

HARVARD LAW RECORD

America's Oldest Law School Newspaper

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VOL. 63, NO. 2

OCTOBER 1, 1976

TWENTY CENTS

California's Court Voids Preferential Admissions Policy

By Michael Collins

The California Supreme Court decided September 16 that a preferential admissions program benefitting minority students is unconstitutional. The issues in *Bakke v. Regents of the University of California* are highly reminiscent of the *De Funis* case. However, the California court dealt with issues differently than did its Washington counterpart.

The California court held that the admissions program as administered by the University "violated" the Equal Protection Clause. (Continued on Page 3)

Chicago Firm Exonerated of Discrimination Claim

By David Remes

(Editor's Note: The following is the first of two articles discussing charges of discrimination filed with the Placement Office by Gail Bowman, 3L, against a prospective employer. This first article studies a recently issued report clearing the firm. Bowman's reaction to the report will be the subject of next week's article.)

In a report to the Placement Committee the Law School has cleared an interviewer from a prominent Chicago law firm of charges that he used discriminatory and offensive language during an interview with a black woman 2L at the Law School last year.

The report, which was released last week by Dean Albert M. Sacks, concluded that either the interviewer had not meant his words as the student construed them, or that he had not uttered the words she recalled.

The report closes an inquiry begun earlier this year in response to a formal complaint filed with the Placement Committee by Gail Bowman alleging that John Morrison of Kirkland & Ellis had made the following statements during their interview on October 8, 1975:

1. "The corporations just keep hiring our blacks out from under us. We just can't keep them. Well, you know the corporations have to meet their quotas just like we do."

2. "We once had a black gal working for us. She was just like you only she was short."

3. "In fact, you'll appreciate this, this is funny. The last black to leave our firm went to work for Clorox . . . you know. Now, isn't it funny, a black man working for a bleach company?"

Bowman charged that these statements, which she said were made in response to her inquiries about the firm's hiring policies, violated Rule One of the Placement Office, which in part provides that "no employer may practice discrimination in any form based upon sex, race, color, religious creed or national origin." "Statements expressing discriminatory conduct or intentions" are within (Continued on Page 5)

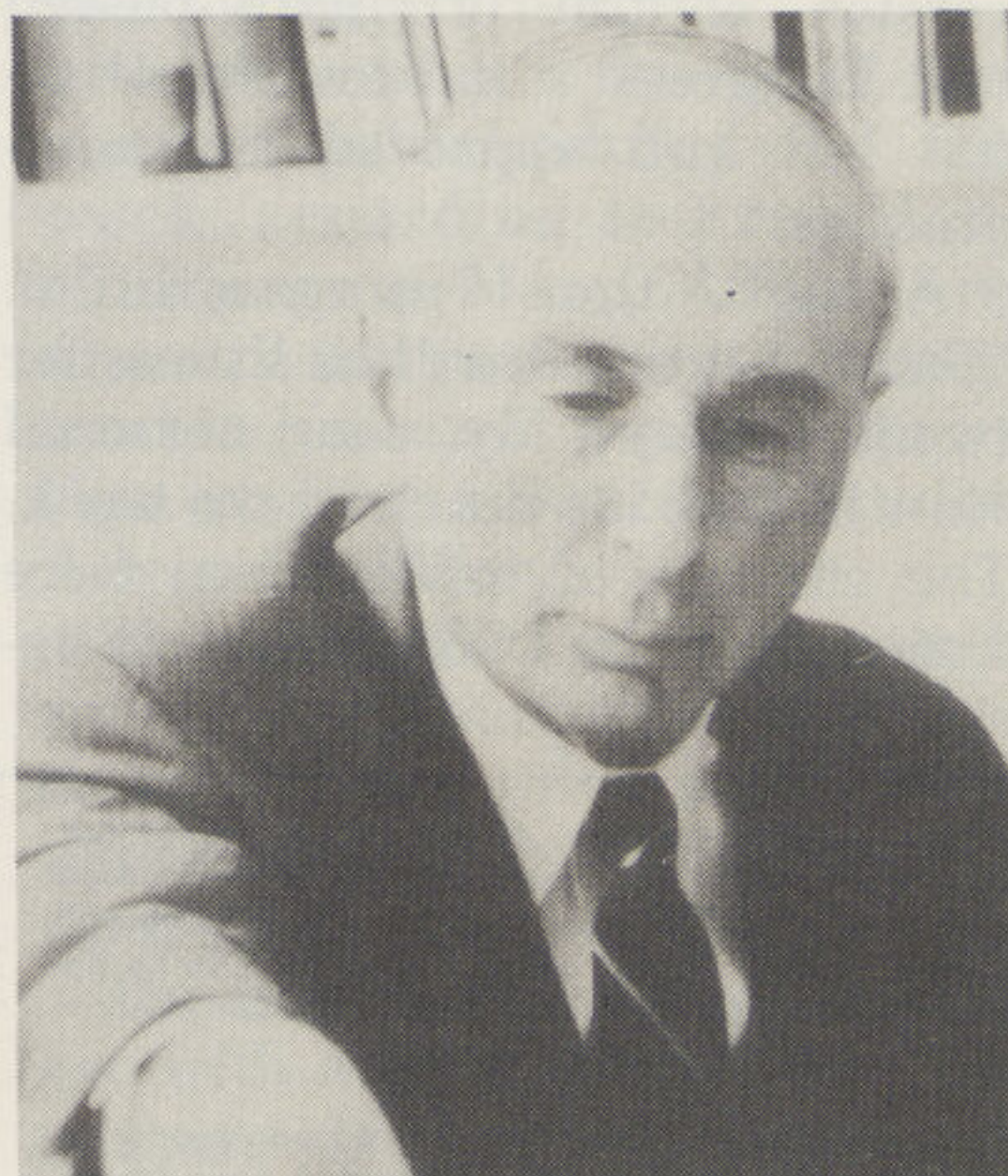
Harvard's Brain Trust Aiding Carter Candidacy

By Madison King

If some of Jimmy Carter's statements on international and domestic policies and issues sound awfully familiar, it's probably because many were authored by the learned men instructing you each day on constitutional law, civil procedure, anti-trust litigation and international law.

For more than a year, several members of the Law School faculty have chaired or served on the 18 task forces the Democratic presidential hopeful has amassed to add credibility and impetus to his candidacy.

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Prof. Milton Katz — on the Carter bandwagon

Ely "Marks Time" While at DOT

By Bob Ruxin

Until June of 1975, Professor John Hart Ely's knowledge of transportation matched that of any typical traveler. That month the U.S. Senate confirmed Ely's nomination as General Counsel of the Transportation Department, the third highest post in the department.

For nearly ten years Ely, who clerked for the late Chief Justice Earl Warren, had not appeared in a courtroom. Last spring he argued for the government in a suit intended to prevent the Concorde supersonic airplane from landing in the United States.

Even though it was highly unusual for a high-ranking political appointee to argue a case himself, Ely did not want to take any chances. The decision to let the Franco-British plane land on a trial basis had been made by his boss and friend since their days as Warren Commission Staff members, Transportation Secretary William T. Coleman.

As general counsel for 13 months, Ely served as ex-officio judge advocate general of the Coast Guard and as America's "time czar" as specified by the Uniform Time Act.

It took Ely three months to feel comfortable in his new post; it took two hours for the U.S. Court of Appeals to rule in the government's favor in the Concorde case (Ely had expected six or seven weeks); and it took the persuasiveness of Dean Albert M. Sacks and the threat of boredom in Washington to lure Ely back to teach a federal courts course.

Ely, his legs propped upon his nearly empty desk top, recently

reflected on his year in the Transportation Department.

About the Concorde: "I won't be surprised if it is admitted to New York after the election. This airplane will never be in heavy service. It's not profitable. They're going to fly it to make the point that not all aeronautical innovation occurs in the U.S."

Ely foresees the development of a cleaner and quieter supersonic plane by the U.S., Britain, and France. But even then the plane will be for "specialty travel."



John Hart Ely

Besides the Concorde, Ely's major concerns were railroad reorganization and deregulation of elements of the transportation industry.

To avoid a Presidential veto of a Northeast railroad reorganization bill, Ely headed negotiations with Congressional staffs for a revised version of the originally-passed bill. Congress withdrew the original bill and approved the compromise.

About the reorganization: "That's a mess; it will be a mess for twenty years. My own personal view is that it's not going to work. The chances of profitability were diminished by Congress's insis-

tence on the labor protection provision and on maintaining certain light density lines."

Ely noted that a multi-billion dollar law suit has ensued with most of the major Northeast law firms representing somebody.

He believes freight trains are indispensable, especially because they are highly fuel-efficient, but feels that passenger trains are highly inefficient. Noting that Amtrak is more than half subsidized, Ely says, "I suppose it could be made to pay in the Boston to Washington corridor, but that may be the only place."

He predicts, nevertheless, that heavy government subsidies will maintain the passenger train system "in one form or another."

Planes and buses should be the primary means of long distance travel, Ely maintains.

"Buses turn out to be neglected by government policy. There's a class bias against them by the upper middle class. Buses are not regarded as a very pleasant way to travel."

Some of the 350 lawyers in Ely's office drafted the Aviation Act of 1975, a bill that has languished in Congressional committees. He says that because most legislators are sensitive to airline industry or labor pressure, a bill to "break the hold of the C.A.B. on keeping carriers out of new routes and from engaging in price competition" may stay in committee.

"Assuming Carter is elected — and it's not clear to me he's going to be — it [passage of the Aviation Act] will depend on how he feels," says Republican Ely.

A bill assigned to deregulate the trucking industry and promote greater efficiency has "not a prayer" of being passed by Congress, Ely says.

He asserts that his experience in Washington, which was divided evenly between law and policy-making, has not changed his thinking about constitutional law, his

Published ten times each semester by the Harvard Law School Record Corporation, 23 Everett St., Cambridge, Mass. 02138. Telephone 617-495-4418. Subscription price: \$3.00 semester, \$6.00 year mailed; \$8.00 year mailed outside U.S.; students \$3.00 year distributed at the Law School. Individual copies including back issues: 20 cents at the Law School, 50 cents mailed. Second class postage paid at Boston, Mass. Copyright 1976 by the Harvard Law School Record Corporation. The opinions expressed in the Harvard Law Record are those solely of the students comprising the Board of Directors of the Harvard Law School Record Corporation.

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HARVARD LAW RECORD

Decision Finds Med School's Minority Admissions Preference Unconstitutional

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lated the constitutional rights of non-minority applicants because it affords preference on the basis of race to persons who, by the university's own standards, are not as qualified for the study of medicine as non-minority applicants denied admission."

The decision appears to jeopardize special admissions programs at professional schools throughout California.

The suit was waged by Allan Bakke, a Caucasian, who had applied for admission to the UC-Davis Medical School in 1973 and 1974. He was denied admission in both years. Of the 3,737 applicants in 1974 and the 2,644 in 1973, 100 students were admitted. 84 were chosen by the regular admissions process; 16 were selected under a special program.

Though this program was for students from disadvantaged backgrounds, and certain non-minority students applied to the program, all of the students admitted under the plan from 1969 through 1974 were members of minority groups.

Bakke sought to compel the University to admit him, claiming that the special program resulted in "invidious discrimination" against him in violation of the Fourteenth Amendment.

The trial court found that the program did indeed discriminate against Bakke. However, it also determined that Bakke was not entitled to an order compelling his admission to the school. It stated that "although he was qualified to be admitted . . . he would not have been selected if there had been no special program for minorities."

Bakke's GPA was 3.51 and had MCAT percentile scores of 96, 94, 97 and 72 on the verbal, quantitative, science and general information portions respectively.

Both parties appealed from the lower court decision. Bakke

appealed on the denial of admission. The University appealed from the determination that the program was invalid and that Bakke was entitled to consideration "without regard to his race or the race of any other applicant." The case was certified immediately to the state supreme court.

In its lengthy opinion, the majority affirmed the unconstitutionality of the special program as administered. But the court reversed the decision below insofar as it had denied Bakke injunctive relief.

In the trial court's determination that Bakke would not have been admitted in either year even without the minority program, the burden of proof rested with Bakke to show that he *could* have been admitted. The Supreme Court held,

however, that since discrimination by the school had been shown against Bakke on the basis of race, the burden of proof should shift to the school.

The Supreme Court remanded the case to the trial court to find whether Bakke, under the reallocation of proof-burden, would still have been refused admission.

The Supreme Court was careful to distinguish situations of deliberate past discrimination. The Court denied that such a showing — based upon all its information — could be made in *Bakke*. It indicated, nevertheless, that a different result might follow upon such a showing.

The lone dissent was a 57-page opinion by Justice Tobriner. He
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Auto Repair, Beer Appreciation, Other Free U. Courses Offered

By Randy Phillips

Fans of Thomas Pynchon, motorists anxious to beat the Boston-area's high cost of car upkeep and repair, and sundry interest groups in between, may find what they're looking for in this year's Free University.

Registration for fall-term courses is scheduled for next week, according to Free U. co-chairperson Mary Miller. Anyone still interested in teaching a course has until 5 p.m. today to sign up in the Board of Student Advisers' office.

The HLS Free U.'s purpose is simply to "humanize the Law School," Ms. Miller said. "Other than that, the sky's the limit as to what people want to do."

The institution began two years ago with a visiting professor's yen to share his knowledge of celestial navigation. Last year's courses ranged from volleyball to bread

baking to "traveler's French."

Besides the novels of Pynchon and auto maintenance and repair, tentative offerings this fall include Israeli folk dances, Boston walking tours, Transcendental Meditation (a fee is charged), "Pack-Rat Philosophy: the fine world of trivia and junk," and "Serious Beer Appreciation."

The last, the instructor cautions, is "not free-for-all for luses."

Complete offerings and course sign-up sheets will be posted until Friday in Harkness Common and by the Langdell elevator. Anyone in the HLS community — faculty, staff, students, and their families — may participate.

Most classes will get underway the following week. Students will be notified by their instructors as to the time of their initial class meetings.

Chirelstein Joins HLS Teaching Corps

By Kenneth Levin

As a member (at least temporarily) of an elite reputed for its smug arrogance, the Harvard Law School faculty, Professor Marvin A. Chirelstein is refreshingly self-effacing. He appears, in fact, unaware that he is expected to be either smug or arrogant. But then, as anyone in his basic *Corporations* class could tell you, Chirelstein is not your typical Harvard prof.

Visiting Professor Chirelstein received permission from the warden to leave New Haven for a year, where he teaches at Yale. In addition to *Corporations*, he will also conduct a *Basic Taxation* course and a seminar in *Corporate Policy Problems*. Word filtered up from Yale that one could do considerably worse in picking a professor, and both his *Corporations* and *Tax* courses are fully subscribed.

Chirelstein, a product of Berkeley and the University of Chicago Law School, is 47. "Of course, I look much younger." Between degrees, he spent a year hanging out at Arlington Park Racetrack, outside of Chicago. It was "not a losing venture, but it had an indistinct future."

After law school, Chirelstein went to work for Prof. Surrey at the American Law Institute. Then came brief stints at the Treasury Department and Kaye, Scholer, Fierman, Hays & Handler in New York. In 1960 he went to teach at Rutgers, and five years later the big-time beckoned. He has been at Yale ever since.

This is not, however, Chirelstein's first visit to Harvard. Seventeen years ago he and his wife lived in the basement of Story Hall while he was participating in the International Tax Program. "We were paid so little by Harvard that we would feel in the furniture for quarters that may have rolled out of people's pockets."

Professor Chirelstein's attitude towards Harvard Law



"The teaching of law is ironic."

School is more favorable this time. "I like it," he says. "I like the look of it. There's something funny about those gigantic pillars. A little campy, don't you think?" Like all of his comments, this is said with a perfectly straight face.

Langdell South Middle, home of his *Corporations* class, "awed" him. "I was a little timid. I was surprised at the class size [the room is almost full] and wondered if it was possible to form any sense of intimacy. My discovery was that it wasn't impossible to work up a sense of a group." Prof. Chirelstein adds, however, that if he were a student the massive size of the Law School might be somewhat less appealing. And he finds the thought of grading a couple of hundred final exams "physically terrifying."

Chirelstein also seems awed by the school's oil paintings, which most students barely notice. He claims that they are "worth millions. You don't know what you've got here." It adds to his impression of Harvard as "a university virtually afloat in money."

Class size isn't the only difference Prof. Chirelstein finds between Yale and Harvard. Harvard law professors are, believe it or not, "less acerbic." They are also, in his opinion, less competitive with each other, and "kindlier. Or perhaps just

to visitors."

Prof. Chirelstein's beliefs concerning both the procedural and substantive aspects of a *Corporations* course are unorthodox. He does not subscribe to the Socratic method, where students are given "petty characterization problems" and then "marched over the cliff. I think it's phony. Most questions in my field are not so monumental as to deserve to be treated with theological mysticism. Tax and corporate law questions have answers," he maintains, "or at least discernible alternatives."

This attitude is probably a result of his course's content. "I really think that *Corporations* as taught as basic Agency should be scrapped. A four-hour course of that type is unnecessary. It's one of the reasons why students think the last two years of law school is just shoveling coal."

Prof. Chirelstein would eliminate the "jurisprudential component," which he claims is not challenging. He thinks that the conventional *Corporations* course is both too simple and too detailed, and generally fails to sophisticate the student about business. He would call his version of the course *Basic Finance*. This down-to-earth approach to the teaching of law is ironic, as Chirelstein reports that the rumor at Yale is that Harvard "professionalizes" its students. But as Prof. Chirelstein points out, "no one teaches it this way but me. Didn't you know that?"

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'Quota' Hiring of Blacks, Offensive Joke Denied

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the explicit ambit of Rule One.

The report released last week indicated "that Mr. Morrison was perhaps too casual in his dialogue with Bowman, but that he did not likely conduct himself in a seriously offensive manner and that he did not violate the rules of the Placement Office." The report also disclaimed any suggestion "that Ms. Bowman's charges have been made in any other manner than good faith."

The report represents the conclusions of Robert A. Gorman, Associate Dean of the Pennsylvania Law School, who conducted an investigation of the allegations. It was submitted to the Placement Committee on September 2 of this year, and was unanimously endorsed. With the consent of Gorman and the two parties to the dispute, Sacks released the report last Thursday, September 23.

In a memorandum announcing the release of the report, Sacks suggested that the report would have remained confidential but for the publicity that attended the dispute last spring. The HARVARD LAW RECORD, the BOSTON GLOBE, the Associated Press, and the HARVARD CRIMSON all reported the controversy, the latter paper printing an editorial criticizing the Law School for delay in resolving the dispute.

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After presenting the facts of the dispute and Bowman's recollection of the interview, the report examined in detail each of the three statements Morrison reportedly made.

Bowman contended that the first statement violated Rule One because "the existence of a quota is suggestive of nothing if not that Kirkland & Ellis approach the hiring of blacks differently than the hiring of whites." She further inferred that the firm's alleged quota represented a ceiling on the hiring of blacks.

With this inference, however, the Gorman report took issue. Acknowledging that Morrison may indeed have used the term "quota" to refer to the hiring practices of his firm, Gorman averred that if it had been used, "that term was not used, and was not reasonably to be understood, to mean a ceiling upon employment of blacks but rather a floor, a minimum." Without addressing Bowman's contention that quotas are inherently discriminatory, Gorman confessed that, faced with a statement referring to the term "quota" in "its more benign sense," he would be "hard pressed to understand how such a statement is discriminatory or at all in violation of Rule One."

Bowman next alleged that the use of the word "gal" in the second statement "in reference to a professional woman shows lack of respect for professional women in general and for the woman referred to in particular." She further alleged that the second sentence in that statement ("She was just like you only she was short.") "suggests that Morrison was stereotyping black females to the extent that while each white male was being considered for employment on the basis of his credentials, it was Morrison's feeling that black women can be differentiated only on the basis of size."

As with the term "quota,"
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Un-DeFunis-Like Result Reached In California Appeal

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argued in behalf of the constitutional propriety of the admissions program which the medical school had instituted to promote integration of its student body. He further defended "affirmative action" programs as necessary to remedy exclusionary and discriminatory policies of the past.

Tobriner concluded, "Two centuries of slavery and racial discrimination have left our nation an awful legacy, a largely separated society in which wealth, educational resources, employment opportunities — indeed all of society's benefits — remain largely the preserve of the white-Anglo majority."

The dissent continued, "It is anomalous that the Fourteenth Amendment that served as the basis for the requirement that elementary and secondary schools could be *compelled* to integrate, should now be turned around to forbid graduate schools from voluntarily seeking that very objective."

Professor Jack Friedenthal, visiting Harvard for a year from Stanford Law School, was responsible for an *amicus* brief on behalf of the American Association of Law Schools. He subsequently commented that "emotionally this would be a difficult decision to accept." The Association's position had generally been that most of the determinations that go into deciding a law school's composition should be left to the law school. Friedenthal said that given the California Supreme Court's liberal reputation "there will be, for better or worse, a large tendency to give the decision credence . . . unless the United States Supreme Court does something."

Friedenthal predicted that the decision would have a profoundly greater effect on schools without the drawing power of the "national" law schools. Schools such as Har-
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Concorde Gripes

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academic field. Even so, Ely was "amazed at the extent votes seemed to be influenced by jealousies between one Congressional committee and another."

The knowledge that he had another job waiting enabled Ely to be "more candid and outspoken" than he might otherwise have been. The most dramatic example occurred when Ely became the first member of the Warren Commission staff to call publicly for an investigation of the mechanisms by which the Commission got its information, or rather failed to get it.

Writing in the NEW YORK TIMES Op-Ed page on October 30, Ely concluded, "Every American is entitled to be angry about the recent disclosures and accusations, but perhaps our [the Commission staff's] entitlement is the greatest of all."

Does Ely see himself going back to Washington?

"I suppose there are some jobs that would tempt me. But I wouldn't do the same job."

Chayes, Cohen, Katz, Haar, and Dershowitz Aid Carter

(Continued from Page 1)

Before the heralded presidential debates last week, Professor Benjamin Chayes, a member of Carter's Foreign Policy and Defense Task Force, said, "Most of the polls show Carter beating Ford in a head to head race, and looking at Ford, I don't see anything that is likely to change that."

Chayes, who wrote the first draft of the major policy speech Carter delivered in New York last May entitled, "Nuclear Energy and World Order," said Carter is by far "the better man for the White House."

Citing President Ford's 25 years in the House of Representatives, Chayes said the Republican response to the problems facing the country has been "too little, too late and not informed by any very deep understanding of what the nation's problems are and how they can best be handled."

"Let's face it," he said, "Ford is used to two things — reacting

and opposing — and he's not used to developing coherent programs of leadership to deal with a set of problems."

Professor Jerome Cohen, also a member of the Foreign Policy and Defense Task Force and Carter's China advisor, said his special interest in this campaign has been to try to "foster public education on international issues and formulation of an 'enlightened China policy.'"

In the October issue of Foreign Affairs Quarterly, Professor Cohen suggests that one way to lessen hostilities between Taiwan and Mainland China might be "a Sino-American agreement declaring the international waters and airspace between Taiwan and mainland China a bilateral zone of peace and binding the two sides not to resort to force in this international area."

Cohen added that he would like to increase the extent to which consideration of human rights influences our foreign policy formulation and execution. As a start, Cohen declared we should end military and economic aid to authoritarian dictatorships.

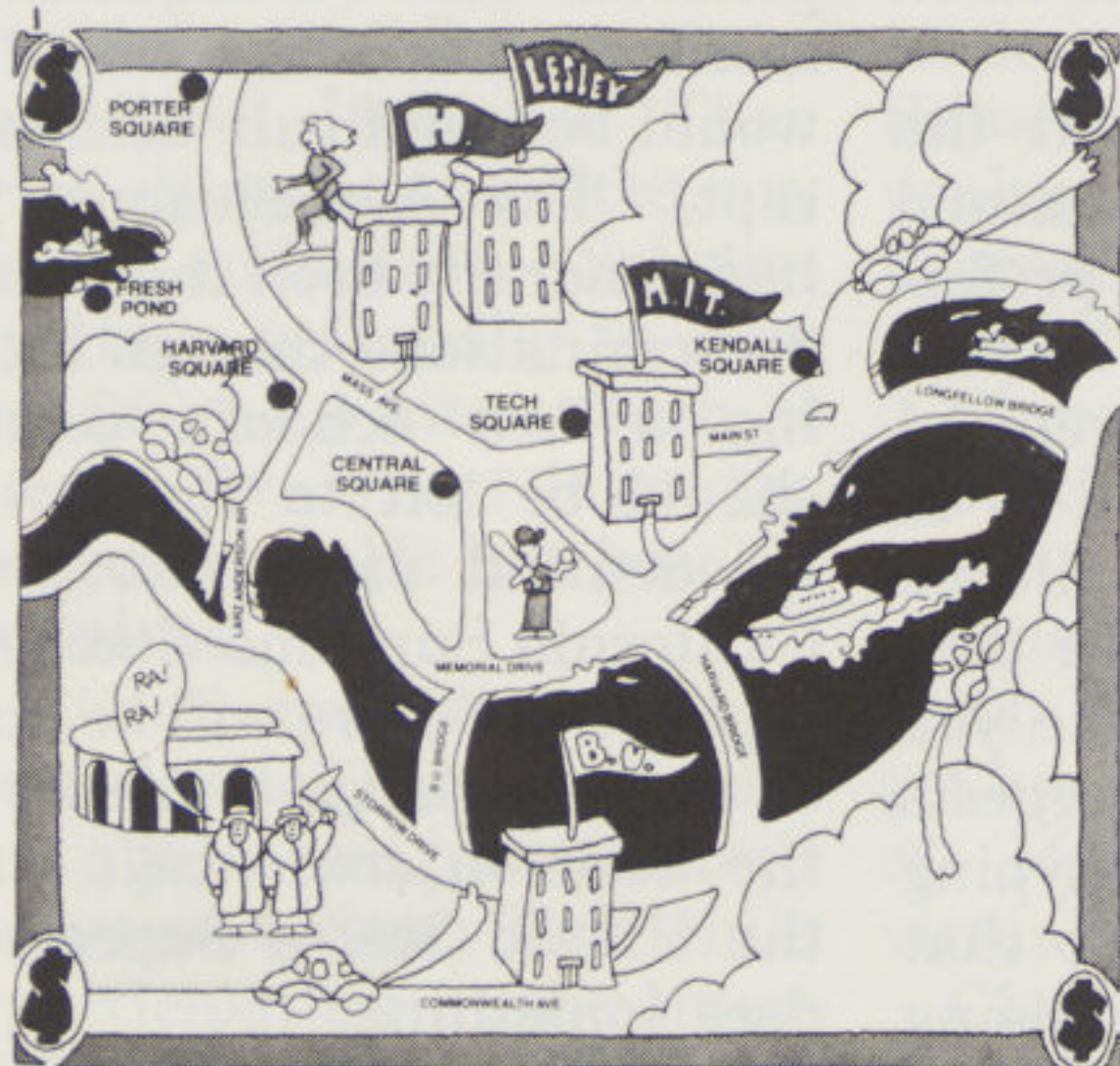
"Can't we do better than we've done by upholding certain minimal values and showing the world that we're against torture, and constraints on a free press, and the repression of political dissent?"

Cohen, who said the first presidential debate was "fairly even," added that reporters should have focused questions on the "major philosophical issues" rather than settling on the "broad statistical approach."

The candidate's stand on revising the nation's criminal justice system is in large part the handiwork of Professor Alan Dershowitz.

Dershowitz — whose article in the New York Times Magazine entitled, "Let the Punishment Fit the Crime," elicited a handwritten let-

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Professors Smile On Carter Candidacy

(Continued from Page 6)

ter of praise and solicitation of help from Carter, has served on the candidate's Criminal Justice Task Force and been responsible for many of the policy statements which advocate "presumptive" or "mandatory-minimum" sentences instead of the widely criticized indeterminate sentences currently imposed.

Dershowitz urged an approach "that steers a delicate course between the Scylla of glaring disparity and the Charybdis of inhumane equality — an approach that permits the sentencing judge and the parole board some limited discretion to tailor punishment to the particular criminal and his crime without producing significant disparities between similarly situated defendants."

Professor Milton Katz, who has worked with the candidate on several aspects of policy development including military, foreign, legal, and economic matters, as well as government reorganization proposals, said, "I guess I come as close to being a genuine Independent as you might find, but I'm a Democrat all the way on this one."

The way Katz sees it, "It took relentless pressure from a Democratic Congress to get Nixon and Kissinger out of Vietnam and if it hadn't been for relentless pressure from a Democratic Congress, God only knows what Ford and Kissinger would have gotten us into in Angola."

According to Katz, Carter has been firm in his assurances that he would maintain our vital alliances with Western Europe, Japan and Israel, and he has made just as clear his reservations about intervening in the internal affairs of any foreign nation.

"The other thing about Jimmy," Katz continued, "is that he is quite clear about the responsibility of the President to maintain the security of the United States."

Katz, who visited the candidate in Plains last month, said the real issues in this campaign are "the restoration of trust and confidence in government, an active and concerned approach to the unemployment problems, and the prudent and effective management of our financial resources."

Professor Charles Haar, chairman of the Housing, Land Use and Environmental Task Force, said one of the important aspects of a Carter presidency will be a stronger federal commitment to

housing programs and a more prudent approach to the use and maintenance of the nation's natural resources.

Haar said he doesn't think the presidential debates were a sensational launch for the Carter campaign, but added "in the end, he did quite well."

"On the whole, however, the debates were rather unexciting because they tried to deal with an entire law school curriculum in an hour and a half — and you just can't do it in that time."

Jimmy Carter
Plains, Georgia 31750

2-12-76

To Alan Dershowitz

I was impressed
with your ideas on
crime & punishment
expressed in NY Times
magazine in Dec.

Other ideas of
yours would be very
valuable to me &
I would appreciate
them.

Jimmy

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Kosinski: Typical Actions Often Marginal Fiction

By Adrien Mally

"What is typical and what is not?" Jerzy Kosinski, Tuesday night's Law School Forum speaker, asks precisely that question in his pursuit of fiction. Addressing a near capacity audience in the Ames Courtroom, the prose author stated that a novelist "writes precisely because he thinks he is typical."

Kosinski, winner of the National Book Award, has been a Visiting Professor of English at Princeton and at Yale and is currently living in New York City.

The choice of what is typical or marginal may often be problematic, according to the Polish-born novelist. Sometimes a situation becomes either "too typical to be redeeming, or too slanted for the reader's taste and therefore atypical."

In making a distinction between the typical and the marginal the author looks for guidelines within the norms of society. Such criteria are not hard to discern in a controlled mental environment such as is present in Russia; in the United States, however, it is "almost impossible to verify what is typical or what is not."

The size of the U.S. figures heavily in its "principle of public fiction," Kosinski stated. An author may write of a situation which will seem typical to only one per cent of the country, but when the population is well over 200 million, that percentage may represent a large audience, he explained.

One problem in the selection of typical situations arises when the novel is translated into different languages. Kosinski raised the question of whether an author is free to exclude those parts of a novel which won't be understood in another language or country. Kosinski recalled addressing a group in Holland which complimented him for his sense of the bizarre and his feel for science fiction. This was perplexing to him

until it was explained that his audience had found the situation in one of his novels of a man making a long distance phone call to another country both bizarre and futuristic.

In a lighter tone, Kosinski pointed out some of the problems involved in explaining to Eastern European readers some very



Typically Kosinski

American things such as Candy Pants, the 100% edible underwear that comes in three basic flavors, or the National Vasectomy Club which offers a sterling silver lapel pin, a membership card, and unlimited bumper stickers.

Recent Decision May Affect Who Schools Let In

(Continued from Page 5)

vard and Stanford, he concluded, would probably always be able to draw from a uniformly high pool of applicants without the problems of preferential discrimination which a decision like this might pose.

It is unknown as this article goes to press whether the University of California will seek review by the United States Supreme Court.

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A Step Backwards

Barely two weeks ago, the California Supreme Court straitjacketed a state medical school's attempt to escape from the racial errors of our past: it invalidated the University of California's affirmative action program. In finding that the program to ensure medical school places to disadvantaged minority candidates lacks a "compelling state interest," the Court pronounced the program unconstitutionally defective and offensive to the rights of the white majority.

It is undeniable that graduate schools' affirmative action programs, such as the one reviewed by the California court, favor one group of people at the expense of another. But as Justice Tobriner noted in his dissent, racial classifications can be benign as well as invidious, and justified as well as suspect. The substantial medical disadvantages that have beset minority groups throughout our history can be most effectively remedied — or at least alleviated — through the training of doctors who can be sensitive to the needs of their own communities.

Opening wide the doors to a "largely segregated medical profession" may be an idealistic goal. However, the need to offset past injustices and to meet present medical demands is concrete. We believe the program to be neither an example of egalitarian tyranny, nor — given the historical backdrop — an unjustified intrusion into the interests of the white majority. Reasonable men may certainly differ on whether the need to reverse the yesterday's errors is a "compelling" one, but in our opinion, it was accorded insufficient weight by the California high bench.

It is our view that equal opportunity means the freedom to compete for the rewards of excellence. The affirmative action program of the University of California Medical School presented such an opportunity to minority candidates who might otherwise have been denied this chance, regardless of their efforts.

By labelling applicants as "economically disadvantaged" rather than as members of minority groups, professional schools may evade the strictures placed on special admissions programs by this decision. But we maintain that affirmative action programs are a "perfectly proper" means to reach a more representative racial balance within the professions.

HARVARD LAW RECORD

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Fenno

Fenno navigated a path through the alluvial glut of students pouring out of the Pound Building and installed himself on a concrete slab. The 1L sitting at the other end was beaming and appeared lost in his thoughts. He had just spoken up in Civil Procedure and was feeling his oats; after all, he *was* the first in his section publicly to utter the phrase "*de minimis*". Fenno watched him remove a boy scout knife from his pocket, bend over, and carve a quarter-inch notch into the side of his leatherette briefcase.

"There. One, two, *three*. Not bad for the second week." He was thinking out loud when he caught a glimpse of an approaching acquaintance. A trained hand picked up his *Black's Law Dictionary* (4th ed.) and swiftly secreted it in the hollow of his oversized sportcoat.

"Hey, you really laid it on them today. Where'd you pick up that lingo?"

"Huh? Oh, hi, Jim. Well, you know how it is; one just picks these things up." He almost choked on his self-satisfaction. "After all . . ."

"The law is a seamless web." The sonorous maxim echoed off the wall of the Hark. Fenno had employed a skill acquired in a Free University ventriloquism course and projected his voice into the bushes behind the concrete bench.

"Who said that?" The 1L's looked around them.

"I did." Fenno returned to his normal voice.

The 1L's looked over to the odd individual sitting a few feet away from them. "And who are you?", *de minimis* asked.

"I'm your collective unconscious." Fenno was pleased at the spontaneous thought.

"What gave you that idea?" The second 1L was disturbed by all the words he didn't know and attempted to disguise his ignorance.

"Mannheim." Fenno was thinking quickly.

"Mannheim, Germany?" *De minimis* demonstrated his exhaustive knowledge of world geography.

"No, Karl."

Out of the midst of confusion, a frightening idea dawned on the second 1L. He addressed his friend. "Watch what you say; he may be Fenno."

De minimis wasn't intimidated. "Fenno. Hah! Why you're nothing but a superannuated law student!"

Fenno, not to be outdone, responded, "Well, what have we here? A master of the obvious."

"The obvious? Why, I'm not even sure that you exist." *De minimis* turned to his friend for the expected approval. When he looked back, the other end of the bench was empty, save for a half-sheet torn from a legal pad. *De minimis* picked it up and read it. "If Fenno didn't exist, law students would have to create him." Hmmm . . .

Letters to the Editor of the RECORD

Erie Tactics Under Attack

To the Editor:

You and Bob Rizzi who wrote "Erie Memoirs Reveal Drama, Tragedy" in the September 24th issue of the RECORD are to be congratulated on an interesting article; but your restraint in discussing certain tactical moves by both sides exceeds the requirements of journalistic courtesy, at least for a law-oriented publication.

In the course of reviewing the litigation that led to the famous *Erie Railroad Co. v. Tompkins* decision, the article mentions several interesting facts. We are told: (1) that while the case was in the Supreme Court the railroad, without notice to its attorneys, sent emissaries to the plaintiff Harry Tompkins with a settlement offer of \$22,000, only \$8,000 less than a jury had awarded him for his injuries; (2) Tompkins's attorneys, we are advised, "reacted with a fitting countermove." They secreted Tompkins away to protect him from the "enticements of the railroad," and the "danger" of early settlement.

Evidently, in the interest of not confusing a good story on federal court jurisdiction with issues from another course — professional responsibility — the article failed to comment on the propriety of the railroad (one must assume with the acquiescence of its attorneys) communicating on the subject matter of the representation of their client with a person (Tompkins) known to be represented by his lawyers, without the consent of those lawyers. For current professional standards, see, e.g., Canon 7, Ethical Consideration (EC) 7-18, and Canon 9.

And perhaps more serious, the article appears to accept and even commend as a "fitting countermove" Tompkins' attorneys' removal of their client to a place where he was unlikely to learn of other, perhaps even more attractive settlement offers. Ethical Consideration 7-7 of Canon 7 requires contemporary attorneys to allow "the client to decide whether he will accept a settlement offer . . ." and E.C. 7-8 requires a lawyer to "exert his best efforts to ensure that decisions of his client are made only after the client has been informed of relevant considerations."

Your silence in discussing ethical considerations may reflect an acute understanding of the rules — and their limitations. Tompkins' attorneys were convinced they would win in the Supreme Court. Had they tried sincerely to make an objective presentation of his options, it is likely that their conviction — and desire to press on — would have been conveyed to Tompkins with an urgency that a man in his position could hardly resist. Regrettably, Tompkins is an

OCTOBER 1, 1976

all too typical example of poor and ill-educated clients who are afforded inadequate protection by the canons of ethics.

And as for the railroad attorneys, the best efforts of ABA draftsmen have not succeeded in devising meaningful penalties and feasible methods of proof to control any but the most blatant excesses of those who represent the powerful, particularly when they are engaged in legal battle against the weak.

Derrick Bell
Cambridge, Mass.

Ed. Note: No one has ever accused the RECORD of paying too close attention to ethics, as Professor Bell observes. However, credit in this instance cannot be shared with the Editor — it goes to Rizzi alone.

Law Notes

William M. Kunstler will speak on "Justice in America" to a meeting of the Harvard Law School Forum on Thursday, October 7, at 8:30 p.m. The meeting will be held in the Ames Courtroom, Austin Hall. There will be a \$1.50 admission charge for those who do not hold season tickets. Season tickets will be available at the door for \$8.00.

* * * *

A rally to support the Massachusetts Bottle Bill will be held today at 12 noon in the Gardiner Auditorium of the State House in downtown Boston. Speakers will include Governor Dukakis and Secretary of Environmental Affairs Evelyn Murphy.

* * *

Harvard-Radcliffe Hillel is sponsoring a series of Sabbath Table Talks. The first one will be held on Friday evening, October 1, 1976, 8:45 p.m. at Phillips Brooks House Parlor, with Michael Walzer, Professor of Government, who will speak on "Reflections on the War in Lebanon and Its Implications for Israel."

* * *

An exhibition of photographs by Joan Lebold Cohen, entitled "The Year of the Dragon," will be on display in the Langdell Mezzanine Gallery from October 1 through December 31, 1976.

* * *

An "Artisanry" exhibition by Delle Sacks and daughters will be shown in the Langdell Reading Room from October 1 through October 31, 1976.

* * *

Staff lunch for the *Record* staff will be held in the Mallory-Smith Room in the Hark at 12:30 today. Liquid refreshment provided by the *Record*. We will discuss the Friday issue and story assignments for the October 8 issue. Prospective members welcome.

Faculty Notes

Professor Frank E. A. Sander has recently been appointed by the President of the ABA to a Special Committee on Resolution of Minor Disputes. This group will investigate the present operation of small claims courts and propose improvements.

Cryptic Law

The following excerpt from a law school case book is in "judicial code." Decode it. Sports fans should enjoy this week's selection. (Hint: Each letter stands for a different letter of the alphabet.)

. . . [A]fhyhisfe yb aefrgctft zeix
fzzfrhynfgm leqcysq hwlh hwf lulet
risbhyhchft l qyzh, lst wf rls isgq wiaf hi
brief is wyb leqcxfs hwlh hwf lulet
dclgyzyfb lb ls fvrfahtys cstfe [hwf
laagyrllkgf] bfrhyis . . . Ys xlpysq hwyb
leqcxfs, afhyhisfe bwyzhb yshi l bwihqcs
ziexlhyis, rishfstysq hwlh wyb
lrrixagybwxfshb ys hwf rwlxayisbwy
ziikhlgg qlxf risbhyhchf fterlhyislg,
lehybhyr, bryfshyzyr, lst rynyrlrwyfnfxshb
uyhwys hwf xflsysq iz [hwf laagyrllkgf]
bfrhyis . . . Uf kfgyfnf hwlh afhyhisfe
bwicgt kfrlcqwh kfwyst hwf gysf iz breyxxlqf
is hwyb alehyrcgle izzfsbynf xlsfcnf.

(Solution on Page 16)

SPORTS QUIZ

1. How many times was Lew Alcindor (now Kareem Abdul-Jabbar) outrebounded in a Pac-8 conference game?
 2. 50 home runs have been hit in a single season on 16 occasions and by 9 different men. Who was the oldest man to accomplish this feat and who was the youngest?
 3. What is the record for fewest hits by both clubs in a major league baseball game?
- DEALER'S CHOICE:**
4. What three sports are commonly won while moving backwards?
 5. After winning Super Bowl III in 1969, four members of the New York Jets were teamed together to form the singing group, "The Four Jets," which sang the praises of Score hair cream in a nationally shown television commercial. Who were the Four Jets?

Black Student's Charges Nixed

(Continued from Page 5)

Gorman found that if indeed the term "gal" was used, it was not used in other than a benign sense. Pointing out that both he and Morrison belong to a "sub-culture of our society" that regards the term "gal" as "completely innocent," Gorman concluded that imposing sanctions for the use of the word would be pointless and unfair, and accepted Morrison's promises to display "increased sensitivity" in future interviews.

The report also dismissed the allegation about the second part of Morrison's second statement, finding that Bowman "appears to make less of the alleged statement," that Morrison meant the alleged statement as one of fact and as a compliment, and that it was impossible to determine exactly what was said or how it was said.

The report paid most serious attention to the alleged third statement containing the reference to Clorox bleach. Gorman acknowledged that if in this case the facts were as alleged, the statement "was at the least callous and offensive and at worst . . . a violation of the rules of the Placement Office which might warrant a sanction ranging from a reprimand to exclusion from Harvard's placement facilities."

According to Gorman, Bowman and Morrison agreed that Clorox was mentioned as one of the industrial corporations for which three black associates had left Kirkland & Ellis. Bowman, however, asserted that this information was conveyed "sarcastically," and that it was "accompanied by a reference to the supposed humor of the situation." Morrison denied both the sarcasm and the attempt at humor.

Because no third person was present at the interview to corroborate either story, Gorman decided to settle the question by determining 1) whether it was reasonable to believe that Morrison would have

made the statement attributed to him by Bowman; and 2) whether it was likely that Bowman would have construed innocent but clumsy words in their worst light. Gorman concluded that the answer to the first question was "no," and to the second question "yes."

In Morrison's favor, Gorman noted the following findings. Of the minority students Morrison interviewed in 1974 and 1975, only one later expressed a "negative reaction" (in response to what the complaining student called Morrison's "flip" and "insensitive" way of explaining the absence of blacks at the firm). In Morrison's 14 years as an interviewer (12 years at Harvard), no similar complaint had ever been filed against him. Further, Kirkland & Ellis in their interviewing manual and inter-office memoranda professed a strong commitment to non-discriminatory hiring and an awareness of the sensitivity of law school students to suggestions of possible bias. Also, Morrison said that he was favorably impressed with Bowman after the interview and considered inviting her to the firm for further discussion later that fall.

Finally, Gorman found that Morrison's personal life suggested concern for the sensitivities of women and blacks. His wife entertained blacks at their home as a recruiter for Bryn Mawr College. His home is

in a racially integrated suburb of Chicago and his children have attended integrated schools. The report added that "Mr. Morrison also noted that the firm's former black attorneys were good friends of his socially, and that he took a personal concern in their progress while with the firm."

Concerning Bowman, Gorman found no evidence to suggest that her charges "have been made in any manner other than good faith," and commended her for filing a complaint despite the risk of repercussions which could follow.

Nevertheless, Gorman held that Bowman had overreacted to the situation. "Certainly the surrounding conversation was upsetting to Ms. Bowman; witness all of the charges made by her and discussed in this Report. Having already come to the conclusion that Mr. Morrison was disrespectful to her because of her race and her sex, it is not surprising that Ms. Bowman characterized as hostile and offensive his comments regarding the Clorox company."

From this evidence, Gorman found that it was "extremely unlikely that Morrison made the statement with which he has been charged. At worst his total response to Bowman's question regarding the status of blacks within the firm was unduly casual, and his manner might

(Continued on Page 16)

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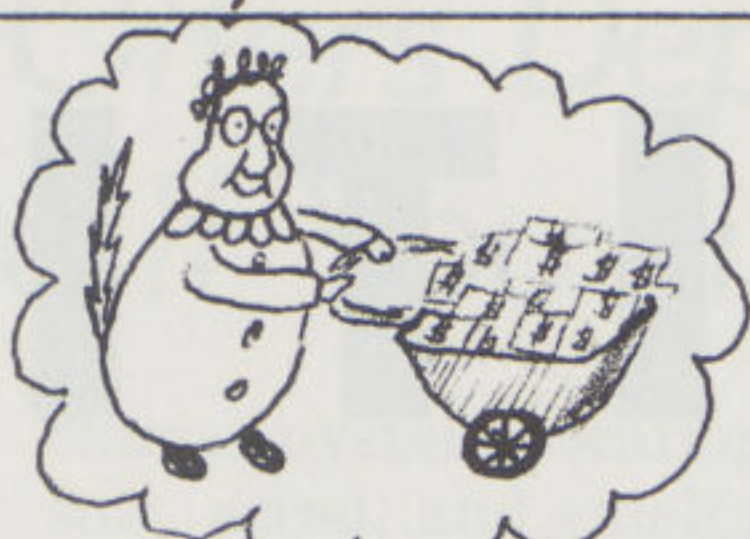
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NERD COMIX

starring
Herb
Garnish



Herb ponders his offer...



(But suppose they gave offers to all the clerks! I'd just be one of the pack!)



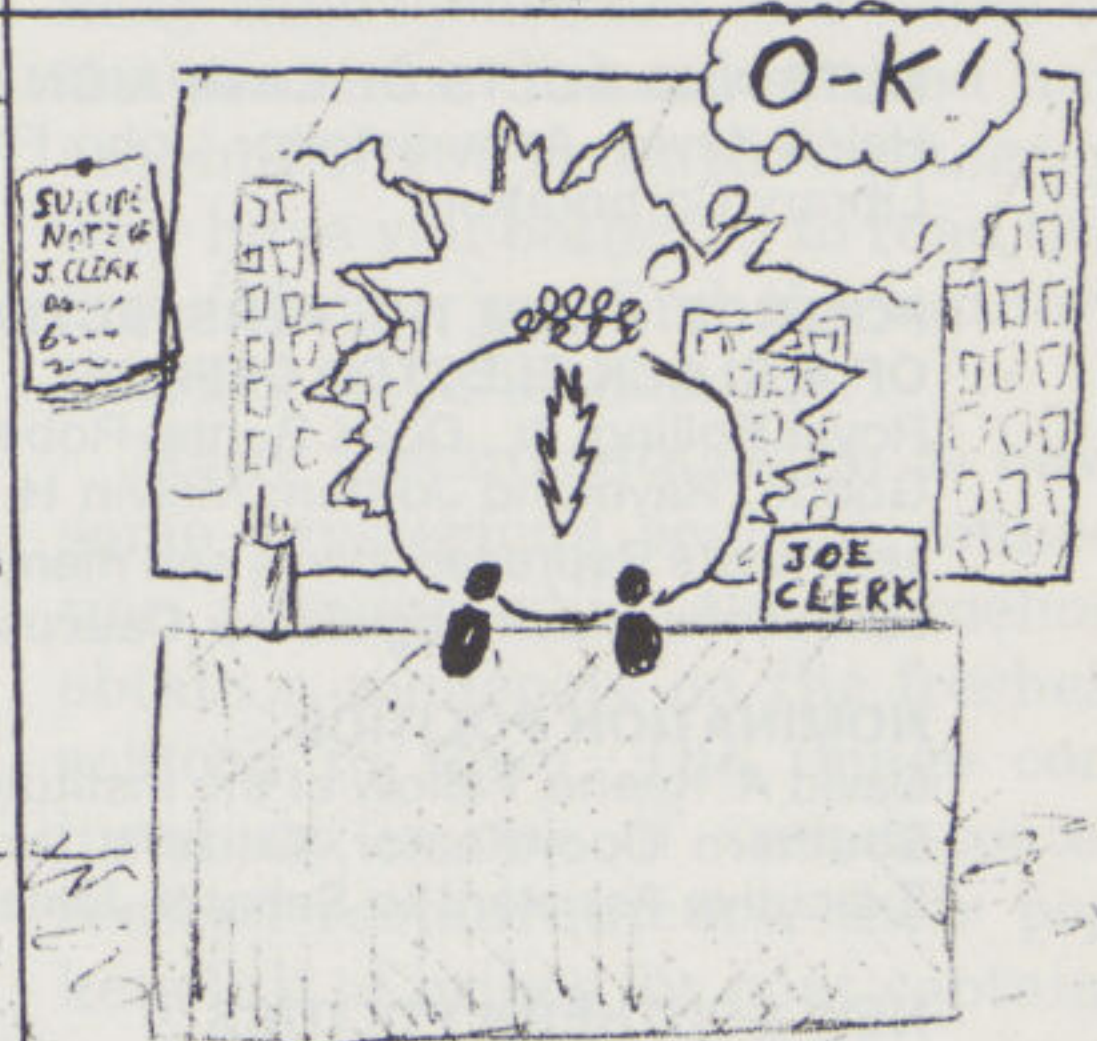
Ho!
No more
litigation
memos
for you,
Ed!



No loss. He stole
pens from the
supply closets
anyway



O-K!



Uh-oh!
They gave him an
offer?? HIM??



Hi Herb!

Hiya,
Willie

Five clerks, two offers??
Two out of five?
That's forty percent!

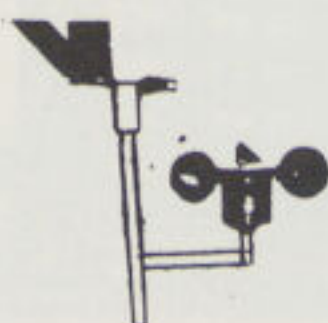
That's not "very (+) selective!"
Not even "highly selective!"
THAT'S PRACTICALLY
"OPEN ADMISSIONS!"



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to change its name to
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Scott Patterson



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Jack Walsh, organizational consultant; Massachusetts political activist

NUTS AND BOLTS OF CAMPAIGN ORGANIZATION

Helen Keyes, Administrator, John Fitzgerald Kennedy Library Corporation

POLITICS: FROM THE PERSPECTIVE OF A BLACK ELECTED OFFICIAL

Royal Bolling, Jr., Doris Bunte, Robert L. Fortes, Mary Goode, Raymond Jordan, Melvin H. King, Massachusetts State Representatives and members of other Massachusetts Black Legislative Caucus

NOMINATION POLITICS

David A. Keene, Fellow of the Institute of Politics; 1976 Southern Coordinator, Citizens for Reagan; former Executive Assistant to Senator James L. Buckley

NEW SOUTHERN POLITICS

Robert G. Clark, Fellow of the Institute of Politics; Mississippi State Representative; former member of the board of directors for the National Black Legislators and chairman of the Mississippi Black Elected Officials

THE POLITICS OF BUSING

J. Anthony Lukas, Fellow of the Institute of Politics; former New York Times correspondent; author of Don't Shoot — We Are Your Children! and Nightmare: The Underside of the Nixon Years

WHO REALLY RUNS OUR BIG CITIES?

Barry Gottehrer, Executive Director of the Life Insurance Association of Massachusetts; former Executive Assistant to New York Mayor John V. Lindsay, author of The Mayor's Man

POLICING URBAN AMERICA

Robert J. diGrazia, Police Commissioner, Boston; former Superintendent of Police, St. Louis County, Missouri; former Chief of Police, Novato, California

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Martin A. Linsky, Editor of The Real Paper; consultant to the Ford Foundation on law-media problems

THE FAR SIDE OF POLITICS: GOVERNMENTAL ISSUES AND MEDIA COVERAGE

Richard Broeker, Fellow of the Institute of Politics; former Minnesota State Planning Director for Human Services

THE POLITICS OF HEALTH CARE

Mark L. Schneider, Legislative Assistant for Senator Edward M. Kennedy

FOOD, NUTRITION, AND HEALTH: RESEARCH INTO THE DYNAMICS (AND POLITICS) OF A STATE POLICY OR LACK THEREOF

Saul Barry Wax, Senior Policy Analyst, Massachusetts Consumers' Council

THE POLITICS OF ENERGY

Henry Lee, Director, Massachusetts Energy Policy Office

THE POLITICS OF MONETARY POLICY

Frank E. Morris, President, Federal Reserve Bank of Boston

THE POLITICS OF EQUALITY IN THE JOB MARKET

Micho Fernandez Spring, contributing writer on Hispanic Affairs for the Boston Herald American and formerly of the Lindsay Administration in New York City; William Spring, Director of the Boston University Regional Institute on Employment Policy

FOREIGN POLICY MAKING IN THE DEPARTMENT OF STATE

Tain P. Tompkins, Fellow of the Institute of Politics; Foreign Service Officer

AFRICA AND WORLD POLITICS

Thomas R. Kanza, Associate Professor of Political Science, University of Massachusetts (Boston); former Cabinet Minister in Congo (Zaire) under Prime Minister Patrice Lumumba; former Ambassador to the United Nations, India, Britain

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APPLICATION DEADLINE: OCTOBER 5

'76

CAMBRIDGE, MASS. 02138

The Dolphin Offers Dependable Seafood; Go Elsewhere If You Like Hanging Plants

By Gary D. Hailey

Two brand-new 1L's were recently overheard discussing Harvard Square restaurants.

First 1L: "I don't understand why Harvard Square restaurants are overpriced and trendy, and why they seem to feature unrecognizable, pseudo-ethnic food, and why the service is dependably incompetent and the decor overly chic. Why aren't there any places here with basic, well-prepared food at reasonable prices?"

Second 1L: "There must be a law against it."

Given the somewhat excessively legalistic emphasis of the first few weeks of law school, the second 1L's incorrect answer is understandable (although it is still incorrect).

There seems to be no good explanation for the fact that so many local eateries depend more on gimmickry than on the quality of their food. Maybe it has something to do with their clientele's perceptiveness (or lack of it).

But we know that "there must be a law" is not the answer. There are a few pleasant exceptions to the rule, and The Dolphin Restaurant, located at 1105 Mass. Ave., is one of them.

The Dolphin relies on simple preparation of fresh specimens of just about any species of seafood that one would care to eat.

The basic menu offers shrimp,

clams, oysters, scallops, haddock, sole, scrod, and smelts, in broiled, fried, or steamed versions, either singly or in combination. Complete dinner prices range from \$2.15 for fried or broiled smelts, to \$2.65 for fried or broiled haddock or sole, to \$2.95 for steamed clams, to \$3.25 for fried shrimp, to \$3.85 for the particularly praiseworthy broiled scallops. From day to day, the listings may also include fresh broiled mackerel, bluefish, perch, trout, salmon, or swordfish, at prices ranging from \$2.85 to \$4.25.

The portions in general are healthy — on a recent trip, there were 13 fried oysters to an order, and the steamed clam dinner brought 40 of the wonderful little bivalves.

One especially recommended dish is the combination platter (\$3.35), which includes a generous helping of fried clams, shrimp, scallops, and a fried haddock fillet.

If you are feeling particularly expansive (Webster's Seventh New Collegiate Dictionary, p. 292, definition #5), there's always boiled lobster, available in three sizes ranging up to a one-and-a-half-pounder for \$6.25.

Last but not least, the Dolphin serves clam (\$2.05) and lobster rolls (\$2.95).

The price of any of these dinners entitles the diner to bread and butter and a choice of two items from a list of side

dishes including baked or french-fried potato, a tossed salad, cole slaw, or the vegetable du jour.

Also available are potato-less seafood chowder (\$.50/1.00), allegedly homemade pies (\$.55), and ice cream (\$.40, vanilla only). Unfishy sandwiches are also listed on the menu for diehard seafood haters, but if you're in that category, why have you bothered to read this far? (Maybe you find the author's literary style irresistible?)

Many restaurants claim to have some mysterious seafood connection, through which they somehow obtain a monopoly on the freshest seafood in town. The image conjured up is one of trench-coated seafood restaurateurs, their pockets full of bribes for boat captains and fish wholesalers, who spirit away the choicest examples of our finny friends from under the very noses of their competitors, and then somehow (jet helicopters? laser beams?) transport it all from boat to kitchen to table within minutes.

However the Dolphin's owners do it, they manage to get very fresh, high-grade seafood. But what they then do to it, which is not very much, is just as important. The manner of preparation is always very basic — broiling, frying, or steaming. Thankfully, there is no attempt to disguise the food with a melange of spices or a pretentious title. Perhaps it is what is *not* done to the food at the Dolphin that makes it a successful restaurant.

Some may find the menu too unimaginative. It is true that broiled bluefish tastes pretty much like broiled mackerel which tastes pretty much like broiled perch. But the Dolphin's culinary strategy has resulted in dependably satisfactory food, and no choice will

(Continued on Page 16)



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Tables and Shrimp Are Smallish; Dolphin Recoups With Low Prices

(Continued from Page 15)

prove really disappointing.

No place is perfect, and the Dolphin does have its faults. The best that can be said about the neo-seafood plastic decor is that it is not too aggressively tacky; at least there are no sickly ivy plants hanging over you like the sword of Damocles.

The service is not too bad by Harvard Square standards, but won't win any prizes either. The two-person tables are too small, and the place can get pretty crowded and noisy at peak times. The smallish Maine shrimp just aren't as tasty as their Gulf cousins, but that's not really the Dolphin's fault.

Most of the restaurant's shortcomings are minor, and some are only arguably faults. True, the Dolphin does not offer alcoholic beverages. But the silver lining to this cloud is that it gives the experienced drinker a welcome opportunity to pick up his wine at a lower-than-restaurant-wine-list

price (and your friendly neighborhood liquor store offers a wider selection than the familiar wine-list trio of Lancer's, Mateus, and Blue Nun).

So go to the Dolphin for consistently well-prepared, reasonably-priced, fresh seafood. If you want strange-looking, strange-tasting, and less than eminently palatable food, served in "colorful" (i.e., bizarre) surroundings by waiters in "colorful" (i.e., absurd) costumes, and a bill which seems to have little relationship to the amount of enjoyment you've received from the experience . . . well, there are a lot of restaurants that fit that description.

And sometimes it seems like all of them are in Harvard Square.

Sports Answers

1. Once, by Ron Taylor (7-1, 290), 8 rebounds to 7, in USC's 46-44 upset. It was Alcindor's last Pac-8 game.
2. Willie Mays for both: 51 in 1955 at the age of 24 and 52 in 1965 at the age of 34.
3. One, on September 9, 1965, when the Los Angeles Dodgers beat the Chicago Cubs, 1-0.
4. Rowing, backstroke, and high jump (Fosbury Flop).
5. Jim Turner, Bake Turner, Matt Snell, and Don Maynard. Special thanks and a slice of pizza to Dave Abrahamson for providing some of the details in question #1. If you have a question you'd like to see in print, please send it on to the Record office. We have a slice of pizza with your name on it.

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"Clorox" Denied

(Continued from Page 12)

have been viewed as not serious enough to match the very serious concerns being voiced by Bowman. But even were that true, I cannot conclude that there has been a violation of the rules of the Placement Office."

Appended to the report are reflections by Gorman on the general problem of discrimination in placement interviewing.

To help improve the complaint procedures of the Placement Office, Gorman recommended that a less litigious mode of resolving disputes be adopted.

Gorman asserted that this system was responsible for Bowman's "conception of her case as a litigated controversy," and ascribed to this conception her unwillingness to withdraw her complaint upon receiving a conciliatory letter from Morrison over the summer. Bowman, however, maintained that Morrison's continuing refusal to concede the alleged Clorox joke made it impossible for her to withdraw her complaint.

Solution to "Cryptic Law"

for Hornung's position. Personal foul code narrowly and was unable to find a basis. The judge, however, read section 74(b) of the rules some degree of mathematical skill. It requires some degree of play books re-ment was that digestion of play books re-exclusion, and thus nontaxable. One argu-award was within the section 74(b) awards come for 1962. Hornung argued that the should have been included in his gross in-performance in a championship game Bay halfback) by Sport Magazine for his awarded to Paul Hornung (former Green held that the value of a 1962 Corvette Commissioner, 47 T.C. 428 (1967). The court particular offensive maneuver." Hornung v. We believe that petitioner should be caught behind the line of scrimmage on this par-ticular offensive maneuver." Hornung v. In making this argument, petitioner shifts into a shotgun formation, contending that his accomplishments in the championship football game constitute educational, artistic, scientific, and civic achievements within the meaning of [the applicable] section . . . We believe that petitioner should be caught behind the line of scrimmage on this par-ticular offensive maneuver." Hornung v. Commissioner, 47 T.C. 428 (1967). The court held that the value of a 1962 Corvette awarded to Paul Hornung (former Green Bay halfback) by Sport Magazine for his performance in a championship game should have been included in his gross income for 1962. Hornung argued that the award was within the section 74(b) awards exclusion, and thus nontaxable. One argument was that digestion of play books requires some degree of mathematical skill. The judge, however, read section 74(b) of the code narrowly and was unable to find a basis for Hornung's position. Personal foul