear policy of the School to permit anyone invited to speak at the School to do so.

Mary D. Upton
Dean of Students

Labor Lawyers "Hired Guns"

To the Editors:

I graduated from Harvard Law School in 1951. For the last nineteen years I have

spent most of my time as an arbitrator in labor grievances.

Counsel from Seyfarth, Shaw, Fairwether & Geraldson have appeared before me on several occasions. Without exception, the positions taken by them at their hearings have been justified and reasonable, and the conduct of their members was competent, ethical, and justifiable. I have found that they have accepted their wins and losses with equal grace. Nothing more can be expected of any lawyer.

The criticisms leveled against them by some of the students at the law school are grossly unfair.

Labor law is almost unique in the practice of law in that labor lawyers are generally considered to represent management or unions out of deep philosophical conviction. The truth of the matter is that they are "hired guns" as is anyone else in the adversary system. Labor lawyers could represent either side with equal ease but because of public perception are rarely given the opportunity.

Gerald Cohen '51
St. Louis, Missouri

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