



Harvard Law Record

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25 CENTS



Sal Casente

Coffee Shop Manager Brian Powers mans the helm of the robbery site.

Harkness Coffee Shop Robbed

By Marla Becker

An undisclosed amount of money was stolen from the HLS coffee shop, known as the "Hark Box Cafe," during the night of Wednesday, September 23. It was the first theft to occur at the coffee shop.

Brian Powers, 3L, the manager of the coffee shop, said that the theft could have been avoided, observing that "there were procedures that should have been followed but weren't; we should have taken more precautions than we did. Someone caught wind of the fact that operations weren't being followed, and this happened."

Powers added that the Harvard University Police Department (HUPD) is currently investigating the theft.

The theft was discovered by Harry Bader, 3L, an employee of the coffee shop and the person responsible for closing the coffee shop at night and opening it up in the morning. According to Powers, the theft occurred after closing at 5 p.m. Wednesday but before 6:45 a.m. Thursday, when Bader opened up the coffee shop. Dormitory and Student Affairs Council (DSAC) Business Manager Raul Carrillo, 3L, added that he

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Teach-In Pulls Packed Crowd

By Troy Morgan

HLS Professors Richard Parker '70, Martha Minow, Frank Michelman '60, Alan Dershowitz, and Assistant Professor Randall Kennedy sharply criticized Judge Robert H. Bork at a forum September 29. The "Teach-in" drew an overflow crowd of students to Langdell North Middle.

The underlying theme of the meeting was that, solely because of his character flaws, Bork is not qualified to sit on the Supreme Court, regardless of his professional credentials. Minow and Kennedy expressed concern that Bork is not positively dedicated to civil rights as such rights affect women, blacks and other minorities. Kennedy attacked Bork's ethics, stating that Bork does not "embrace the *spirit of Brown v. Board of Education*." Michelman called Bork's doctrine of "original intent" "intellectually bankrupt," and said that Bork's lack of "judicial moral consciousness is something to fear."

Distaste and Distrust

Tuesday's "Teach-in" was only one manifestation of the open hostility that many HLS professors harbor toward Bork's nomination.

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Government Should Attack Woes, Democrats Say

By David Snouffer

Campaigners for six Democratic presidential hopefuls told about 50 HLS students last week that under each of their candidates' leadership the federal government would get more involved in solving the nation's problems. Several of the speakers also promised rewarding experiences to students who join their campaigns. The six campaign representatives, all but one of whom were full-time staff members in New England, spoke on September 23 in Pound Hall at a forum sponsored by the HLS Democrats.

Represented at the forum were former Arizona Gov. Bruce Babbitt '65, Massachusetts Gov. Michael Dukakis '60, Rep. Richard Gephardt (D-Mo.), Sen. Albert Gore (D-Tenn.), the Rev. Jesse Jackson and Sen. Paul Simon (D-Ill.). Sen. Joseph Biden (D-Del.) withdrew from the presidential race while the forum was being held, so his campaign scrapped plans to send a speaker. Rep. Patricia Schroeder (D-Colo.), who was then considering a run for the White House, declined the HLS Democrats' invitation to send a campaign representative.

Issue of Education

The speakers all called for a greater federal commitment to education. Speaking for Dukakis, Roger Ballentine, 3L, said an "insufficient intellectual base" has helped produce the nation's trade deficit. Jackson's representative, May Louie, said the civil rights leader favors more federal money for student financial aid.

Susan Calagari, who works for Babbitt, said education should be a "lifetime experience." Babbitt advocates federal assistance to parents in the form of day care tuition, she said, because some children have been "lost" by age 5. Babbitt also favors federal support for adult retraining, she added. Speaking for Gephardt, Kevin Keefe said the congressman also supports job training and would make education a "national goal."

Simon believes better foreign language skills would greatly improve Americans' education, according to Simon campaigner Mark Wagoner. "Think of what a different country this would be if [President] Reagan and [Soviet Communist Party leader Mikhail] Gorbachev had participated in an exchange program," Wagoner said.

As a legislator in Illinois, Simon championed civil rights legislation and was "in the forefront of minority education," Wagoner stated. In Congress, Simon "has been on the forefront of Democratic ideals," he added. Prepared to take unpopular positions, Simon opposed the tax reform legislation of 1986 and has promoted greater regulation to curb acid rain, Wagoner said.

Economics and Electability

In Arizona, Babbitt persuaded a generally conservative electorate to accept his more liberal agenda, Calagari said. Babbitt especially advanced children's interests, she added, but managed to balance nine state budgets.

A committed environmentalist from "the Grand Canyon state," Babbitt seeks to strengthen the economy by promoting workers' democracy in the corporate world, Calagari said. He would encourage profit sharing at all levels of business, she added.

Babbitt's proposal for a progressive consumption tax "took courage," Calagari said. "He's the only candidate in the race who isn't afraid to use the word 't-a-x,'" she added.

The only active duty Vietnam veteran in the race, Gore favors "family values and a return to the rule of law in the White House," said Glenn Tobin, a Gore campaign aide. Gore is a "national expert" on arms control, Tobin said, and also knows a lot about a major environmental concern, the world's deteriorating ozone layer.

But Tobin stressed what he called Gore's "electability." Gore is a southerner, and the South "is a swing area," Tobin said.

Jackson believes the federal government has an obligation to see that Americans have adequate food and shelter, a clean environment and no threat of nuclear war, Louie said. He favors expanded rights for women, she said, and thinks the government could overcome foreign policy problems if it cooperated more with other countries.

Dukakis deserves a share of the credit for the "tremendous turnaround" in New England's economy, said Ballentine, a volunteer in the Dukakis effort. Dukakis hopes to bring economic success to the whole country by promoting "joint ventures" between government and the private sector, he said.

The son of Greek immigrants, Dukakis "deeply cares about how society treats all its members" and favors "economic justice for all Americans," Ballentine said.

Keefe stressed Gephardt's ability to garner support nationally. He also defended Gephardt's call for trade sanctions against other countries that have large trade surpluses with the United States. Gephardt believes sanctions may be appropriate in the event that U.S. officials determine that those countries have engaged in a pattern of unfair trade practices to keep out U.S. exports and the countries refuse to end the practices or curb their trade surpluses with the United States.

Gephardt "is not a protectionist. He's for fairness," Keefe said. Because other countries have closed their markets, the United States does not now enjoy free trade, he asserted.

But representatives of Babbitt, Dukakis and Gore all said that Gephardt's proposal would create new problems, rather than solve old ones. Louie said Jackson blames U.S. multinational corporations, more than foreign countries, for U.S. trade woes, because those companies have closed factories in the United States and then opened new operations in Asian countries.

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Estrich Dumps Crim Law For Dukakis

By Lauren Ruby

Students planning on taking Professor Susan Estrich '77's Advanced Criminal Law course, scheduled for the spring of 1988, were surprised, upon returning to campus, to find a blank space and four credits missing on their revised course schedules. The administration told those who inquired that Estrich would teach in the fall of 1987, but had decided to take a leave of absence in the spring in order to work on the presidential campaign of Gov. Michael Dukakis '60.

Estrich did not teach last year; 1986-87 was the first of two years for which she had requested a leave of absence. She spent last year practicing law in California. Estrich also served as the deputy manager of the Dukakis campaign during the spring and summer of 1987.

Estrich decided in the first few months of 1987 that she wanted to return to HLS for the 1987-1988

school year, and it was decided then that she would teach Sex Discrimination and Election Law in the fall and Advanced Criminal Law and the other half of Election Law in the spring. She will continue to participate in the campaign throughout the last four months of 1987, but in the reduced capacity of senior advisor. She plans to resume her post as deputy campaign manager in January 1988.

"[HLS Dean] Jim Vorenberg '51] and I discussed how I was going to balance two commitments — a long-term commitment to Harvard Law School and a short-term commitment to Mike Dukakis," Estrich said. "My hopes of being able to juggle a campaign and teaching just couldn't work out. As a result, I am teaching a full course load in the fall, but I will not be teaching any classes in the spring. Advanced Criminal Law was dropped simply because it fell into the spring schedule," she added.

Vice-Dean David Smith '61 told the RECORD that only two students who registered for the course had complained to the administration. Two other students did contact Estrich directly, Estrich noted.

"I asked the students how Estrich's course was different from the other advanced criminal law courses and seminars offered at HLS, and I reached the conclusion that her departure would in fact leave a gap in the curriculum," Smith recalled. "The Dean has since spoken with Max Stern, who is a criminal lawyer in Boston and has taught here in the past. It was decided this week that Mr. Stern will teach a course in the spring along the lines of Susan Estrich's course. There is no title yet, but a course description will be published in about two weeks. We intend that the course deal with advanced criminal law, both substantive and procedural," Smith added.

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Forum Will Host Giuliani And Yamani

By Greg Herbert

The fall schedule of the HLS Forum is sure to arouse plenty of interest, and, as usual, some controversy. American journalists and foreign leaders, always a staple of the Forum, once again highlight the annual lecture series.

In addition, the Forum has changed its usual solo-speaker format for at least one scheduled event, a panel discussion of affirmative action issues featuring HLS Professor Alan Dershowitz and Cambridge politician Mel King. "I'm glad to see the Forum branching out and trying new things," said Program Assistant Pattie Millett, 3L.

The Forum, a student-run organization that brings a variety of speakers to HLS each fall, kicked off its 1987 schedule last week with journalist/author Linda Ellerbee. In her talk Ellerbee praised CBS White House correspondent Lesley Stahl as one of the journalists she most

admires. Stahl will have a chance to return the compliment November 2, as she is, coincidentally, the next journalist to speak for the Forum.

Cable News Network talk show host Larry King, usually on the receiving end of broadcast conversations, is the other television personality taking the microphone for the Forum this fall.

Former *contra* leader Arturo Cruz, scheduled to speak November 19, will likely spark the most controversy among Forum audiences this fall. Cruz, who before defecting to the *contras* was a Sandinista Ambassador to the United States, will speak on "Peace and Democracy in Nicaragua."

Millett and Forum President Fiona Branton, 3L, recognize the potential conflict that Cruz's presence might incite, especially in light of recent controversy concerning proposed Central American peace plans and further U.S. funding of the *contras*. Branton, however, anticipates that Cruz's impact will be

minimized because, as she put it, "he's been on both sides of the Nicaraguan conflict, and now he claims to be neutral."

In addition, *contra* leader Adolfo Calero is speaking for the Harvard Republicans this week, and may deflect some attention away from Cruz.

No Precautions Planned

The Forum officers have not planned any precautions for the Cruz talk as of yet, according to Branton. "We'll have to see what kind of response Calero gets and act accordingly," Branton said.

The Forum is no stranger to controversy. Last year's speakers faced varying levels of audience hostility ranging from organized protests to mid-speech shouts of "murderer" and "racist" from listeners.

Perhaps the most heated arguments of last year occurred during

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Sander Finds New Challenges As Associate Dean

By David Snouffer

HLS Professor Frank Sander '52 said this week that his recent appointment as one of HLS's two associate deans comes at an "exciting" time highlighted by "a great deal of vital discussion around the school." HLS Dean James Vorenberg '51 named Sander in August to replace Professor Philip Heymann '60, who had been an associate dean since 1985. Professor Andrew Kaufman '54 has been an associate dean for the past year.

In assuming the position, Sander resigned from the HLS Administrative Board, which he chaired for over seven years.

As usual, the two associate deans will have the "central task" of putting together a teaching program for next year, Sander said.

"It's a daunting task," he stated, because the two administrators have to "mesh" the courses professors want to offer with those that students and the school need them to teach. Accommodating faculty leaves of absence complicates the job, he added.

"A lot of negotiating and ironing out needs to take place," Sander said.

Integration

Other issues facing the deans include whether to have more experimental integrated sections for first year students and whether to offer an integrated course for second and third year students, Sander said. Two of the four first year sections are experimental at present and are taught by professors who work closely with each other and try to harmonize the material of the five first year courses.

The law school offered an integrated course in corporate finance, corporate tax and secured transactions to second and third year students in spring 1986, and Sander said HLS may offer a joint course again next year.

Choosing professors for first year sections is "tricky," Sander said, because HLS administrators strive

to achieve a "balance of teaching styles" in each section. And finding professors for integrated sections is further complicated because the professors who participate "have to be people who are particularly anxious to work together," he said.

In recent weeks, several professors have criticized other members of the faculty for actions they took when the faculty considered two candidates for appointment last spring. Faculty divisions "add a little bit of greater challenge to the administration of the school,"

Sander said. "It's no secret that there are some disagreements and different points of view around here."

Sander joined the faculty to teach tax in 1959 and later taught courses in family law. In recent years, however, he has devoted most of his professional time to alternative dispute resolution and has abandoned the tax field entirely. He also has recently taught a legal profession class. Sander holds the HLS Bussey chair.

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Theft Garners Undisclosed Sum

(Continued from Page 1)

was in the Backbench Pub until about 1:30 a.m. when he helped a Harvard University Policeman lock up the bar and Harkness Commons. Carrillo said that he and the police officer checked to ensure that the windows, the Hark door leading to the underground tunnels, and the front and back doors to the Hark were locked.

Breaking & Entering

When asked how the perpetrator could have gotten into the Hark once it was closed, Carrillo responded that someone could have broken into one of the doors, that a door could have been left open by Harvard Security, that the perpetrator could have come in through one of the windows, could have hidden in the Hark late at night, or could have come into the building once it was open early the next morning.

Deputy Jeff Morse of the HUPD termed the occurrence a "breaking and entering," as opposed to a mere theft; he also stated that "some force was involved in the break-in." When asked if he believed that someone simply used a key to get into and out of the coffee shop, he responded that it "doesn't look like that right at the moment." He described the amount of money stolen as a "major loss."

When asked if the cash box, in which the coffee shop money was stored, was locked or if it was kept in a padlocked cabinet, DSAC President Scott Jacobs, 3L, responded, "The police have asked us not to comment on any aspect of coffee shop security." Carrillo added that the procedure before the theft was to count the money at the end of the night, lock it in the cash box, and lock the cash box in a cabinet. "That's normal operating procedure; that's the way it should have been," he added.

The cabinet apparently was locked with a padlock on the night of the theft, but, according to Carrillo, the lock could have been picked, broken into by prying off one of the side doors, or unlocked with a key. It is further possible that the padlock was not used or was left unlocked.

Investigation Pending

When asked if DSAC would conduct its own investigation or look into possible involvement in the theft by former or current employees, Jacobs said that "we're letting the police handle it. I was the coffee shop manager last year. As far as I know, we didn't have any problems last year with amounts of money being stolen. If it's true that there was no forced entry, that doesn't

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Pro-Bork Faculty Members Express Views

(Continued from Page 1)

Professor Laurence Tribe '66 cancelled his classes to testify before the Senate Judiciary Committee. Tribe's views were echoed by Professor Philip Heymann '60 in an Op-Ed piece in the *New York Times* (see "Off the Record"). Heymann stated that "Judge Bork's basic point that the Supreme Court has in numerous cases wrongly made it its business to protect individuals, minorities, dissenters, females, and others against majorities" is "a position that no one has chosen to defend."

Like others, Heymann has expressed distrust about Bork's moderate tone before the Senate, asking, "what risk should a senator be prepared to take that he or she is being given a Trojan horse?"

Both Sides' Views

Although Bork's opponents have been the most outspoken, a diversity of opinion does exist within the Harvard law faculty. Professor Richard Stewart, for example, despite having reservations about a number of Bork's views, said that he believes that "able and distinguished people should be confirmed even if they are controversial." He suggests that such a policy would be "better for the country in the long run."

Stewart pointed out that former Supreme Court Justices Brandeis, Hughes and Stone were also controversial nominees, Hughes and Stone being thought too conservative and Brandeis too liberal. Nonetheless, according to Stewart, "they all became distinguished justices."

In September, Stewart submitted a paper to the Senate Judiciary Committee that attempts to rectify what he called "distorted and inaccurate" interpretations of Bork's opinions on procedural and statutory issues as presented by the AFL-CIO, Ralph Nader's *Public Citizen* and the *Biden Report*.

Professor Mary Ann Glendon also said that she believes that Bork has



Kevin Reed

Professor Richard Parker criticized Judge Robert H. Bork's nomination to the Supreme Court at the "Teach-In."

not been given "a fair shake." In a memorandum to the Senate Judiciary Committee, Glendon protested that Bork has been a victim of a disinformation campaign aided by a "professorial elite." She argued that an examination of Bork's law review articles indicated that "Robert Bork as a Supreme Court Justice would be a strong supporter of women's rights."

She concluded that "as a judge, Bork has consistently joined in opinions vigorously enforcing the Equal Pay Act and other anti-discrimination statutes. As a scholar, he has explained his philosophical basis for doing so: 'individual rights are always most secure when they rest on the kind of consensus that emerges through the legislative process in a vital and self-confident democracy.'"

Glendon challenged Bork's opponents on "his supposed position on abortion." Glendon recalled that Bork "has been an outspoken opponent of what he regards as impermissible attempts to overturn the abortion cases, even testifying against a proposed Human Life

Bill." The significance behind these findings, according to Glendon, is that Bork's opponents have used his criticism of the *reasoning* in various decided cases as evidence of his dissatisfaction with the *result* and lack of sympathy for the parties involved.

Professor Hal Scott also thinks that Bork is "a reasonable choice by this administration." Scott believes that Bork is "not radical" and that his "moderate to moderate conservative" views are "within the range of the Republican Party." In general, Scott explained that his views echo those of Lloyd Cutler, counsel to former President Jimmy Carter, as stated in Cutler's testimony before the Senate.

For the "Bork Busters," Kennedy declared that the question of whether Bork is "in or out of the mainstream" says nothing. For him, what matters is "the substance of the stream." In the same strain, Minow stated that her opposition is "a matter of principle and in matters of principle I am not interested in playing these strategy games — we fight each battle as it comes."

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The Press, Biden, And Bimini

Recent cries of indiscretion and lack of restraint on the part of the press have been heard rising with particular clarity from the inner circles of one-time presidential candidate Senator Joseph Biden. The notion that somehow the press has overstepped its bounds by reporting the truth strangely echoes what was heard in another's camp upon the docking of a now famous slow boat to Bimini.

Peculiar is the notion that, to reporters, truth should exist in a gift-wrapped box full of goodness and light. Peculiar is this notion particularly in a country which prides itself on a free press. Such "truth" exists as the antithesis of this freedom. For whatever the result, the press accounts about Hart and Biden were quite simply the truth — hard fact and not the "fuzzy truth" campaign managers would rather they print.

The press has merely done its job and in so doing deserves neither blame nor credit. It is the American public that should answer this call, for it was not the press which forced these candidates to withdraw, but rather public opinion which forced this result. Neither should these men be considered martyrs, for it is not the first time that society has played judge and jury of those in the political arena. Ferraro and her family, Muskie and his tears, Eagleton and his shock treatments, and both John and Edward Kennedy with Marilyn Monroe and Mary Jo Kopechne, respectively, have fallen prey to the weight of society's mores.

And is society so wrong in its judgment of its most recent victim? It may be an understatement to say that what Americans want from a President is an honest Abe. Indeed, that does not seem too much to expect of a person who may potentially hold in his hands the wealth and perhaps the very life of this nation. To decide that someone who has admitted to cheating and plagiarizing may not be of honest character seems safe enough. What American wants to go through another Nixon? Majority opinion. And Biden withdraws from the race.

Yet this decision seems markedly different from one where the only reason a man is condemned is because of a society's subjective view of his marital morality. Whatever occurred aboard the Monkey Business is nobody's business but that of Mr. and Mrs. Hart and Donna Rice. It is difficult to justify the idea that one's choice of paramour clearly affects one's ability to lead a country. Minority opinion. The majority of Americans cannot, for whatever reason, draw this distinction. And Hart withdraws from the race.

Do not then criticize the press for reporting what it knows to the public. It is our responsibility in its simplest form to report what we know regardless of personal bias. Blame instead society for Gary Hart's condemnation and congratulate it for Biden's demise. The press merely printed what it knew. You did the rest.

T.M.F.

HARVARD LAW RECORD

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Fenno

Fenno could barely believe his eyes. He crouched lower behind the bushes at the base of the Whirly Tree in front of the Hark. The full moon in the clear September sky illuminated the nefarious scene.

Inside the cafe, a large form was visible, cramming all the Bageldogs within its grasp into the voluminous folds of its cloak. The thief moved on ... toward the ice-cream freezer. There, the dark figure poised but an instant and hoisted out two cases of fudge bars.

"Such rapidity for a big person," Fenno thought to himself. He considered his own lack of agility; his slender frame with extended belly led to unbalanced movement. Especially tonight, as the victory Fenno had gained at the Freshman chug-a-thon in the Yard had transformed the perpetual 3L into a tottering snail.

"Is this real or is it Memorex?" Fenno mused as he gazed at the still-moving form. By now, the criminal was approaching the cash register. It reached in and withdrew a fistful of cash.

"Omigosh, a real crime." Fenno was shocked. Attempt. Aid and abet. Misdemeanor. Felony. Phrases from years of crim. law assaulted Fenno's feeble brain. Suddenly, one clicked: the Reasonable Man.

Fenno knew what he, a reasonable man, would do. He sat and watched.

"The vigilant Harvard police will surely save the day," he thought. Yet from his cache, he saw the security guard snoozing contentedly in his booth.

"Well, I'm too drunk to do anything."

The figure sped out of the Cafe, carefully knocking over a few items, leaving a trail of nickels on the floor and opening the window before leaving and relocking the door.

Fenno watched the hulking thief lumber over to the Pub. It reached over and grabbed a keg of Meister Brau.

"Argh!" Fenno was gripped with the strength, clarity and conviction of ten Fennos, plus two. Vaulting the top of the Whirly, Fenno tackled the exiting form as it headed from the Hark toward ILS. He wrestled the keg from the thief and recaptured 3 Bageldogs. A thirst for justice filling his ever-dry mouth, Fenno turned over the strewn body to face the light.

"Jabba the Hut! Not you!!" With the scream still on his lips, Fenno fainted.

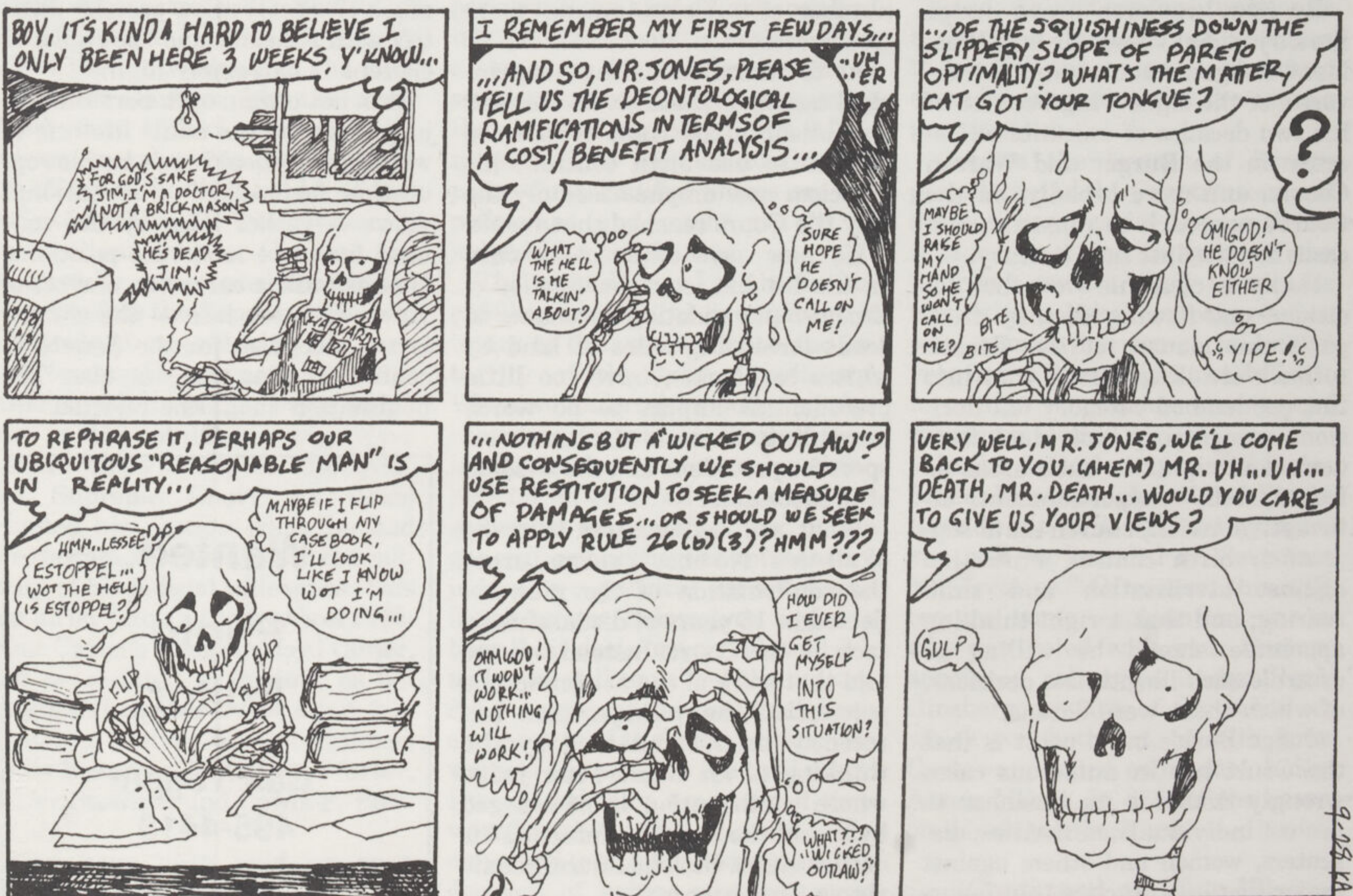
"Fenno, you did a fine job, risking yourself for HLS. I never thought I'd ever congratulate you for anything." The Dean smiled and stood over Fenno. He held a rubber mask in his hands — it was the only clue left by the thief.

"Fenno, in acknowledgment of your efforts, I'd like you to teach Criminal Process next term — Suzie left us in the lurch, as you know."

"No thanks, Jim. Just give me a brew," muttered our hero. ☞



by KA



CON: Will The Real Judge Bork Stand Up?

by Philip Heymann and Fred Wertheimer

Professor Philip B. Heymann '60 teaches criminal law and other courses at HLS. He is also senior counsel at Common Cause, of which Mr. Fred Wertheimer '62 is president. This Off the Record originally appeared in the Op. Ed. pages of the New York Times.

Who is the real Judge Robert H. Bork? And how should the Senate go about answering that question? Surprisingly, these have become the crucial issues in the fight over his confirmation.

At first, there was public debate about the propriety of the Senate's considering the political and ideological aspects of the nomination as it examined his radical judicial philosophy. Today, few deny the propriety of the Senate's basing confirmation on its estimate of what he would do on the Court in light of what he has written over the years.

By now, we have heard Judge Bork's judicial views. He was President Reagan's choice and the favorite of the right wing because of his two decades of uninhibited assault on the Burger and Warren Courts, and more broadly, on the Court's approach to constitutional cases for the last half century.

He made clear his view that decisions not flowing directly from particular clauses of the Constitution were illegitimate; that into this condemned category fell decisions recognizing individual freedoms and rights in such areas as free speech, reapportionment, affirmative action, church-state separation, birth control, protection against sterilization and child rearing; and that a right-thinking appointee should be willing to overrule such illegitimate decisions, of which there were dozens.

Judge Bork's basic point is that the Court has in numerous cases wrongly made it its business to protect individuals, minorities, dissenters, women and others against majorities — a practice that is jus-

tified, he says, only where the constitutional command is very clear. Constitutional language that the Court frequently has found warranting such protection is not clear enough for him.

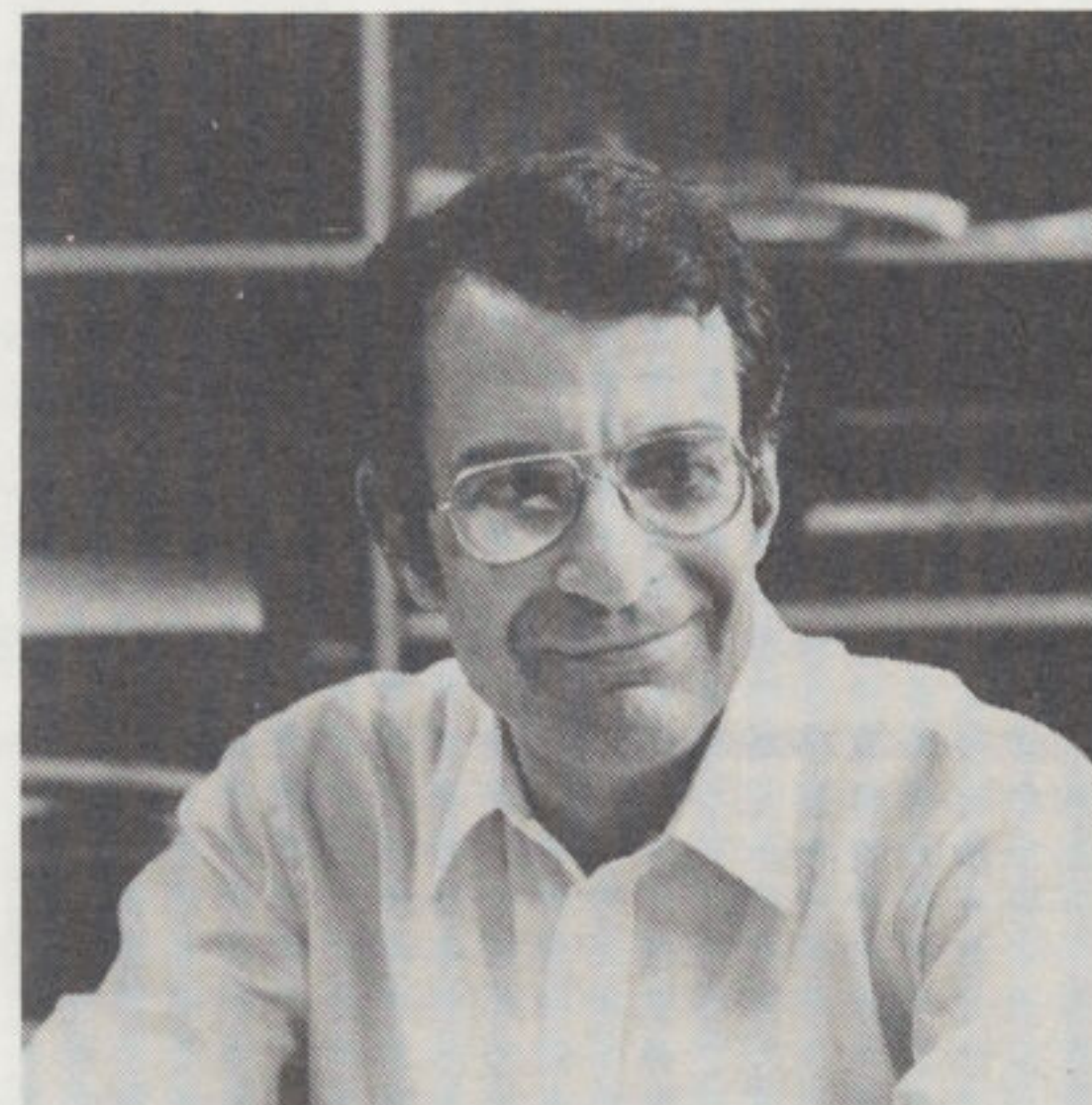
That is a position that no one has chosen to defend. The White House, Judge Bork himself and his Senate champions have all withdrawn from this field of battle. They have all but conceded that there can be no confirmation of a candidate committed to denying the Court its historic role as protector of the individual, the dissenter and of vulnerable groups. Thus, the debate about the Court's role ended not with a bang but a whimper.

Instead, we have been given a new, different Judge Bork — moderate, open-minded, within the mainstream, undogmatic. It turns out, we are told, that he has recently reconsidered his views about a number of subjects, among them free speech.

As to others, including his principal target, *Griswold v. Connecticut* (establishing the right of married couples to use birth control), his criticism now emphasizes only the way the Court reached that result.

He now says other cases once on his hit list, such as *Shelley v. Kraemer* (invalidating covenants in deeds forbidding sales of land by whites to blacks), have too little precedential impact to be worth overruling. There is also a new respect for precedent and the wisdom of predecessors.

What are the senators to make of all this? No one, it seems, urges the confirmation of the man reflected in 15 years of disdainful attack on the Court. Instead, we are told that work of the academic, the polemicist, the younger man has recently been supplanted by the thinking of an older, wiser judge whose confirmation is now urged by those who eagerly embraced his earlier views. But should the Senate risk a Trojan horse?



Prof. Phil Heymann '60

If we were in the Senate's place, surely we would all normally assume constancy of long-held views. It is not hard to explain the only contrary evidence: far more temperate testimony and interviews at this time.

The cost of guessing wrong and confirming a man who would undo much of what we now proudly identify with America and the rights of citizens is extremely high.

It is not unfair to Robert Bork to judge him by his adult lifetime of writing and speaking — by his reputation for radical constitutional views — rather than by the very new, far more moderate positions. He has built a career on one set of views. It is too late — the change is too recent — for the Senate to confirm him as someone else. The nomination should be rejected.

✽

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PRO: Bork Is Right Man For High Court!

by Orrin Hatch

The following comments of Sen. Orrin G. Hatch (R-Utah) were delivered at the start of the Senate confirmation hearings of Judge Bork on September 15, 1987.

At the outset of these hearings, I was going to give Judge Bork one suggestion on style, namely, be careful not to appear smarter than the senators on the Committee. But, on second thought, that might place severe restrictions on him from the very start.

In all seriousness, Mr. Chairman, I feel honored to welcome to the Committee one of the most qualified individuals ever nominated to serve on the Supreme Court. His resume — outstanding law student, successful trial practitioner, leading law professor, esteemed author and lecturer, excellent Solicitor General, and respected judge on the District of Columbia Circuit — speaks for itself. Nonetheless a few details might demonstrate the quality of his life's work. He was not merely one of the top students at the University of Chicago, but the managing editor of the Law Review. He was not merely a top law professor for 15 years, but the holder of two endowed chairs. He was not merely an excellent Solicitor General, but successfully represented the United States before the Supreme Court in hundreds of cases during his four-year tenure. He was not merely another appellate judge, but a judge who in 416 total cases was never once reversed on appeal. Moreover, the Supreme Court six times adopted his position when he had the courage to dissent from the majority of his judicial colleagues. This is a jurist who, in the words of President Carter's counsel, Lloyd Cutler, will be counted by history as belonging alongside a few select justices, like "Oliver Wendell Holmes, Louis Brandeis, Felix Frankfurter, Potter Stewart, and Lewis F. Powell, Jr."

You have been paid an even higher tribute than even that en-

dorsement, however, Judge Bork. That tribute is found in the witness list of those who have volunteered to testify on your behalf. That list includes a former President, a former chief justice, six former attorneys general of both parties, twelve top leaders of law enforcement officers, seven law school deans, twelve of the leading law professors in the nation, four top antitrust lawyers, three bar leaders, several of your former colleagues at the Department of Justice, and other influential lawyers and organization heads. If an individual can be judged by the company he keeps, you are unrivaled.

In light of these remarkable credentials, it is hard to understand why Judge Bork's nomination would generate controversy. The answer is found in one word, which is tragic in this judicial context, and that word is "politics." Judge Bork is experiencing the kind of innuendo and intrigue that usually accompanies a campaign for the Senate. Many senators are experienced at running that kind of campaign, but it has no place in a judicial nomination proceeding. Federal judges are not politicians and ought not to be judged like politicians.

The great danger I see in the impending ideological inquisition is injury to the independence and integrity of the federal judiciary. When we undertake to judge a judge according to political, rather than legal criteria, we have stripped the judicial office of all that makes it a distinct separated power. If the general public begins to measure judges by a political yardstick and if the judges themselves begin to base their decisions on political criteria, we will have lost the reasoning processes of the law which have served so well to check political fervor over the past two hundred years. I would ask any American if they would wish to have their life, liberty, and property resting on the decision of judges who are more

worried about what the newspaper might say about the case than they are about the life, liberty or property.

Recognizing precisely this danger, the Senate has refused to employ political litmus tests while confirming 53 justices over the past century. Senate precedent does not support subjecting judicial nominees to ideological inquisitions.

Moreover the Constitution itself does not support that practice. Based on the common sense observation that a diverse congressional body would have difficulty overcoming jealousies and politics to select the best candidate, the Framers in 1787 unanimously voted to vest the nomination power in the President. The Senate, however, was given a checking function. In the words of Alexander Hamilton, the advice and consent function was to prevent "nepotism" and "unfit characters." The advice and consent function is a checking function, not a license to control the outcome of future cases by overriding the President's prerogatives.

Despite the lessons of Senate precedent and the Constitution and despite the potential damage to the independence and integrity of the judiciary, we are likely to witness a bruising political campaign before your nomination comes to a final vote in the Senate. It is not difficult to outline in advance the type of campaign it will be.

In the first place, you will be labelled. Even though political litmus tests do not work well with judges, you will be branded an "extreme conservative." Of course, this will require some explanation as to why you voted with your Carter-appointed colleague, Judge Ruth Ginsberg, in 90% of the cases on which you both sat, or with your Carter-appointed colleague, Judge Abner Mikva, in 83% of the cases on which you both sat.

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Sen. Hatch Calls For Bork As Next Justice

(Continued from Page 11)

The next tactic will be to extract a few quotes from 15-year-old articles and ignore your judicial actions. For example, we have already heard allegations that you might allow censorship of free speech. In fact, anyone who wants to know your views on censorship would merely need to read your *Lebron* decision where you held that the D.C. Metro authorities violated Mr. Lebron's free speech rights by refusing to let him hang a poster that was extremely critical of President Reagan. You were even willing to allow the embarrassment of the President who appointed you to uphold Mr. Lebron's rights. In my mind, actions speak louder than words.

Another tactic will be to selectively use evidence. For instance, we have already seen criticisms that your *Dronenburg* decision denied homosexuals a special constitutional protection. The evidence that these critics consistently ignore is that the Supreme Court reached precisely the same result in the *Bowers v. Hardwick* case.

Still another tactic, familiar to political campaigns, is to accuse you of ethical violations. In that vein, we have heard too often about the Saturday Night Massacre. In fact, this was one of your finest hours. You were not the cause of Watergate, but you were part of the solution. As a precondition of carrying out the President's order, you gained a commitment that the investigation would go forth without further interference. You had to make a difficult decision on the spur of the moment. Even then you had to be convinced by Attorney General Richardson not to resign, but the evidence that your decision was correct is history. Because you preserved the investigation, the President was later forced to resign and several others were prosecuted. This performance deserves commendation, not criticism.

It will not end there. Inconsistent charges will be hurled at you. For example, you will be called both an

"extremist" and "the one likely to tip the balance." You cannot be both, unless those making the charge are actually saying that four other justices are already "extremists." Frankly, it is more likely that those making the charge are the extremists because the four other justices include one (White) appointed by President John Kennedy and two (Scalia and O'Connor) who were unanimously approved by the Senate. Consistency will not be a hallmark of this debate.

We could discuss likely political tactics for a long time. The important thing to remember is that these political charges betray themselves. As Hodding Carter, an official from the previous Democratic Administration, candidly observed:

"[The nomination of Judge Bork] forces liberals like me to confront a reality we don't want to confront, which is that we are depending in large part on the least democratic institution, with a small 'd,' in

government to defend what it is we no longer are able to win out there in the electorate."

This is the reason that politics are injected into this proceeding — because many politicians hope to win from unelected judges what they cannot win in Congress or with the people of America.

My fear, however, is that the price of a politicized judiciary is too high to pay in exchange for any short-term policy gains. If judges fear to uphold the Constitution due to political pressures or sense that their judicial careers might be advanced by reading that document in the smoky backrooms of political intrigue, then the Constitution will no longer be a solid anchor holding our nation in place during times of storm and crisis. Instead the Constitution will just become part of the political storm — blowing hot and cold whenever the wind changes. That is a price we cannot afford to pay.

Police Have No Suspects

(Continued from Page 4)

necessarily indicate that it was a former employee. Due to the number of employees that worked in the coffee shop, it's impossible to say who had access to keys to the coffee shop. . . . The keys may have been copied." Jacobs added that he is not suspicious of anyone who worked at the coffee shop last year or this year.

Jacobs said that the only people who had official access to keys to the coffee shop last year, and the only people who have keys now, are "people involved with management or with the opening or closing of the coffee shop." Jacobs said that he thought it was possible that someone who had keys last year could have gotten into the coffee shop this year, but that it was not likely.

Both last year and this year, the DSAC accounting system involved the coffee shop manager and the

business manager keeping separate sets of books, which were both cross-checked by the business manager. Deposits were checked daily, deliveries weekly and managers' commissions twice a semester.

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Harkness Thief Absconds Without Bagel-Dogs

(Continued from Page 12)

As business manager, Carrillo is responsible for depositing the receipts in DSAC's bank account. "Normally the money is picked up every day. I usually make a deposit three times every week," Carrillo said. On the night of the theft, the receipts from Monday, Tuesday and Wednesday were contained in the cash box. The deposit of receipts from September 18 was made on Monday morning, September 21, according to Carrillo. He stated that it was impossible for him to deposit the money on Tuesday or Wednesday of that week because he was in class or at the Legal Services Center until after the bank had closed. "I'm the only person authorized to take money out of the cash box, unless there are extreme circumstances," he added.

No Comment

When asked exactly how much money was stolen from the coffee shop, Jacobs responded, "The police have asked us not to comment on that. There's no way for anyone except Raul [Carrillo] or Brian [Powers] to know how much money was

stolen. Anything else anyone may have heard is complete speculation. And the figures I first heard officially mentioned were wrong." Jacobs refused to comment on his source for those initially reported figures. Rumors that the amount taken exceeds \$1500 were denied by Carrillo as "too high."

Since the time the money was stolen, several new security measures have been taken. Deposits are now made at the end of every business day. Money is no longer left in the cash box at night. During the day, the money is kept in a combination lock safe. The locks on the door to the coffee shop have been changed. Even the bank account where the money was deposited has been changed.

In addition, HUPD will step up its own security measures in and around Harkness Commons. Summarized Jacobs, "we have taken additional security measures to prevent this from happening again."

Ultimate Responsibility

Jacobs said that responsibility ultimately "rests with DSAC and the coffee shop managers. Security measures should have been in place

so that this couldn't happen. I'm convinced that this could not happen again." Jacobs further stated that "the students at HLS will bear the cost of the lost proceeds. There won't be an increase in prices at the Hark Box Cafe. But DSAC generally spends every single dollar to benefit all the students. We now have X amount of dollars less to do that. It's impossible to pin it down on anything. It may be that some idea that someone comes up with in the future won't be implemented because of the lack of funds. . . . It's the money of every student at HLS that was stolen, because that's how we think of it."

Jacobs said he believes that the theft "could have been prevented by implementing the kind of security measures that we have taken now. You have to remember that we have a number of very busy law students involved with the management of the coffee shop. That is essentially a full-time job. I don't think anyone is to blame directly for the theft that occurred. This is a new enterprise for DSAC and unfortunately in this case, we have to learn as we go along."

☛

Estrich's Imminent Departure Irritates Students

(Continued from Page 3)

Pattie Millett, a 3L who plans to work as an assistant U.S. attorney, said she was extremely upset by the administration's response to what she considers to be a critical situation. "I got to school and there was a blank on my schedule where Advanced Criminal Law should have been. I couldn't believe it — no explanation, nothing," Millett stated.

"The administration of this school is always saying that it supports public interest law, but it doesn't. Those courses are always the first to go," added Millett. She said that the administration decided to add Stern's course much too late. "What good does it do us now? Many of us

have made irrevocable changes in our schedules. I don't understand why they hesitated in the first place."

Estrich disagreed. "I see this as an example of the administration being concerned. They moved as quickly as they could. It's a good day for HLS when, no matter how small the enrollment of the class, the administration is still responsive."

Rana Sampson, a 2L and a sergeant with the New York City Police Department, is one of the 35 people who enrolled in Estrich's class. Sampson started a petition protesting the administration's failure to provide a substitute Advanced Criminal Law course. "There are always enough sections of tax

and corporations to accommodate everyone. Many of the students enrolled in this course need to take it before they graduate. I'm lucky I'm a 2L; the 3Ls are really stuck," Sampson said.

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Central American Leaders Highlight Schedule

(Continued from Page 3)

Philadelphia Mayor Wilson Goode's speech in the Ames Courtroom last November. Shortly after beginning his speech, protestors interrupted Goode by standing up, smearing their faces with ashes and shouting down the mayor with chants and taunts. The controversy centered around Goode's alleged involvement in a police operation in which eleven members of the radical M.O.V.E. group were killed. One protestor threw herself on the floor in front of Goode in imitation of one of the M.O.V.E. victims.

The Forum chose to relocate the speech to Langdell North Middle and to prevent anyone without a Harvard identification card from entering the room. The protestors, according to Millett, were probably members of the local Spartacus Youth League and not Harvard students. Millett is unsure if the Forum will face similar challenges from the outspoken group. "You can

never tell what they're going to protest," she commented.

Nicaraguan Vice-President Sergio Ramirez and Speaker for the California Assembly Willie Brown also aroused some heated debate at their 1986 Forum appearances, but nothing more than strongly-worded petitions and fiery challenges were heard from audience members during the question and answer segment of their lectures.

Millett noted at least three precautions the Forum takes in order to ensure incident-free events. "We have the police on hand as needed, students monitoring the question and answer microphones and we usually prepare an alternative plan for the event," she said.

Yachters and Sheiks

The other Central American leader on the Forum's fall schedule, Carlos Lopez Contreras, promises to attract considerable attention, though probably less controversy

than Cruz. Contreras, a Honduras foreign minister, will speak October 7 on "Honduras and the Central American Crisis."

Of particular interest to HLS students should be Rudolph Giuliani, the United States Attorney for the Southern District of New York. Giuliani has gained renown for his involvement in several infamous cases, such as the Wall Street insider trading scandals and the uncovering of widespread corruption among New York officials that resulted in the gruesome suicide of Queens Borough President Donald Manes. Giuliani is scheduled to speak November 9.

Rounding out the 1987 Forum schedule are America's Cup winner Dennis Connor and former OPEC Minister Sheik Ahmed Zaki Yamani. Millett expects Connor to attract one of the larger crowds this year. "A lot of people have expressed interest in hearing him," she said.

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