



Harvard Law Record

America's Oldest Law School Newspaper

VOL. 86, NO. 7

APRIL 15, 1988

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Bell Questions Minority Hiring

By Dan Kroll

Despite a well-publicized clash at Stanford Law School over his alleged teaching inadequacies, HLS Professor Derrick Bell now claims Stanford's newly-announced commitments to student and faculty diversity are "much more encouraging ... at the present time than Harvard's."

While a visiting professor at Stanford in 1986, Bell was dismayed to learn that several other professors there had organized supplementary lectures to his constitutional law course after receiving student complaints about Bell's teaching approach.

Bell, who returned to HLS as a tenured professor in the fall of 1986, said some Stanford students were threatened and angered by the importance he placed on racism and slavery in constitutional law.

Paul Brest '65, dean of Stanford Law School, announced that school's new commitments to affirmative action last November, along with a public apology to Bell over the earlier controversy. Brest admitted the Stanford administration supported a series of lectures in basic constitutional law the "unstated purpose [of which] was to offer Pro-

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Patty Lee

A portrait of the first female graduates of HLS was unveiled by HLS Art Curator Bernice Loss in last weekend's "Celebration 35". (Story on page 6)

Denied Again, Dalton Waits

By David Snouffer

Harvard President Derek Bok '54 last month announced that he would not recommend that Harvard's two Governing Boards extend tenure to Assistant Professor Clare Dalton, LL.M. '73. In deciding not to promote Dalton, Bok let stand a divided faculty vote against appointing the scholar to a full professorship.

The decision concluded a six-month investigation Bok conducted after HLS Dean James Vorenberg '51 and at least 18 other professors asked him to review Dalton's case.

Following an acrimonious debate, the tenured HLS faculty last spring narrowly denied Dalton the two-thirds vote she needed to be recommended for tenure.

Student supporters of Dalton responded to Bok's recent decision with two weeks of organized protests, including lunchtime meetings, a march on Bok's office in Harvard Yard and a rally outside Langdell Hall that drew over 100 students.

Dalton, whose tenure-track appointment at HLS will expire this

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Budget Changes Elevate Financial Aid Ceiling

By Troy A. Morgan

Some Harvard law students will be living easier during their school years, thanks to a new policy that "shifts the burden of your legal education to later years," according to Tom Higley, 2L, member of the school's financial aid committee. "Rather than incurring hardship now," he said, "students will pay their debts when they are earning more and are better able to bear it."

An 18 percent increase in the financial aid calculation of the typical student's budget expenses for 1988-89 is three times the size of next year's cost of living rise in tuition and various related expenses. One third of the increase in estimated costs is due to the tuition hike from \$11,400 to \$12,300, while two-thirds is based on a recalculation of living expenses.

Before last spring, the financial aid office determined student living expenses according to the nine-month consumption standard for singles in the 20 to 35 age group specified by the Bureau of Labor Statistics for Boston. Higley pointed out that the consumption budget for Boston is considerably lower than would apply to Cambridge, because the Boston statistics include less expensive areas like Roxbury and Jamaica Plain.

Now, he explained, the financial aid office bases the student living budget on the moderate level statistics for the Boston area, which more accurately reflect the cost of housing in Cambridge. Thus off campus student budgets will rise by \$136 per month next year and on campus budgets will rise by \$82 per month.

Sally Donahue, director of financial aid, said that the student budget increases reflect a realistic appraisal of the cost of living in Cambridge by members of the committee. "Students felt pressed by cutting a lot of corners," and their problems "had a lot to do with general cash flow and monthly rent," she commented. The committee drew these conclusions from "general feedback

from the three student representatives and from student complaints to their financial aid counselors," she added.

Donahue attributed the lower budgets of previous years to "historical attitudes regarding financial aid, which are not limited to the law school." She suggested that the thrust was to "encourage students to cut costs and live on a frugal budget."

Joyce Curll, assistant dean for admissions and financial aid, indicated that past student budgets were lower, partly because "Harvard housing used to be more available and cheaper," but that prices have increased because "it is no longer subsidized."

Her own philosophy, she explained, is that loaning students an extra thousand dollars now, instead of "squeezing another thousand" out of them, seems to make a lot of sense — "especially since HLS graduates usually obtain rather lucrative jobs afterwards, or they are protected by LIPP [Low Income Protection Plan]."

Fat LIPP Increase?

LIPP assists HLS graduates who enter low paying, law-related jobs with their annual loan payments. Those with salaries from \$20,001 to \$29,000 must pay two to six percent of their annual income for all undergraduate and graduate loan repayments, while those with salaries below \$20,000 receive complete forgiveness of annual law school loan payments.

Donahue stated that on April 20th the financial aid committee will discuss LIPP's policies while reviewing the new budget proposals. Presently the neediest graduates earning above \$29,000 are ineligible for LIPP, forcing them to choose jobs paying at least \$45,000 in order to repay their loans unassisted. Donahue said she hopes the committee will expand the ceiling of \$29,000, while raising the percentage of gross income graduates must pay as their salary increases.

Donahue stated that LIPP, begun

at HLS in 1979, was "the first of its kind in the country." She added that "last year's revisions to the program have greatly expanded the forgiveness parameters and make it among the most generous programs of its type." Over the eight years before 1987-88, 166 graduates received money through the program, but over 74 participants received more than \$350,000 worth of forgiveness in 1987-88 alone.

Higley asserted that "there is definitely a policy determination in favoring LIPP over grants" and that "this is exactly the right thing to do." Nevertheless, grant aid has also improved, since for the first time students need not apply for all the loan money to which they are entitled in order to receive a grant. Thus "students are no longer penalized for economizing and living below their budgets," Donahue maintained. Curll noted that this approach "leaves more choice in the hands of the students."

New Blood

Higley stated that in past years student needs were underestimated, because "the financial aid office was not in as close communication with students and other areas of the administrative powers that be." He claimed that Renda Johnson, former director of financial aid, "felt powerless to get changes done in the way she needed."

The better communication today is "largely due to new people," Higley asserted. He pointed out that "[Professor] Louis Kaplow '81 [who chairs the financial aid committee] is new, as well as two other members of the committee." He mentioned that Kaplow and administrative dean Simone Reagor "were involved in the hiring of Sally Donahue and Joyce Curll, largely with an eye to improving vision."

**Next RECORD:
April 22, 1988**

Pub Priestess Exorcises Stench-Demons

By Julia Loewy

No doubt about it — these have been tough times for Back Bench Pub patrons. First there was the stench that periodically permeated the Pub area. Now students have returned from vacation with a touch of spring fever only to find *L.A. Law* in reruns and a draught beer drought.

According to DSAC Business Manager Karen Spencer, 1L, the whole problem of the pub odor reached a crisis over spring break. While other HLS students were busy sunning themselves and frequenting bars in places like Florida and Mexico, Spencer and an assistant spent three days scrubbing everything in the pub. When their efforts failed to produce a marked improvement, they took one last step to seek out the rank smell. Spencer and her assistant up-ended the dreaded keg cooler in search of a leak and were apparently surprised by the source of this year's hated Harkness haunt.

"I almost lost my breakfast" when the cooler was turned over, said Spencer. Beer overflow had seeped out of the reservoir and had sat so long that it had corroded the bottom of the cooler. The unknown pub stench was, therefore, successfully identified as the unmistakable odor associated with decaying kegrotators.

Apparently one cause of the problem was the absence of a draining system for the spillover beer from the cooler. Numerous attempts to drain and rinse away the putrid brew failed to eliminate the smell. Spencer said the only alternatives were to close the pub or junk the cooler. She chose the latter option.

Upon returning from spring break to find their beloved bar gutted, pub employees and patrons became infuriated by the harshness of Spencer's unilateral action. When the grave nature of the situation was explained, however, the brew-ha-ha subsided and all rejoiced in the



Kevin Reed

The troublesome kegrotator proved to be the source of the Pub's ornery aroma.

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Dalton's Final Appeal Falls On Prexy's Deaf Ears

(Continued from Page 1)

summer, has accepted a visiting post at Northeastern Law School, where she will be considered for a tenured position. Northeastern administrators already have assured Dalton that her scholarship passes muster for tenure at their school.

Dalton also has filed sex and ideological discrimination complaints with state and federal agencies, but last week she said she did not know when those bodies will take up her case. Dalton said she may sue Harvard in the meantime but felt no pressure to decide in a hurry whether to go to court.

Bok announced his decision through a press release issued March 10, a few days after he met with five legal experts from outside the full-time HLS faculty. The experts reviewed criticism of Dalton's scholarship from HLS professors and outside experts and discussed her work with two of her faculty supporters, Professors Morton Horowitz '67 and Frank Michelman '60, and two professors who opposed her promotion, Robert Clark '72 and Richard Stewart '66. Vorenberg and two former members of the HLS faculty appointments committee, Professors Detlev Vagts '51 and Paul Weiler, LL.M. '65, joined Bok for the meeting with the outsiders.

The five-member committee Bok consulted reached a "consensus" against Dalton's promotion after studying both her forthcoming book on the history of tort law, on which much of the faculty's debate focused last spring, and an article about contracts she published several years ago in *The Yale Law Journal*, Vagts said last week.

A Dalton supporter, Professor Duncan Kennedy, charged last week that the committee's decision to oppose Dalton's promotion became foreordained as soon as Bok selected it because a "preponderance" of its five members "in one way or another had already manifested a decided hostility to CLS work."

The decision to appoint Professor Emeritus Archibald Cox '37 to the review committee was singled out

last month by Professor Charles Nesson '63 as an especially inappropriate choice. Bok chose Cox, Nesson said in a memo and audio tape distributed to the faculty and obtained by the RECORD, to "insulate" the committee's judgment from legal attack, "because Archie Cox is Mr. Integrity." But Nesson said Cox is also the foremost "symbol" of the traditional scholarship that CLS adherents have attacked since

the early 1970s and is therefore subject to bias. Cox and the other members of the committee either declined comment or did not return telephone calls last week.

The committee did not include any CLS adherents, but Bok also was "careful not to put on it anybody who was known to be actively hostile," Vagts said. "I suspect that

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Jackson Fleeing Faculty Turmoil?

By Andrew Pollis
and Jeff Gershowitz

Professor Thomas H. Jackson's recent announcement that he will be leaving HLS for the deanship of the University of Virginia Law School has become the source of conflicting opinions and of reports tying the move to the Dalton tenure conflicts (see related article).

"In my opinion, why he wanted to take the deanship at the University of Virginia and [why he wanted] to leave Harvard are very different questions," Professor Robert Clark '72, said last week. "Why he wanted a deanship at Virginia . . . is easy to understand. . . . But that doesn't explain the fighting and unpleasantness he experienced at Harvard last spring and summer in the aftermath of the Dalton vote."

According to Clark, "Jackson worked hard to contribute to the Dalton debate. He was active. He paid the price among the faculty."

"I suppose the basic pattern is that anyone who says something that goes against what the left wing wants to happen is accused, not only of being wrong, but of being evil," said Clark. He noted that faculty relations have deteriorated greatly since the Dalton vote. "There isn't all that much contact now. You look the other way [when you pass each other in the hall]."

Jackson denied that the Dalton affair was the impetus for his decision. "My colleagues can speculate all they want," he said this week. "The sole reason I'm going is be-

cause it's an exciting thing to do at this time of my life. I'm satisfied that I'm doing this affirmatively and enthusiastically and I hope I can convince others of those that that is my reason for doing this.

"I would've taken the job under any set of circumstances. It's something I really want to do," he said.

According to Jackson, the intra-faculty problems at HLS "don't really affect my work here. I don't think it's very productive to discuss this at this point."

Hints that alternative motives were behind Jackson's move came from other sources as well. After the RECORD ran its story on Jackson's decision (March 4, 1988) Professor Steven Shavell telephoned the paper to state that the 'real' reason for the move had been overlooked.

According to RECORD Business Manager Marla Becker, 3L, Shavell asked a number of rhetorical questions implying that something was amiss.

"He said, 'Don't you care about getting the truth? . . . Didn't anyone on your staff think it a little odd that Jackson would turn down a deanship at Stanford just to come to HLS to teach only to turn around a year later and take a position at University of Virginia Law School? . . . Do you have any idea what his leaving will do to this school?' He was definitely anguished."

According to Becker, Shavell "didn't say anything about politics" in his call. Shavell could not be reached for further comment.



Stanford Leads HLS In Diversity, Bell Says

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fessor Bell's students a supplement to his course."

Despite his Stanford experience, Bell said Harvard had even more problems with diversity, stating in a letter to the RECORD that although HLS has four black males on the faculty, not including Visiting Professor Charles Ogletree '78, "[t]here are no minority women, no Hispanics, Asians, or Indians." Bell said that even with its much smaller faculty, Stanford also has four minority faculty members — two Hispanics and two Blacks.

According to Bell, three of the four minority faculty members at Stanford visited Harvard before going to Stanford. "Either they were not offered permanent appointments here or the offers came so late as to raise understandable doubt about the depth and character of the school's interest," Bell said.

Bell, who served for four years as dean of the University of Oregon Law School before resigning in 1985 after the faculty failed to appoint an Asian-American woman to a teaching position, also said in the letter that his recommendations of teaching candidates "who have other than the traditional HLS qualifications" were ignored at HLS last year as well. Because of this, Bell refused appointment to the minority sub-committee of the faculty appointments committee this year, he said.

While he was a member of that sub-committee, Bell said he continually suggested that HLS use visiting professor positions to "help bridge the gap" in the number of minority faculty members, and that this suggestion was ignored. According to Bell, there are "a number of minority individuals who are doing good jobs [in the legal community] who deserve to come here for a year to help bridge the gap. This is particularly a problem with regard to Black women, Asians, and Hispanics. We can debate whether to offer permanent positions to particular candidates, but we certainly could get good value [from numer-

ous individuals] for a year."

When confronted with Bell's statements that his recommendations for teaching candidates were ignored, Dean James Vorenberg '51 responded that it was "not unusual to have disagreement over certain candidates." Vorenberg refused to discuss particular candidates, but emphasized that it is "at the top of my list of hopes and goals to identify and bring minority faculty" to HLS.

Wanted: Minorities

Vorenberg said that HLS has made important progress in seeking minority teaching candidates. He explained that there is a minority search committee, chaired by David Shapiro '57, which serves to identify minority teaching candidates and bring them to the attention of the faculty appointments committee. "The committee and faculty are committed to making the most minority appointments we can," he said.

In addition, Vorenberg stated that the administration has not been ignoring minority candidates. He stressed that there have been a number of tenure track appointments made over the last few years, and that "if one compares the number of minority faculty members now with the number of minority faculty members of a few years ago, I think we've made progress." In the 1981-82 school year, Vorenberg noted that there was only one minority full professor, one minority assistant professor, and three minority lecturers. For the 1988-89 school year, Vorenberg said that the faculty would include as minority teachers two full professors, two assistant professors and seven minority lecturers, and he added that some offers for visiting professorships were still in negotiation.

In his letter, Bell added that he does not know "if any [minorities] are now under really serious con-

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Female Pioneers Of Class Of '53 Feted

By Erick Hachenburg

A celebration of the 35th anniversary of the first graduating class of women at HLS was held this past weekend, April 8-10. "It was an important occasion," said Simone Reagor, administrative dean, reviewing the weekend.

The symposium, entitled "Celebration 35: A Reunion Dedicated to a Discussion of the Effect Women Have Had on the Law and the Legal Profession," brought together the first class of twelve women along with some of the 2600 women that have graduated since 1953.

"I think it's great when you consider the odds they were bucking to make it," said Deborah Holmes,

3L, in reference to the twelve women.

Reagor added that she looked with "awe and gratitude" at those "who began to make it an integrated school. We need to celebrate it more often." Holmes said that a display next to the exhibit in Pound Hall, "Our Sisters in the Law," summarized the weekend for her. Someone added four empty picture frames, she said. Below the pictures were titles such as "First Woman Professor of Color" and "First Woman Attorney General." The title of this display was "Where We Still Have to Go." "The two displays focus us on how far we've come and remind us of how far we have to go," Holmes said.

The festivities included panels on "Women in the Workplace," "Women in the Constitution," "The Balance Between Work and Family," and "A Report of Gender Bias in the Courtroom."

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Pub Odorcized

(Continued from Page 3)

demise of the drinker's dilemma.

Things are looking up for the Pub now that the olfactory offender has been obviated. A new cooler has been ordered at a price estimated by Pub Manager Holly House, 3L, to be \$2000. In addition, there will be four new upcoming episodes of *L.A. Law*, and by next week, the taps should be flowing again when a new cooler is delivered.

These recent pub events coincide with DSAC's selection of next year's Pub Manager Rick Genow, 2L.

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Holmes Debate

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most of the people [in the group] were somewhat cool about CLS. We thought we had people who were detached about making a judgment."

And Vagts said professors from outside the CLS movement can be fair about its members' scholarship. The faculty has recommended a "reasonable number" of CLS adherents to join its ranks, he added, including Professor David Kennedy '80, who was promoted last year and who Vagts said is "more closely associated" with the CLS school than Dalton.

Bok emphasized that he made his decision "independently" of last spring's faculty vote against Dalton. In discussing Dalton's book about the 19th century English torts case of *Rylands v. Fletcher*, the committee focused "to a significant extent" on how she portrayed Oliver Wendell Holmes' views of strict liability. Professor David Rosenberg attacked Dalton's scholarship by saying she had misused sources and had characterized Holmes as favoring strict liability more than he really did. Dalton said she had presented an orthodox view of Holmes among legal historians and that Rosenberg's approach has never been published.

Dalton said someone who attended Bok's meeting with the committee told her the group had "laid to rest" doubts about her "scholarly integrity." Vagts declined

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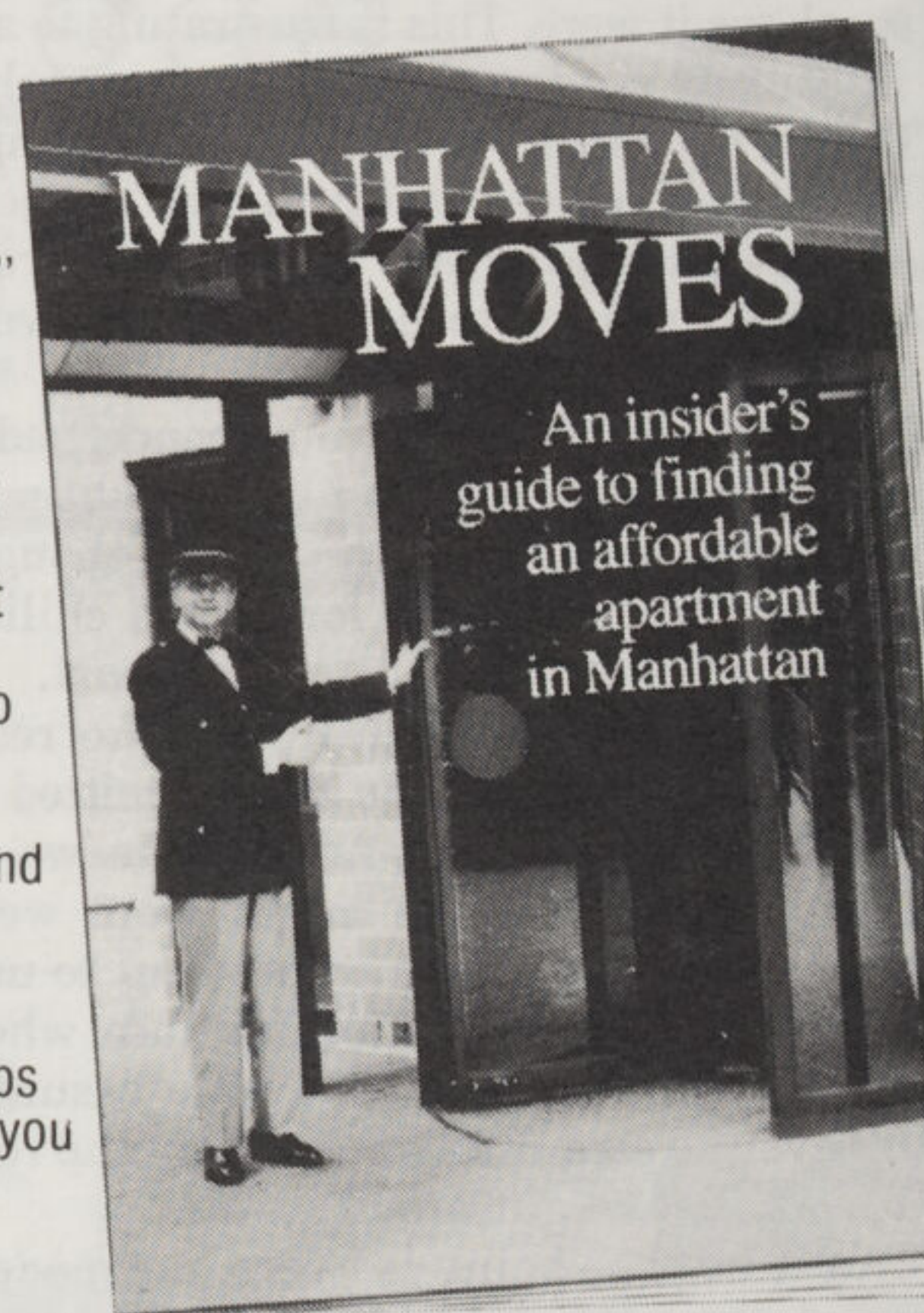
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Put It On The RECORD

The RECORD often finds itself in the position of substantiating rumor. We "hear" things. A professor tells his or her research assistant something in confidence, and we hear about it. Someone leaks a tidbit from a confidential student organization meeting, and we hear about it. Rumor. Gossip. Let it be known that the rumor and gossip mills are alive and well at HLS. People talk — but it's not easy to get them to talk to us on the record. And this is the root of the RECORD's problem.

The RECORD makes it a policy *not* to print mere rumor. This forces us to live up to a higher standard, but this is a responsibility we willingly accept and one which we feel benefits the community we serve. It is a standard which should be admired and not criticized; one in which we should be aided and not hindered. After all, it seems to promote complete accuracy and truth, which is the underlying notion of the law which we study.

And, yet, despite this desirable result, the RECORD often finds itself fighting a losing battle. People at HLS are willing to gossip but unwilling to speak, as it were. This is frustrating to a newspaper which is attempting to inform its readers fully and accurately.

This is not meant to be a whining complaint. It is after all a standard of our own choosing which makes our job more difficult. But, isn't the irony obvious here? We "hear" these rumors, we're expected to cover them, but in order to do so we must verify them. And then the hard work begins. And why?

Is it that people here are so concerned with reputation that they are unwilling to say something that might make them unpopular with some even though it is the truth — even though it is their own opinion? That this would be the reason for such a chilling effect on the dissemination of ideas is frightening to say the least.

The motivation is unclear, but the result is quite clear — increased frustration on our part. We are committed to printing a quality newspaper. We value the tips we get. As students, we can't stay apprised of everything going on as well as we might were we full time journalists, and we appreciate having issues pointed out to us. But, understand our position. Understand the frustration we face when we attempt to substantiate the HLS rumor mill. If everyone assumes someone else will say it, it will never be said. Examine closely the result of this silence — ignorance of issues that might affect us all.

Can it be that being lawyers has made us overly cautious about each word we say? Scrutinizing each utterance may be as dangerous as it is desirable.

T.M.F.

HARVARD LAW RECORD

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Fenno

The vow taken so many years before resounded in Fenno's head: Thou shalt never set foot into Langdell Library. On a spitting rainy April day, though, as he tried to make his way from the Law Review's introductory beer-and-ice-cream spree for anxious 1Ls (his favorite breakfast), to the TG in the Pub, the vow made life difficult. The unfamiliar steamy surroundings in the Tunnels disoriented Fenno; panic began to set in.

"Okay, stay calm. Now how would Toucan Sam get outta this?" he wondered. "Of course, follow your nose!"

Honing in on the putrescent Pub odor, identifiable even at those depths, Fenno was again on the move. At the corner of an unfamiliar staircase, a circuitous air vent wound its way from the Hark kitchen and spewed its contents into the fetid corridor, overpowering Fenno's beacon.

Olfactory guidance stymied, he resorted to the fallback sense of hearing. Sure enough, the man-in-numerous-Wellesley-women's-futures could detect the strains of rock music.

"Hey, Meister Brau, here I come — I'd recognize Joel's tape anywhere!" Fenno sprinted up the stairs.

Busting through an unfamiliar door, Fenno was horrified to find himself not in his beloved Pub, but, horror of horrors, in a faculty office! Stammering, Fenno said, "Sorry Prof, I lost my way. I'm just looking for an M.B. on a rainy day."

A startled Professor Nesson looked up from behind the cassette-strewn recording board that blanketed his desk.

"Well," he said to the scrawny intruder, "I was hoping for one of the *Fat Boys*, but I guess a *Beastie Boy* will do."

Flicking on his drum machine, he said, "Let's get started." He rapped out: *CLS at HLS gettin' us in quite a mess.*

A bewildered Fenno interjected, *Where the hell's my Meister Brau, don't want draft beer anyhow.*

"Not bad," whispered Nesson, who continued the rap: *Bobby Clark and Steve Shavell, their market's dropping — time to sell.*

F: *Hell is hot, but beer is cold, an' I hope I die before I get old.*

N: *Dalton sez it's all a crock, blamin' it on old man Bok.*

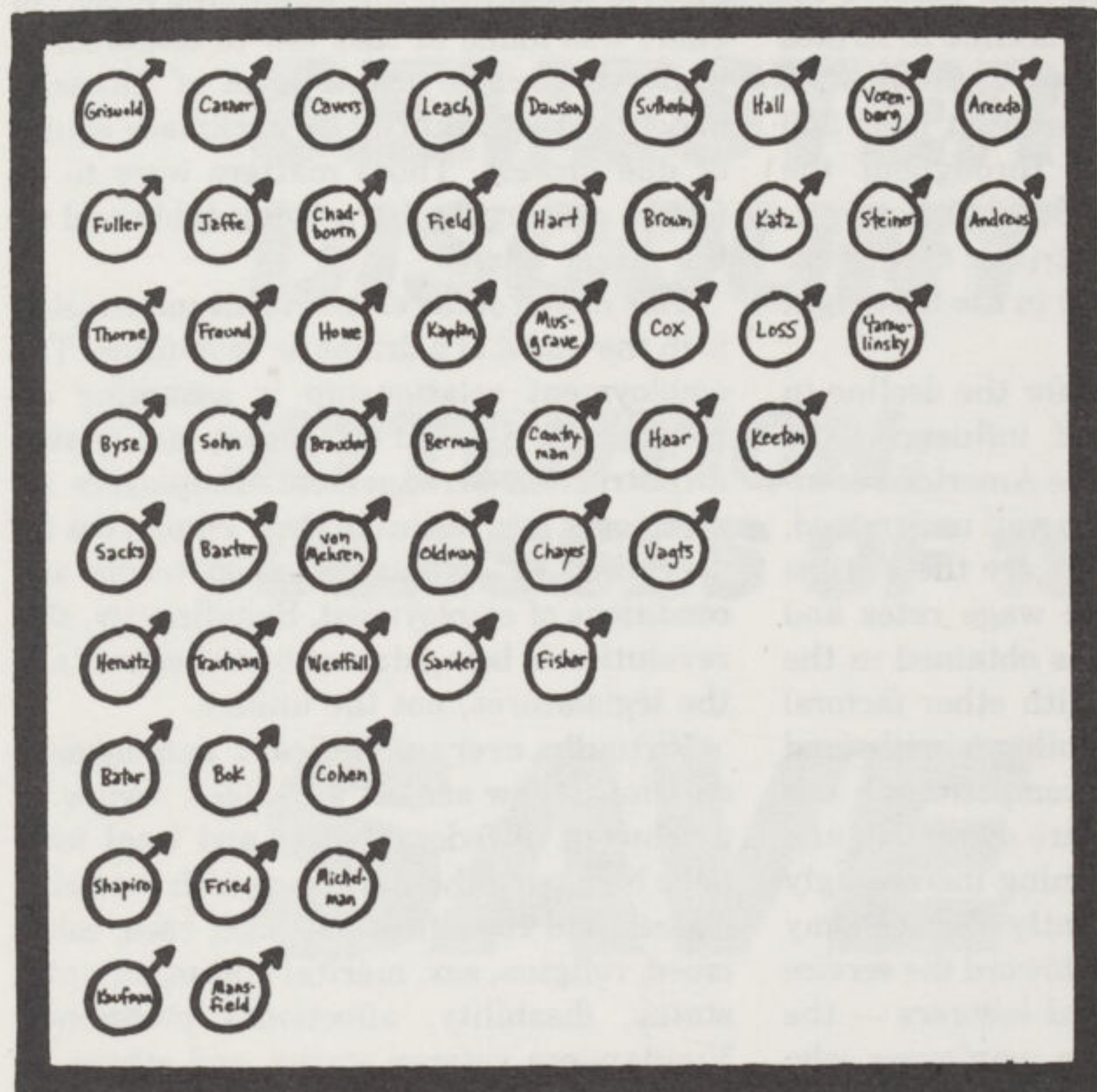
F: *Whole decade here, yet this is new, gotta split to find some brew.*

As Fenno bolted for the door, he heard Nesson wail: *Bury the hatchet, raise your mugs, puff the peace pipe an' spread the hugs.*

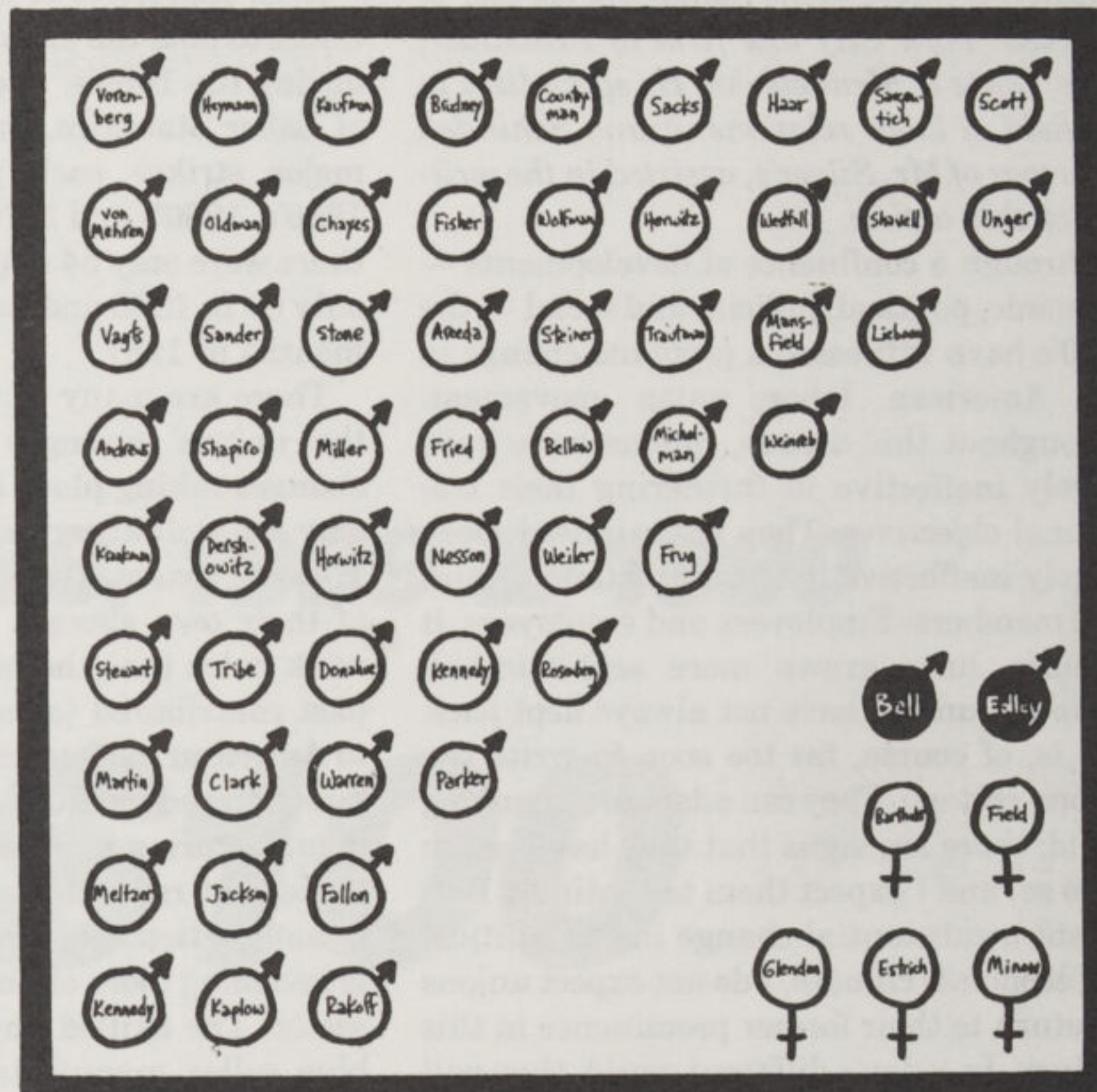


20 Years of Progress...

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TENURED FACULTY, 1988

STUDY GROUP

by KA



Labor Law: Unions Must Change To Survive

Off the Record

by Edward Silver

Edward Silver is the managing partner of the New York City law firm of Proskauer, Rose, Goetz & Mendelsohn. He specializes in the field of labor relations. Aaron Schindel, a partner of Mr. Silver's, assisted in the writing of this article.

Through a confluence of developments — economic, political, judicial and social — the 1980's have witnessed a profound change in the American labor union movement. Throughout this decade, unions have been largely ineffective in furthering their traditional objectives. They have, indeed, been largely ineffective in obtaining (and retaining) members. Employers and employees, it appears, have grown more sophisticated, while the unions have not always kept pace.

It is, of course, far too soon to write the unions' epitaph. They can adapt to a changing world; there are signs that they have begun to do so, and I expect them to continue. But, absent a substantial change in the political and economic climate, I do not expect unions to return to their former prominence in this century. In today's different world, they will have a different role to play.

Union membership statistics alone are eloquent evidence of the unions' decline. According to the Bureau of Labor Statistics, union membership increased following World War II from 14.3 million in 1945 to a post-war high of 20.2 million in 1978. By the mid-1980's the number of wage and salary workers who were represented by unions had declined to about 16.9 million, where it has remained for the past three years. As the total workforce has grown, however, the percentage of employees who are union members has steadily declined. Approximately one-third of the nation's employees were union members in 1945; only one in six is a union member today.

Perhaps the most significant symptom of organized labor's decline has been the disappearance of the strike as an effective weapon. This dramatic shift has many causes, but the turning point, I believe, was the Professional Air Traffic Controller's strike in 1981. Although President Reagan probably did not realize it at the time, firing the striking controllers and replacing them created a remarkable new environment. The PATCO strike proved to employers that they could not only survive a strike, but they could win it. This was a lesson employers were quick to learn and willing to exploit. Unions today often do not have the support and economic strength needed to sustain a strike. Many employers are able to continue to operate almost indefinitely, using automated equipment, supervisors, replacements and employees willing to cross a picket line. When both sides know that a strike will not succeed, there rarely is a strike.

It is, therefore, of more than passing interest to note the dramatic decline in strikes during the 1980's. According to the Bureau of Labor Statistics, there were at least 200 major strikes each year throughout the 1950's, 1960's and 1970's. By 1985, however, there were only 54 major strikes; there were only 69 in 1986 and just 30 in the first eight months of 1987.

There are many causes for the decline in the unions' strength and influence. The changes taking place in the American economy are well known, if not well understood. To some extent, the unions are the victims of their own success. The wage rates and work rules that the unions obtained in the past contributed (along with other factors) to American industry's inability to withstand foreign and nonunion competition. The manufacturing industries are dying out, and those that remain are turning increasingly to automation. Concomitantly, the economy is becoming more oriented toward the service sector. The skilled physical laborers — the blue collar manufacturing employees who were, in the past, the typical union members and the source of the unions' strength — have dwindled in numbers and have lost their economic clout. Saddled with outdated plants and equipment and beset by foreign competition, manufacturing concerns have insisted that their survival depends on union concessions to alleviate high labor costs. For the most part, organized labor has had little choice but to accept the concessions.

In the service sector, other factors have been at work. Traditionally, unions have not had much strength here, and organized labor has been relatively slow to adapt to the different needs and interests of service sector employees. Signs of change are evident, however. Unions are devoting substantial effort and resources to organizing these employees. With such increased attention, unions will probably make some gains in the coming years. What unions will be able to achieve for these employees is far more uncertain.

The decline of organized labor's traditional strength throughout the 1980's has been accompanied by a profound shift in the legal and social perception of the employment relationship. Since the industrial revolution of the nineteenth century (and perhaps before), to the extent that the relationship between a company and its employees has been defined, in law and in public perception, it has been in contractual terms. Except for some minimal protective legislation (for example, establishing minimum wages or prohibiting child labor), the national labor policy was built on this contractual framework. Thus, the Wagner Act sought to give employees, through the right to act collectively,

greater strength at the bargaining table. No effort was made in that law to establish or preserve any particular level of financial benefits or job security or workplace equity or due process. Those matters were to be fought over at the bargaining table and on the picket line.

This notion of the employment relationship is in the midst of a dramatic revolution. The employment relationship is assuming dimensions of a social obligation, not merely a contractual arrangement. Employers increasingly owe duties to their employees independent of any agreed-upon terms and conditions of employment. Significantly, this revolution is being driven by the courts and the legislatures, not the unions.

Virtually every significant employment decision is now subject to judicial review. A patchwork of federal, state and local laws have blanketed the workplace with protected classes and classifications: age, race, color, creed, religion, sex, marital status, parental status, disability, affectional preference, Vietnam-era veteran status, and others. In addition to the antidiscrimination laws, a number of states have enacted statutes protecting various activities (e.g., filing workers' compensation claims or "whistleblowing") from retaliatory action. Thus, every employee is a potential plaintiff, and every employment decision may have to be explained and justified before some court or agency.

Also, a significant and growing number of courts have applied various common law concepts to protect employees from "unjust" dismissal. Damage awards for wrongful discharge have risen to huge sums. Whether framed in the language of "implied" contract or tort law, these judicial expansions grant legal recognition to the notion that an employee has a legally enforceable right not to be treated in an unfair or arbitrary manner, regardless of bargaining strength.

Many of these developments were long overdue. Enlightened employers have always understood the importance of treating their employees fairly. Whether, in the long run, society's (or the employees') needs will be best served by this increasing emphasis on litigation or on other protective devices is a subject for another day. For purposes of the present discussion, it is sufficient to note that the emerging workplace doctrines have largely bypassed, and perhaps replaced, the unions.

The substantive economic terms of the employment relationship have also come increasingly within the legislative and judicial spheres. ERISA (and its acronymical progeny) have transformed so-called "fringe" benefits from tenuous gratuities into in-

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Unions' Decline Heralds A New Era

(Continued from Page 10)

alienable rights. A number of states have required employers to provide specific benefits, such as mental health insurance or severance pay. A few states have adopted laws regulating plant closings. Child care leave and mandatory health insurance laws are now in the legislative process.

Indeed, as employees have turned increasingly to the courts for redress of perceived grievances in the workplace, unions, too, have come under greater judicial scrutiny. Union members have sought (with mixed success) to turn the union's "duty of fair representation" into a generalized code of union malpractice.

There is another major factor at work in the decline of the union movement. The workers themselves have changed. They are, as a group, better educated and more independent than their predecessors. They are more aware of their individual rights and more inclined to pursue them. They view with skepticism the promises of union leaders who have too often used their positions for personal gain.

It would be foolish to assume that the current state of disarray in organized labor will continue without abatement. The labor movement will acclimate to service sector

employees, and ultimately, some of the organizing efforts in the service sector will succeed. Concern for job security will, again, likely become a rallying point for union organizers and a spur to collective action. Particularly if the nation heads into a recession, unions will become stronger.

Unions may also regain some of the effectiveness of their traditional weapons, particularly if the recent readmission of the Teamsters Union into the AFL-CIO leads to greater cooperation by Teamsters in strikes called by other unions. Many employers can continue to operate through a strike if deliveries are not interrupted. If the Teamsters refuse to cross picket lines, however, continued operation becomes substantially more difficult and, for some employers, impossible.

It may be that unions will find it difficult in the present climate to return to their former role or regain their former prominence. At the bargaining table, the economic strength of the unions will be tempered by the realities of the worldwide marketplace. Away from the bargaining table, in the courts and legislatures, the unions will have a role, but only as advocates and lobbyists, not as the primary player.

Moreover, the key workplace issues of the future will require more cooperation and less

confrontation between the union and the employer. As global economic forces restrain the unions' ability to win ever higher monetary settlements, other issues will become more important in collective bargaining. Unions will have to address the employer's concern for product quality and need for production efficiency. Social issues (drug abuse, for example) have begun to emerge as important workplace issues. Whether unions respond by seeking joint, responsible solutions to these issues or by obstructing efforts to resolve them will, in the long run, go far in determining whether unions will become strong or a vestige of former times.

In sum, the 1980's have witnessed a turning point. The world, the workplace and the employment relationship have changed. The old verities of labor-management relations are on the wane. If unions adapt to the changed conditions, they will reemerge as an important force, but likely with a different profile. The nation's future economic health depends upon the efficient and productive use of its human resources. Unions can and should play an important part in achieving these goals. What is required, on both sides, is honest, competent, cooperative, constructive and responsible leadership.



Letters to the Editor of the Record

Rare Praise?

To the Editor:

Having been, in the past and on many occasions, highly critical of the RECORD's position on a variety of issues, common decency and a respect for fair play compels me to admit my agreement with, and admiration for, "M' Stands for Missing Point." That editorial is an unanswerable reply to a scandalous decision — everyone involved was ill-served, particularly Melissa, the most helpless.

Irving Jurow '29
Chevy Chase, MD

High Praise

To the Editor:

I was particularly interested in your editorial entitled "All-Male Clubs in the '80s," which appeared in the March 4, 1988 issue of the RECORD. It was signed "T.M.F." which I conclude is the Editor in Chief, and I congratulate you on this article.

We would like permission to reprint it in

our *New York State Bar Journal* with any credit line that you request.

Eugene C. Gerhart
Editor in Chief
New York State Bar Journal

Club Craze

To the Editor:

The March 4, 1988, edition of the RECORD has just been received by me. I read with interest your editorial, entitled "All Male Clubs in the '80s."

Your article was disturbing to me, both as to what you stated and for what you did not state. As a graduate of the Harvard Law School, a lawyer for 38 years, and as a member of a minority religious group who has supposedly been disadvantaged along with the others referred to in your article, I was disappointed by your failure to even mention the constitutional issue involved. It is the issue that the Supreme Court of the United States is considering in the *New York City* case. Although I do not agree with many of the archaic and silly membership policies

of clubs, I do strongly believe in and defend their constitutional right to freely associate. For some reason, you, as many others, fail to recognize the real issue which the Court now faces.

Instead, you undertake to perpetuate, as fact, statements which have absolutely no basis in fact. I notice you quote from a study of the National Club Association concerning the source of membership income of clubs, but you do not undertake to state that the same Association has repeatedly stated, supported by authority, that there has been no finding of any nexus between club membership and business success. The *amicus curiae* brief filed in the Supreme Court by the Conference of Private Organizations, of which the National Club Association is one, rebuts the myth that your editorial attempts to perpetuate. My experience also supports their findings. I know of no one who has become successful *after* admission to a private club, but, to the contrary, most have reached success *before* obtaining (and affording) that membership.

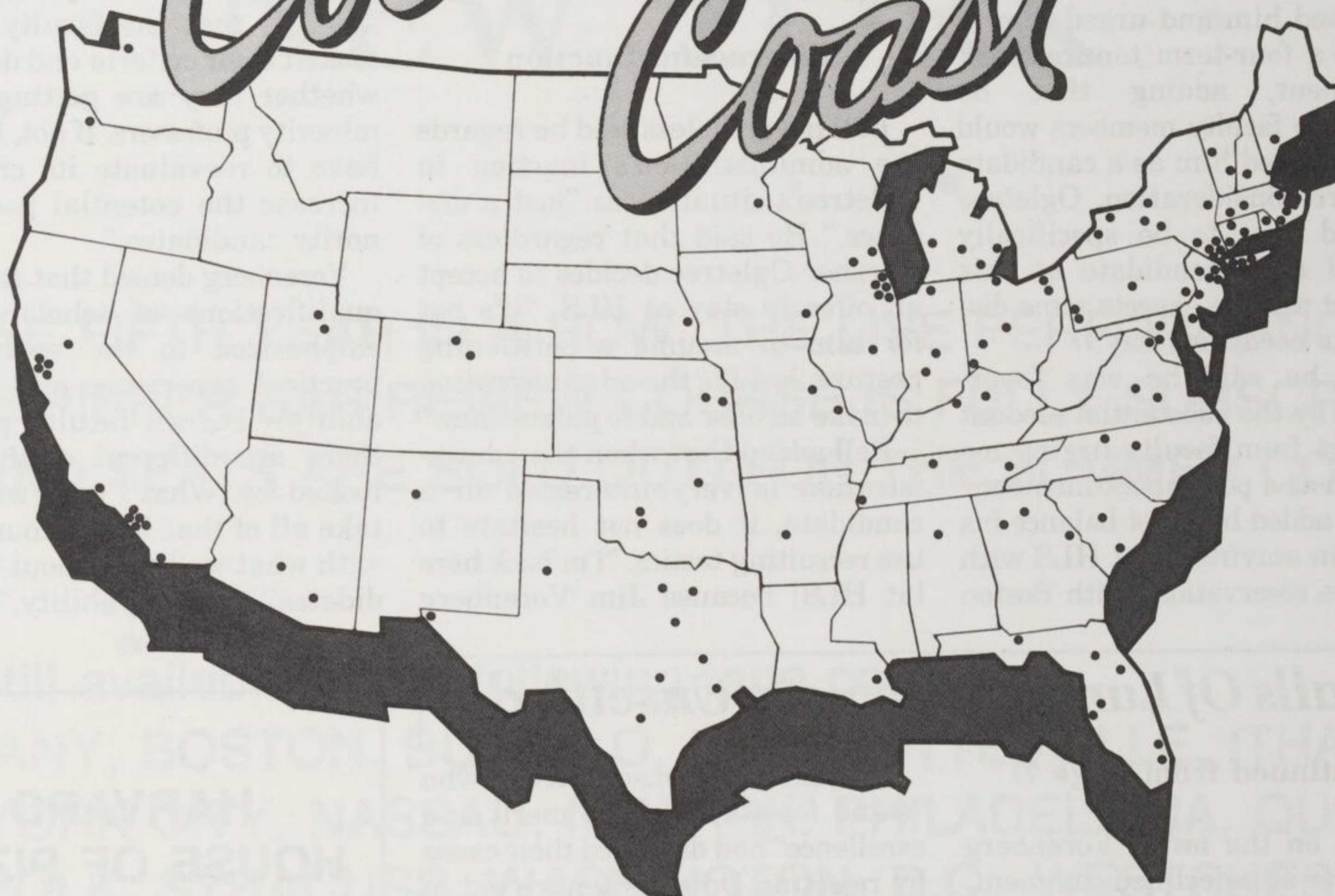
A careful analysis of the New York City ordinance, the American Bar Association

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Profs Criticize Faculty Homogeneity

(Continued from Page 5)

sideration" for tenure at HLS. He said that Ogletree, now in his third and final year as a visitor from practice, has not received an offer that is reflective of his performance and the school's real need for his unique teaching and clinical skills.

Ogletree said, however, that a "number of faculty members" had approached him and urged him to consider a four-term tenure track appointment, adding that he thought the faculty members would have presented him as a candidate for tenure consideration. Ogletree requested "not to be specifically discussed as a candidate at this time," but said he expects some discussion to occur anyway.

While he said he was "overwhelmed by the substantial amount of support from faculty urging me to stay on as a permanent member," Ogletree added he must balance his interest in staying on at HLS with his "grave reservations with Boston

as a community in which to raise a family and with the lack of broad-based collegiality among the faculty" at HLS.

Even if he received an offer to stay on at HLS, Ogletree said he would "have to take a very long walk and think very hard before making a decision" whether to stay or to return to his practice in Washington, D.C.

Disgraceful Inaction

Bell nevertheless said he regards the administration's inaction in Ogletree's situation as "just a disgrace." He said that regardless of whether Ogletree decides to accept an offer to stay at HLS, "it's not for him to assume a petitioning posture, but for the administration to make an offer and to pursue him."

Bell added that when the administration is very interested in a candidate, it does not hesitate to use recruiting tactics. "I'm back here [at HLS] because Jim Vorenberg

gave me an offer and was on the phone with me almost every day," Bell said.

Ogletree said he was not familiar with the operations of the appointments committee, but added that he wonders "why there are no minority women on the faculty. I wonder why there were three tenured Black professors in 1977 and ten years later there are only two. My sense is that the faculty have to look at their criteria and determine whether they are getting enough minority professors. If not, HLS may have to reevaluate its criteria to increase the potential pool of minority candidates."

Vorenberg denied that traditional qualifications of scholarship are emphasized to the exclusion of practical experience and teaching ability. "For all faculty positions, there are different qualifications looked for. What I hope we do is to take all of that into account, along with what we know about [the candidates'] teaching ability," he said.

✽

Halls Of Langdell Remain Unsettled

(Continued from Page 7)

comment on the issue. Vorenberg and Weiler also declined comment.

Professors disagreed about whether Dalton's case has slowed faculty consideration of other appointments. Professor Todd Rakoff '75, who has chaired the faculty appointments committee since last fall, said acrimony among professors last spring may have caused the six-member group to get "off to a slower start this year" than in the past but said committee members themselves have been "very harmonious."

Vagts expressed optimism that "bruises" from recent tenure debates would "heal over." But Duncan Kennedy said the appointments process "has been profoundly affected because the moderate center of the faculty appears to be unwilling to support any appointment that would upset" more conservative professors.

Nesson said conservatives who "stand for standards of merit and excellence" had damaged their cause by rejecting Dalton's tenure bid in spite of favorable reviews of her work received from 14 scholars from outside HLS.

"Clare is the proof that we don't pursue a standard of excellence," he said. Conservative professors voted against her "because of who she is and not what she wrote," he added.



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Letters to the Editor (Continued)

Male Phase

(Continued from Page 12)

resolution from which it originated, and all of the "copy-cat" laws appearing throughout the nation, should offend the intelligence of a lawyer who has been trained to analyze and justify laws that he is being asked to support. I guess I am one of those "'80s" men to which you refer in your editorial, and I give thanks that there are many more like me who stand ready to defend constitutional principles we should all cherish.

Harold B. Berman '50
Dallas, Texas

Jello Says

To the Editor:

Thank you for printing a followup article on the Frankenchrist case (Vol.85, #7, 11-

6-87). It only recently came to our attention, via a xerox sent by George Borkowski '87.

Overall the article was excellent; but there are a couple of inaccuracies that I felt it wouldn't hurt to clarify.

The nine police officers that raided my house did not confiscate my rolodex, since I don't have one. They did go through my address book very carefully page by page comparing names.

More importantly, Alternative Tentacles Records has *not* folded, thanks to everyone who helped us by contributing to the No More Censorship Defense Fund. Our recent releases include a soundtrack album of my recent speaking appearances titled *No More Coccoons*. An entire side is devoted to censorship.

I will be continuing my speaking engagements for a while longer before starting work on a new band. Right now I'm on a flight back from Washington D.C. where I debated a record-burning radio evangelist

at the National Religious Broadcasters' Convention!

Jello Biafra
No More Censorship Defense Fund
San Francisco, CA

Feminist Ways

To the Editor

As president of the HLS Forum back in 1976, I remember the difficult times we had recruiting speakers for the program. Desperate as I sometimes felt, I would never have stooped so low as to invite Mary Beth Whitehead-Gould to air her views at HLS (RECORD, February 26, 1988).

After years of hearing and reading bitter complaints from women and others about sexist attitudes, I am astounded that Ms. Whitehead-Gould was asked to be a Forum speaker. To me it seems perfectly evident that she stands for nothing but a retreat from modern-day feminine values and an admission that women need not be responsible for their own actions — at least if their hormones are involved.

I agree that the Baby M case posed a number of interesting legal questions, but there are better ways of studying those than furnishing Ms. Whitehead-Gould with a platform from which to promote her personal campaign.

Ann Bailen Fisher '76
New York, NY

Upton's Days

To the Editor:

Unfortunately, as a recent alumnus of HLS, I have not kept in close contact with the Harvard Law RECORD and general goings-on at HLS. I find it hard to believe, however, that anyone of sound mind could claim that Mary Upton "did more for students than any other [administrator]" at HLS. (Letter to the Editor, RECORD, February 12, 1988).

Regardless of the fact that none of the professors who signed the letter have memory of all of HLS's past administrators and regardless of the fact that few ever dealt with Dean Upton on a student-administrator basis, such glorification is unwise. As sure as they can find "hundreds of alumni/ae" to attest to her qualities as an administrator, a not-so-diligent investigator could find an equal number of alumnae/i who would freely attest to her various shortcomings.

I wish Mary Upton well at her new position at the American University Law School in Washington, but I would not revise history to somehow discount legitimate quality of life complaints against her former deanship.

Gary L. Ivens '87
Washington, D.C.
HARVARD LAW RECORD

HARVARD LAW RECORD (ISSN 0017-8101) published weekly during school year by the Harvard Law School Record Corporation, 23 Everett St., Cambridge, Mass. 02138-9984. Telephone (617) 495-4418. Subscription price: \$8.00 year mailed; \$10.00 year mailed outside U.S.; students \$6.00 year distributed at the Law School. Individual copies including back issues: 50 cents at the Law School, \$1.00 mailed. Second-class postage paid at Boston, Mass. and additional mailing offices.

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