



Harvard Law Record

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America's Oldest Law School Newspaper

February 17, 1989

Dissatisfied Students Push For Improved Course Lottery

By Sally Johnson
Staff Writer

The administration is considering a proposed new pre-registration system but has indicated that it may not be implemented unless students express their support for it. The system, developed by the Law School Council (LSC) Legal Education Committee (Committee) over the past two and half years, was proposed in response to student dissatisfaction with the present system.

While the proposal has been discussed with Administrative Dean Simone Reagor, Registrar Sue Robinson and Assistant Registrar Mark Siawson, at present it is not clear whether or when the proposed system will be implemented. According to Robinson, "technically [the decision] is up to the deans," but she added that "I think the deans would feel better [about approving the proposal] if there was some more student feedback."

Bonnie Savage, 3L, a member of the Committee, described what she sees as the benefits of the proposed system. Under the current pre-registration system, she said, students who are denied class space for their first choices get no priority over students who do get their first choices. This means that "some students can win at every level of choice, while other students may lose at every level."

The proposed system, Savage said, was developed to address this problem. The system prioritizes students' subsequent choices when their higher

choices are denied. If a student's first choice is unavailable, for example, the system would attempt to give the student his or her second choice, or if that course is filled, his or her third choice would be filled. Only after every student has received one course would the second "round" begin. Students would be able to list as many as 23 different courses.

Another problem students find with the current system, Savage said, is that it does not allow students to list courses whose scheduled meeting times conflict with other listed courses, nor may students list different sections of the same course. Thus, when students are denied a particular course selection, they cannot be placed in an alternate course.

The new system would allow students to sign up for multiple sections of a course as well as for courses with time conflicts, so if their first choices are denied, they can be registered in one of their "back-up" courses.

Under the proposed system, Savage said, students are more likely to end up with a full schedule since they can list back-up courses. Although students would still have to think carefully as they fill out their pre-registration forms, she said, the need for "strategizing" and "second-guessing" of other students would be reduced.

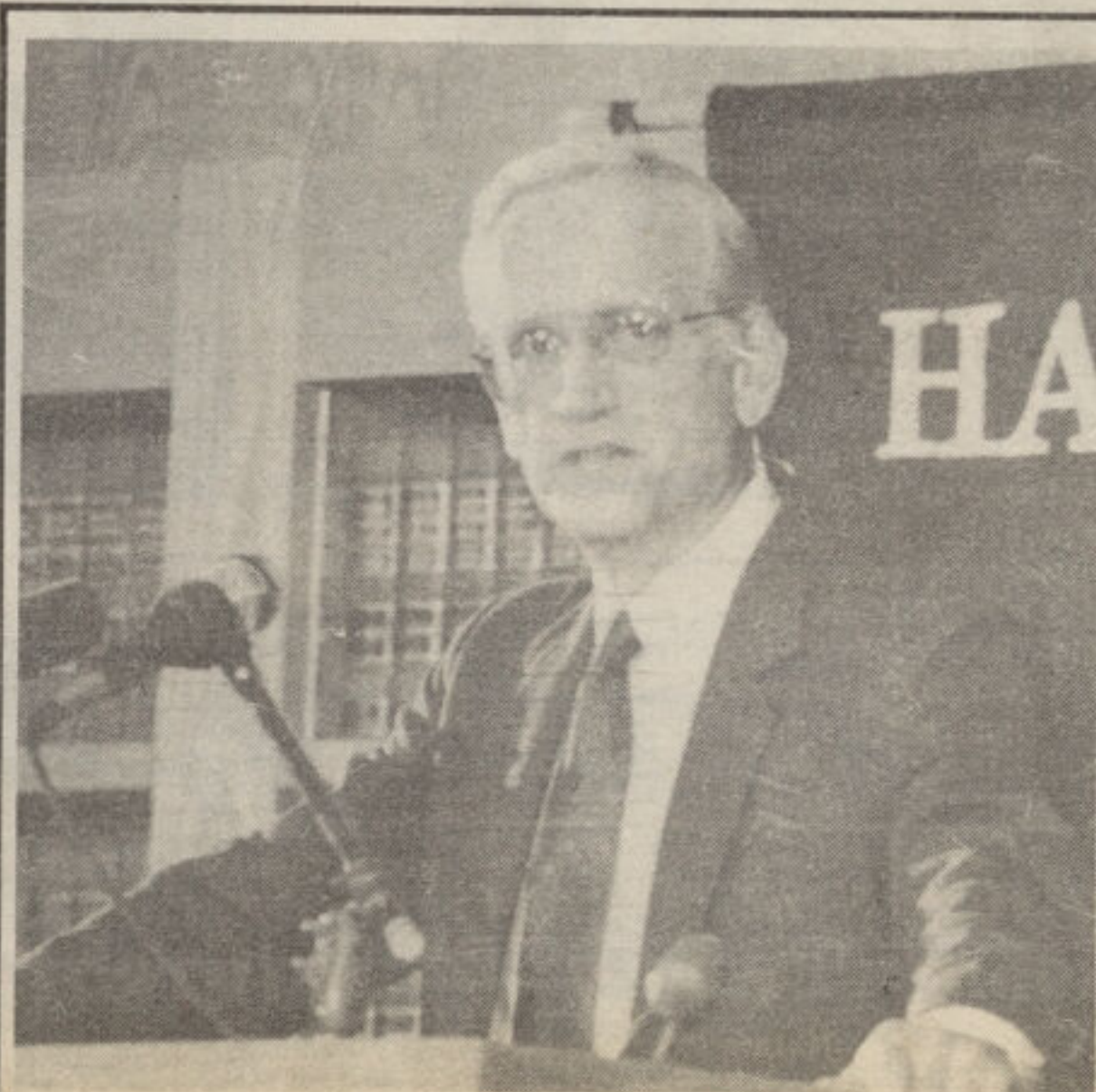
As under the present system, 2Ls would continue to receive preference for second-year basic courses and 3Ls would continue to receive preference for upper-level courses.

While noting some of the benefits of the proposed system, Registrar Sue Robinson said that it too has its unfavorable consequences. First, she noted, under the proposed system a student's second or third choice could become the student's first round choice. As a result, it would be possible for that student to get into a course ahead of another student who listed the same course as a first choice but was lower on the randomized list.

Second, Robinson expressed concern that students might receive a number of courses they listed near the bottom of their forms. Thus, their schedules might consist mostly of "padding," and not reflect their true course preferences. More generally, Robinson stated that "there will always be trade-offs. There is no such thing as a perfect system."

In defense of the present system, Robinson stated that "the great majority of students" do get their first choices, and, although the figures vary from year to year, students generally wind up with complete or nearly complete pre-registration schedules. She further explained that less than full schedules "are not really a problem, because at Harvard we shop for courses." Students who need to add courses in the fall have the opportunity to sit in on various classes and hence to make truly informed choices about which ones they would like to add.

According to Savage, the proposal is finally under serious consideration after being "tabled" (continued on back page)



FBI Director William Sessions

Patricia Lee

FBI Chief Defends Investigative Methods

By Patrick Miles
Staff Writer

The use of sensitive investigative techniques while attempting to balance the rights of society with individual rights was the topic of a speech given by Federal Bureau of Investigation (FBI) Director William Sessions to the HLS Forum on Feb. 8.

Sessions, a former United States District Court Judge in Texas, believes the balance is both possible and beneficial to

our society which values its freedom.

"Civil liberties are very prominent on everybody's mind. As Americans, most of us are offended by any intrusion into our private lives. On the other hand, we are angered that our society is not protected from those who want to do us harm."

"Through the lawful use of sensitive investigative techniques, we can successfully attack criminal conduct in a fashion that is both possible and beneficial to (continued on back page)

Bok Delays Dean Choice

Despite expectations that Harvard President Derek Bok '54 would announce his selection for the new dean of HLS when he returned from a working vacation in early February, there has been no word yet on his choice.

Bok indicated to the faculty last fall that the decision would likely be made before Christmas, but there has been no official explanation for either delay, and Bok's administrative assistant refused to comment.

A number of professors familiar with the dean search said they had only heard speculation about the delayed selection by Bok.

Minority President, Supervising Editor Elected To Review

By Troy Morgan
Staff Writer

The 1989-90 *Harvard Law Review* masthead includes the publication's second minority president and the first black woman ever. The eight new staff heads were approved unanimously by *Review* members in an election on Feb. 5 and Feb. 9.

The new president, Peter Yu, 2L, from Annandale, Virginia, is a graduate of Princeton University and is working toward a Ph.D. in Harvard's Government Department. He described the new masthead as "a diverse and broad-ranging group." Yu, an Asian-American, is only the second minority to head the *Law Review*. The first was Raj Marphatia '88, who is of Indian descent.

One of the two new supervising

editors, Crystal Nix, 2L, also a Princeton graduate, may be the first black ever on the masthead. According to Carl Coleman, 2L, the other supervising editor, "the 10 year memory of the business office can't remember anyone else, [and] the rumor here at the office is that Crystal is the first."

"Our class [class of '90] was more diverse to begin with. I'm glad to be a part of the greater diversity on the *Law Review*," Nix said of her ground-breaking status.

Three of the eight members of the new masthead are women, a proportion roughly equivalent to the forty percent female composition at HLS. One of the women, Caroline Brown, 2L, a Harvard graduate, was next in line to Yu in the election for president and will be the new treasurer — a po-

sition considered to be second to the presidency. The other woman member of the masthead, Christina Uhrich, 2L, a Dartmouth graduate, is to be one of the three executive editors.

The *Review* is more than race and gender-diverse, however, since the new masthead reflects a diversity of academic and occupational backgrounds. Executive editor Tom Krause, 2L, for instance, was a lieutenant on the U.S.S. Sturgeon, a fast-attack nuclear submarine, before coming to HLS. Scott Collins, 2L, managing editor, was captain of the Harvard football team. Coleman, a Georgetown graduate, is earning a masters degree at the East Asian Studies Department and has spent a year studying in China. Brown also studied for a year in China before attending HLS, and Nix has

been a reporter for the *New York Times*.

Most of the candidates and other members of the *Review* were pleased with the diversity of next year's masthead. Nix said the masthead is "one of the most diverse boards the *Law Review* has had." The members also plan to extend the diversity of the *Review* in the future, according to Nix, who said that at a recent candidates' forum, "all but one candidate supported" the *Law Review*'s new affirmative action policy. The policy, implemented for the first time this year, is an attempt to increase the number of minority editors on the *Review*, but does not extend to positions on the masthead or the presidency.

Outgoing president Dan Kahan, 3L, described the presi- (continued on back page)



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Profs In The Public Eye

Estrich Reflects On Highs, Lows Of Dukakis Campaign

By Dawn Ross
Features Editor

This article is the first in a series profiling HLS professors whose activities and accomplishments have brought them recognition outside of the world of academics.

"It was exhilarating when things were going well and depressing when things were going badly." That is how Prof. Susan Estrich '77 summed up her thirteen-month experience as campaign manager for Massachusetts Governor Michael Dukakis' '80 unsuccessful presidential campaign.

Estrich stated that having the opportunity to participate in the political process is "an amazing experience," but added that she is "happy to be back."

One aspect of academic life that Estrich is enjoying again is the opportunity to step back and evaluate decisions and make changes, she said. Estrich said that during the campaign, things happened so quickly and the stakes were so high that there was rarely a time when decisions could be undone without serious consequences.

Still, she feels privileged to have been involved with Dukakis and his campaign and has a tremendous amount of respect for those who worked with her, she said.

The high points of the campaign for Estrich were Dukakis' victory in the New York primary and "of course, the [Democratic National] Convention — it was the culmination of everything we had worked for. So many had written us off, but we pulled together and came through [with the party nomination]," she said.

Estrich's lowest moment in the campaign occurred about two and one-half weeks before the election, right after the second presidential debate. "There was every reason to fear a landslide at that point," Estrich recalled, "but [Dukakis] found the strength to pull out of it."

Election night found Estrich tired. "In the middle of the day, the exit polls were good and it looked for a while like it could be close," she said. Estrich said that the following morning, after the loss, felt "unreal. It's an odd experience to have worked so hard on something for 13 months and all of a sudden it's over." Estrich packed up her office that morning, and went on a much-needed vacation. "I had to resist the tendency to second-guess the decisions made along the way. It was time to move on," Estrich stated.

Estrich refuted the suggestion that the "Harvard elite" or her association with the Harvard elite had any real effect on the election results. "It wasn't the Harvard-Yale game — future peace and prosperity had more to do with the outcome of the campaign," she stated.

"I'm glad I did it," she said of the campaign. "You have to be willing to take big risks in order to grow," she added. Estrich feels that she did experience personal growth as a result of working for Dukakis, particularly in learning to make decisions under "more pressure than I ever have before." She also learned that while one in her position may often get unearned praise, more often, one will receive undeserved criticism. "When things are good, they say you can walk on water. When things are bad, they say you can't swim," she said.

"It wasn't the Harvard-Yale game—future peace and prosperity had more to do with the outcome of the campaign."



Prof. Susan Estrich, Dukakis Campaign Manager

Films Explore Women's Issues

By Dawn Ross
Features Editor

In an effort to attract more attention to women's issues, two student groups have co-sponsored a series of films to be shown at HLS this month. The February Feminist Film Festival, sponsored by the Women's Law Journal (WLJ) and the Feminist Theory Reading Group (affiliated with the Critical Legal Studies Reading Group), will present a total of six films this month, most of them centering on topics of concern to women.

Mary Rasenberger, 3L, Events Coordinator for WLJ, said that she was approached late last year by Marie Park and Minouche Kandel, both 1Ls and members of the Feminist Theory Reading Group, with the idea for the festival. WLJ was interested in pursuing the film series because of the organization's interest in events dealing with women's issues which could increase WLJ's community involvement, according to Rasenberger.

The films cover a variety of topics and genres, from *Taking Our Bodies Back*, a documentary on the women's health movement to *Smitherens*, a comedy about a young woman pursuing dreams of stardom, directed by Susan Seidelman (*Desperately Seeking Susan*).

Rasenberger said that the films were chosen with the help of Prof. Linda Podheiser of the Harvard Film Department. Rasenberger noted that there are a surprising number of women's films available and that it was difficult to choose just six.

The films shown so far have garnered an encouraging amount of support. "We've had really good turnouts, with a lot of undergrads attending," said Rasenberger, although she noted that "it is important to bring [the film series] to the law school, where so many people are focused on law, with little exposure to anything else." She described the number of men attending the screenings as "fair."

The film series has been promoted by advertisements featuring a cartoon by Luke Cole, 3L. Cole also designed a logo for the series which was featured on a batch of T-shirts which sold out quickly, according to Rasenberger.

Rasenberger stated that there has been "the usual reaction from some men, like 'why do you call it a feminist festival?' and 'are you a bunch of radicals?'" but the sponsors are not convinced that such comments constitute a negative reaction to the series. WLJ and the Feminist Theory Reading Group are encouraged by the support the series has received so far and hope that the February Feminist Film Festival becomes an annual event at HLS.

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Harvard Law Record

Volume 88, No. 1

Chris Crain
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Editorial

Toward A Civil Debate

After years of growing divisiveness within the law school faculty, that same factionalism along ideological lines has finally attacked the student body as well. The health of any academic institution depends upon the degree of intellectual tolerance among its participants, so it was probably inevitable that students would take a cue from their professors and learn to practice the peculiar HLS art of intellectual McCarthyism.

Many students, once confronted by other bright minds unwilling to accept a rigid list of acceptable political beliefs, have beaten an intellectual retreat to a McCarthy-like mindset, in which simplistic labelling is the easy way to avoid any challenge to long-held opinions.

Rather than real discussion on issues where there is common ground, the typical political debate within the law school today is more likely something to the effect of, "You're a [conservative/liberal/radical], so I know you're my enemy, and I don't have to take seriously anything you might say. I know what you *really* believe, so your words are irrelevant."

Mutual respect appears almost a foreign concept among the current third-year class, which will most likely graduate with large blocs of students unwilling to acknowledge each other in the hallways.

This rancor has attacked a number of campus organizations as well, and the *Harvard Law Record* has been no exception.

After several "conservative" editorials during the fall semester and prominent coverage of the Federalist-sponsored "Fairness Amendment," some students questioned the newspaper's objectivity, and some labelled it a "tool" of the small conservative contingent in the student body. During a sometimes bitter debate over the election of the *Record's* new editor, the only issue in contention was the ideology of particular candidates.

Some urged that political moderation was the only way for the newspaper to regain lost credibility within certain factions of the student body. If a recognized "conservative" or "radical" was elected, they argued, the *Record* would be relegated to the appropriate faction and accordingly be ignored.

The *Record* board of directors instead chose to place its trust in the ability of the HLS students to think for themselves, whatever their peers might urge them to believe of the *Record*, the law school, or life in general.

Sharing that faith, the new editorial staff of the *Record* believes the newspaper is part of the solution to the political stagnation at Harvard Law School, not part of the problem.

The *Record* exists primarily as a forum for the views of the law school community, and in that capacity it can confront those who would rather label than listen with the bald truth that people and their ideas cannot be pigeonholed.

If that mission is performed successfully, then every time you open the newspaper, you will not only find some opinions that match your own, but some that challenge them as well. The institution of regular political columnists (see box, this page) is intended toward that end.

Outside the editorial pages, the *Record* will continue to make every effort to objectively report the issues affecting the law school, with the purpose of injecting more facts and fewer assumptions into the important discussions about the future of HLS.

No particular faction with the law school community can claim ownership of the Truth, just as no particular faction should be blamed for the current sad state of academic and political discourse at HLS. Acknowledging this, the solution is "more speech," whether it conforms to the prevailing ideology or challenges it—from the left or from the right.

The goal of the *Record's* editorial pages is to afford you with the unique opportunity to reach the entire law school community with your opinion, no matter what it might be; not with the ultimate aim of reaching agreement, but with the more limited hope that we can express ourselves civilly.

CAC

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Letters Policy

The RECORD welcomes letters to the editor on any subject from students, alumni and interested members of the law school community. Letters are printed as space provides, and are edited for space and clarity. All letters should include the name(s) and phone number(s) of the author(s). All letters submitted become the property of the RECORD.

All opinions included in letters to the editor, as with editorial cartoons and editorials, belong to their authors and do not necessarily represent the opinions of the RECORD staff.

Right To Die Lives On

To the Editor:

I am writing as Chairman of the Society for the Right to Die with regard to your editorial of Oct. 21, 1988 on the case of Mary O'Connor, decided by the New York Court of Appeals that month. *In re Westchester County Med. Center* (O'Connor), No. 312 (N.Y. Ct. App. Oct. 14, 1988). Your analysis of the unworkability of the "clear and convincing" evidentiary standard enunciated by that court is absolutely correct. In the wake of the O'Connor decision, the level of proof required by health care providers makes it extremely difficult to have treatment stopped in New York.

Since you have written on this issue, I thought you would want to know that the Missouri Supreme Court issued a decision which is even more damaging to patient autonomy, *Cruzan v. Harmon*, No. 70813 (Mo. Sup. Ct. Nov. 16, 1988). That case held that whatever the contours of the individual right to control treatment, this patient's right was

outweighed by the state's interest in preserving life.

However, this past fall, a Rhode Island federal court in *Gray v. Romeo*, 697 F. Supp. 580 (D. R.I. 1988), said that the right to refuse treatment is included within the federal constitutional right to privacy and allowed the withdrawal of a feeding tube from a patient in the exact same condition. The New York and Missouri decisions reflect a departure from the previously uniform holdings in favor of patient autonomy, and the *Gray* court is the first federal court to clearly address the constitutional basis for these rights. There are currently cases on this issue pending at the appellate level in Illinois, Florida and Connecticut. We would hope that these new rulings will show that the Missouri and New York decisions were aberrational.

Your editorial was cogent and insightful, and is to be commended.

Sidney D. Rosoff '92

LIPP Lament Late

To the Editor:

I applaud your editorial criticizing the recent cuts by the administration in the Low Income Protection Program (LIPP). Too bad it was not written when it could have helped — before administrative action was taken. Now, proponents of LIPP must overcome the awesome bureaucratic inertia involved in changing an administrative policy.

Unfortunately, because of the cuts fewer people will be able to take lower paying jobs — those mostly in the government and public sector. The huge, unavoidable debt burden that many students face will prevent many students from using their legal skills to

represent the people in society that they would like. Regrettably, when many students accepted admission to HLS, they did not realize they were abdicating certain choices. Moreover, many students that are still fully covered by LIPP will not avail themselves of the program. They realize that HLS is retreating from its once firm commitment to occupational choice, and they realize the risk in taking a job based on a program that might not exist next year.

I can only hope that all the alumni will add this recent development to their appraisal of HLS when they are approached by prospective HLS students. Although HLS conveys some incredible benefits, these benefits will not be worth the costs to some applicants. I fear, however, that there will be more classes, such as mine, that will find out only too late.

Steve Crawford, 2L

Letters

Humphrey No Hero

To the Editor:

The letter by Mr. Frolik in your Jan. 20 issue in which he decries Vietnam but applauds Hubert Humphrey suffers from historical amnesia.

The fact is that the person "who must answer for the killing in Vietnam" is, first and foremost, Lyndon B. Johnson, a liberal democrat. And his Vice President, the liberal democrat Hubert Humphrey, supported him every step of the way.

Mr. Frolik forgets how Mr. Humphrey grovelled before the Mayor of Chicago during the 1968 convention while "the whole world is watching" and even failed to speak out against the repression of the Vietnam war protestors after he was nominated. This cost him the respect of a large portion of his party.

As the convention closed, Allard Lowenstein, the leader of the anti-war movement and the genius behind Eugene McCarthy said it best. "Before this convention started Richard Nixon could not have beaten Arthur Goldberg for Mayor of Cairo but we have elected him President of the United States."

While a case may be made in retrospect for voting for Mr. Humphrey as the lesser of evils, it cannot be on the basis that fewer American lives would have been lost in Vietnam.

Jacob L. Rothstein '90

P.S. I rang doorbells for Republican Pete McCloskey when he became the first person elected to Congress on a get-out-of-Vietnam platform. He beat a liberal democrat who supported the war.

Harvard Law Record

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Off The Record

Self Censorship Hinders Discussion Of Sensitive Issues

The following is an excerpt from "The Problem of Self Censorship," a lecture given by Prof. Glenn C. Lowry, Kennedy School of Government, at HLS on Feb. 8.

You all know the phrase "some of my best friends are Jews, but Israel's policies are just..." "Some of my closest friends are blacks, but this affirmative action business is..." "I'm an arch defender of women's rights, but the ERA is an abomination."

The very utterance of the qualifying phrase, "Some of my best friends are..." but..., the intent of which is to gain the speaker ground so as to be exempt from a judgment about his or her values as the following phrase is uttered, instead serves to alert you that what is about to come is a bigot's statement. Your ears perk up, your moral antennae are alerted, because only bigots need to make that qualification. Now what is going on there: Only bigots need to make that qualification.

Something like the following, I submit to you, may be happening: This person who is about to speak knows that we know that people who make these statements are likely to be racist (or, sexist, or anti-semitic, or homophobic,

or insensitive to the plight of the homeless, or a communist sympathizer, or an unreconstructed cold-warrior, or "on the wrong side of history," etc.). There is no way that this person can credibly claim not to know that most people interpret such remarks in this way — indeed the issuing of a qualification acknowledges the suspicious character of such talk.

After all, we have been discussing affirmative action for so long, the issue is straightforward by now. The racists go around talking about how blacks are their friends, but we just cannot have "quotas" in my neighborhood, not on my block. Progressives, people who value liberty and equality, are sophisticated enough that, even if they have occasional reservations, in the interest of sustaining a social compact of good policy and decency they do not utter them.

Therefore this person who superficially tries to delude or fool me by making this qualifying utterance, is merely marking themselves for what they are. That is, the effort to bracket the statement, to qualify, to buy credi-

bility, to get an exemption from the inference of bad values or inappropriate or unacceptable beliefs that the speaker makes when qualifying the statement, fails because we know that the speaker knows that most people think that to engage in this speech act is to be offensive.

sympathizer, or whatever.

If a foreigner comes and makes a faux pas we exempt the person from the judgment at least initially, because we think they do not know the rules. If someone who has been around for thirty or forty years in American society, in the era of racial tension, through the period

"Some issues take on a consensus quality as signals for correct belief and political virtue."

And if the speaker knows that most people think that way, and is nevertheless willing to undertake the act and risk our adverse reaction, then at the very least we can plausibly conclude that the speaker, knowing that we will make this inference, by even starting down that road, has given evidence of a willingness to bear the costs associated with some people concluding that he is a racist, or sexist, or communist

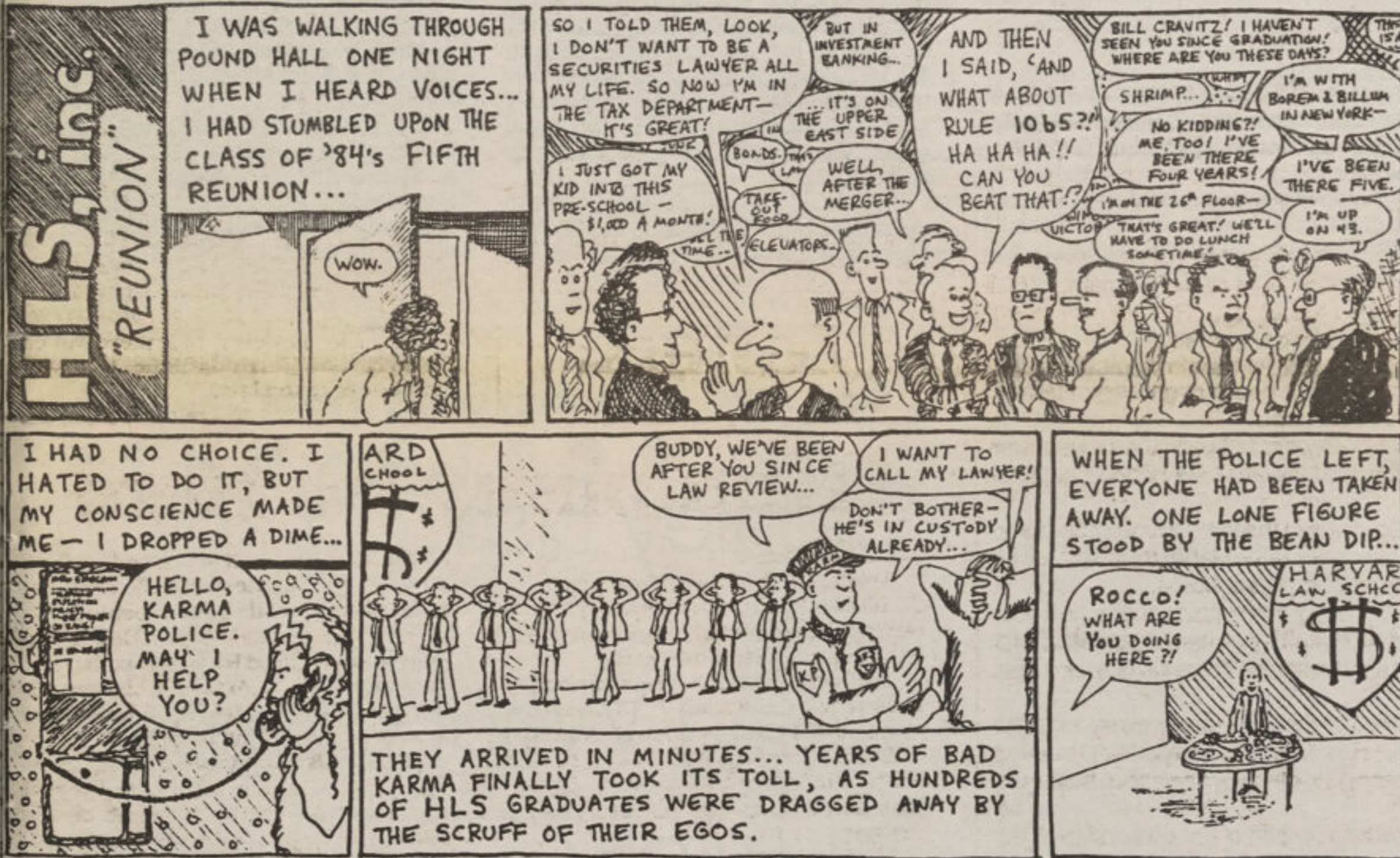
of women's revolution for rights, during the Red Scare — if someone has lived through the Holocaust and makes that offending statement, they do not have any excuse. They know that we know that they could be presumed to understand what the rules are. The rules are common knowledge.

That is very important, I think. If everybody knows what the rules are and if violating the rules carries with it a cer-

(continued on page 6)

HLS, Inc.

By Luke Cole



Fenno

A bleary-eyed Fenno stumbled into the sparsely lit Hark. It was almost instinctive now. No, he wasn't going to class. He wasn't going to see L.A. Law. And he surely wasn't going to some bi-weekly power-dork study group. It was much too late for that, anyway. Fenno was heading for the last beer, after the parties, after O'Henry's.

He sidled up to the bar at the pub. "We don't sell Meister Brau, Mr. Fenno!" the bartender pre-emptively retorted. Fenno forced a grin and took his Sam Adams.

But this was not a night of celebration for Fenno. This was a time of mourning. It was the annual observance of that barbaric and archaic ritual which, for some reason, had not gone the way of the guillotine and the socratic method with the advent of civil society: Valentine's Day. "An anachronism plain and simple," mused Fenno, "just like grades."

No, there would be no coy message to "Chunky Monkey" for him in the personals. No one pledging to be his blanket. Just the annual affirmation of his cruel lot — to live out the rest of his days painfully, brutally alone. Fenno searched for the logic in his fate. ("If there's logic, I'll find it," he thought. "Heck, I have to. I'm a law student.")

"Nice! I'm just too nice!" Fenno cried in a hushed voice. "If I were only forceful, then I would get what I want — nay, deserve — in this world."

As Fenno searched for the cause of this weakness, his mind harkened back to a haunting 1L experience. All Fenno's classmates had been able to badger their professor's secretary into early disclosure of grades. Fenno had failed — failed miserably — as, in the middle of the browbeating, he was overcome by a wave of compassion. "Darn, Dang, Darn," he muttered, tossing back the last of his libation.

Just then, a lone carnation jutting from the hark boxes caught his eye. Could it be his box? Was this lovely symbol of human spiritual connection in his box?

Fenno rubbed his eyes and pinched himself to make sure he wasn't dreaming. The carnation — Fenno's second favorite plant — looked more beautiful to him now than the St. Pauli girl.

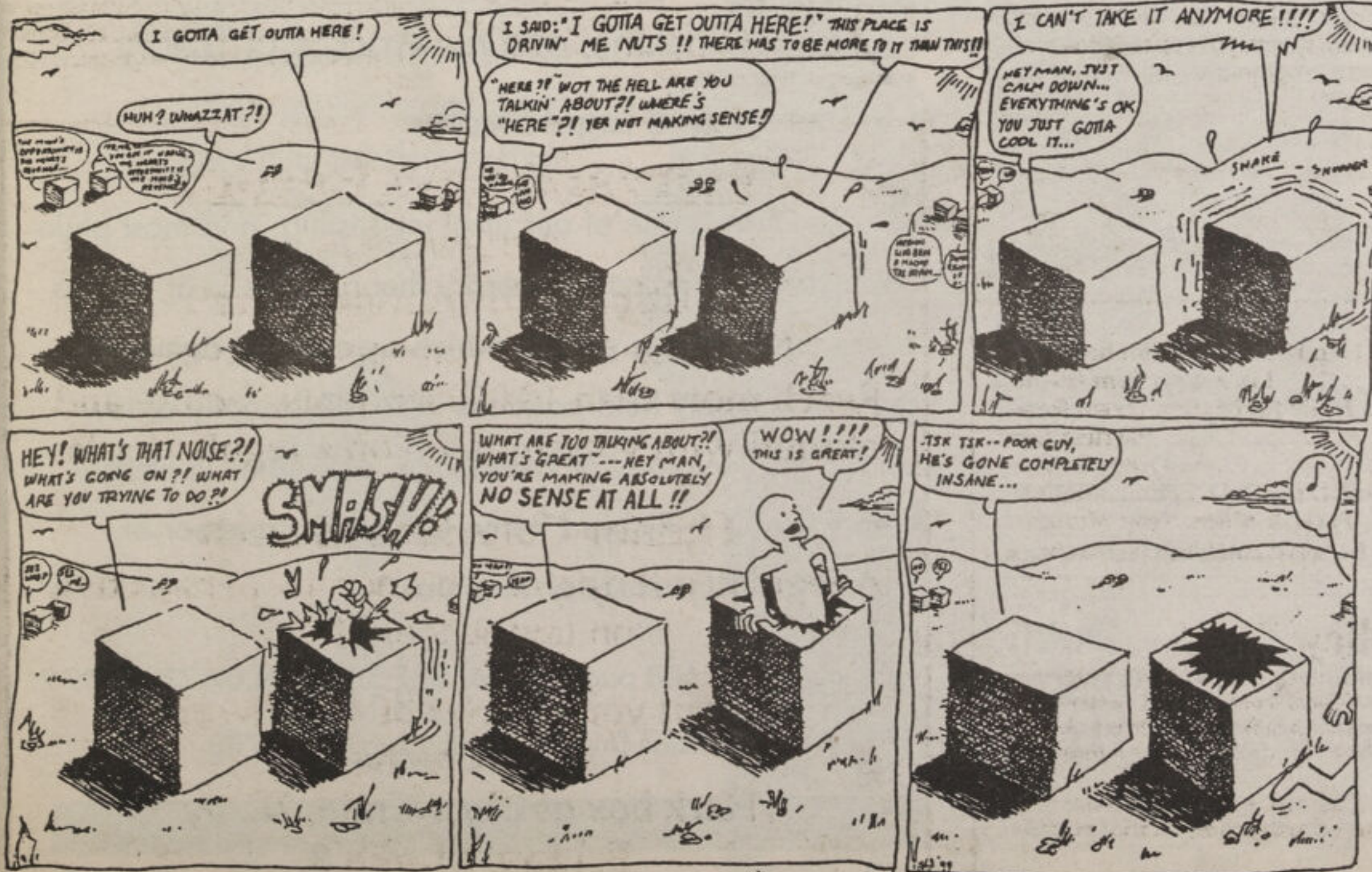
Slowly, he approached the box. "Mr. Fenno, ?L," the heart-shaped note said on the outside.

"Your act of kindness did not go unnoticed. It was no accident that your contracts grade was accidentally wiped off the books."

Fenno wept.

Dead Lines

By K A



Look Beyond Language's 'Politically Correct' Signals

(continued from page 5)

tain kind of sanction, then evidently anyone who chooses to engage in the "breach of etiquette" must be prepared knowingly to incur the cost of that act.

Now here is the crucial link in the argument: *If people who share our values also want to share our community, then those who knowingly act so as to risk loss of community with us may be presumed not to share our dearest com-*

Do you see what I am getting at? I am saying that there is a kind of self-confirming logic in the way the sanctions against disapproved speech work.

Therefore, if I am a university president in the 1980's and I understand that students know that I know that divestment is a way that I signal solidarity with black South Africans, if I nevertheless choose to stand my ground and say "Oh no, let's not divest," I must

point averages, and graduation rates. Now again, you can sort of understand that if a person comes in from a statistics course and they want to talk about test scores they might be excused.

But after a while, having been confronted with the urgency of the problem of opening up these institutions to the fair participation of people too long deprived, such quibbling about the details is a reliable indicator that people are not concerned about the value. So, any way, one might reason. A very intelligent person, committed to the life of the mind, might so reason.

So this problem of self-censorship is not just the province of people too ignorant or backward or unsophisticated to understand. Indeed, the practice of such self-restraint is often the surest sign of political sophistication — to understand that "some things simply are not to be said" is often taken as a sign of refinement.

The burden of my argument is that this practice is intrinsic in the necessity to make guesses about where people whom we hear are "coming from." And at times, I am suggesting to you, some issues take on a consensus quality as signals for correct belief and political virtue. Not all issues are like that. Why some issues become like that, I am not entirely sure.

But once they become like that, they take on a life of their own, a meaning of their own, and discourse about them can never again be the same, can never be neutral, can never be purely technical, can never be devoid of the speaker to be understood in light of commonly held presumptions about the moral meanings of public speech on these issues.

One could argue that there is a function served by this implicit contract to abstain from certain speech. On the

other hand, there are real issues that have to be discussed, about which discourse may be inhibited because of the desire to avoid "sending the wrong signal."

Discourse may become truncated, drowned out by the emotion that attends this tendency to imbue certain utterances with a meaning beyond the literal content of an argument pro or con on a particular question.

We've all got a responsibility, within our capacities, to keep the discourse open and fair. This may require of us taking the risk that others will misunderstand, so as to break a "code of silence" which has evolved for whatever reasons.

Even if we can't avoid making assumptions and judgments about others, or having them make assumptions and judgments about us, we nevertheless are going to be confronted with moments when speaking out is the right thing, even if a terribly costly thing to do.

And when those moments come, it may be that there are some guidelines we can keep in mind, as to how to speak out. Maybe there is a good and a bad way to do this.

Since we know that one important question is loyalty to shared values, it may be that we are responsible to avoid a gratuitous offense to such values, even as we engage in the speech.

I don't think there is anything simple about this problem but I do think it is a profoundly ethical problem, that it engages moral questions at their deepest level.

Each of us will have a responsibility as we go on both in class discussions and private conversations, and beyond in our political activity and our public discourses, to tread carefully, but to speak the truth.

"There is a kind of self-confirming logic in the way the sanctions against disapproved speech work."

mon values.

That is, if bearing the cost of social sanction attendant to aberrant speech is likely to cause great harm for people who share our values and not so great harm for people who do not, then potential speakers will "self-select" themselves into distinct groups based on the relative costs of the anticipated punishment of breaking the mutually understood norm, and the only people who select the risk of ostracism or ill judgment by taking certain kinds of reckless speech acts, would be those who are correctly perceived not to sufficiently share our community, to be presumed to share our values.

Correction

In the "statement of ownership" included in the Jan. 20 issue of the *Record*, the newspaper's publisher was incorrectly identified. The Harvard Law Record Corporation (not the Harvard Law School Alumni Association, as printed) publishes the *Harvard Law Record*. The *Record* regrets the error.

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intend that the students draw the inference that I am an obstructionist of us doing the progressive thing. I must not care enough about what these students think to avoid the cost of this inference.

If, in the early 1950's, I am prepared in the face of the "advancing communist hordes" to nevertheless quibble over civil libertarian niceties, it is quite evident that I am a fellow traveler. That is the kind of reasoning which results in a climate of self-censorship.

Now you may object and say "surely sophisticated people can see through that." Well I do not think so. I think there are too many examples where sophisticated people failed to see through that. I think some of those examples are evident even in a university like Harvard, even at the highest levels of intellectual and academic achievement.

Suppose we are talking about affirmative action at a university and all I can do is worry about SAT scores, grade

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Students Grade Themselves In Bell Experiment

By Rudy Rodriguez
Features Editor

Professor Derrick Bell provided the 20 second- and third-year students in his fall seminar with the unique opportunity to take "personal responsibility" for their grades. Although he found the experiment in self-grading "very satisfying" for the particular course, Bell eventually adjusted the final grades. Nevertheless, he intimated that he will employ self-grading again.

The seminar, entitled "Civil Rights at the Crossroads," was described by Bell as a "group thought process [on the] imponderables of class, race, economics and politics — and their large effect on law."

"The nature of the course would have made traditional grading very difficult," explained one participant, who asked not to be named.

"Each student prepared weekly writings on the assigned readings and I provided written responses each week. I also reproduced some papers for general class discussion," added Bell. Under such circumstances, "the use of traditional grading processes in such a non-traditional class would have been problematic, at best."

Another student, who requested anonymity, described her attempt to grade herself as "really difficult. Although he [Bell] requested only a few sentences explaining the grade we gave ourselves, I felt it necessary to write him quite a long letter." The same student, a 2L, suggested that the fact that she and other students had trouble grading themselves "reflects the failings of the traditional grading system at Harvard."

"Many times a student may enjoy a class, study hard, and take the exam, only to receive a low grade which inaccurately reflects the work put into the class. On the other hand, that same student may put not nearly as much work into another class, and receive a higher grade than she thinks she de-

serves. As a result, when I had to grade myself, I found myself weighing my conception of the grade I should receive against grades I had actually received here for similar effort," she said.

In a memorandum to the class, Bell said he found the overall results of the experiment "less satisfying than I had hoped." Although the majority of the students requested the grade Bell "had thought appropriate," six students differed with him on their assessments. Two recommended lower grades than Bell would have given them, while four requested grades higher than he would have granted. In no case, however, did the grade students assigned themselves differ with Bell's evaluation by more than one-half letter grade.

"The students took the experiment very seriously. Nobody asked for A plusses, and I would have given none." However, where the two students requested grades lower than Bell would have given them, he believed it would have been unfair for them to have "forfeited the grade they earned and deserved."

As a result, Bell submitted his version of those students' grades to the registrar. Similarly, in the cases where students requested grades higher than Bell would have granted, "I decided that since I had substituted my judgment to raise grades suggested by students, I should do the same for the students who suggested higher grades than I recommended."

Nevertheless, Bell insists that "this is a non-traditional course and traditional grading is simply inappropriate."

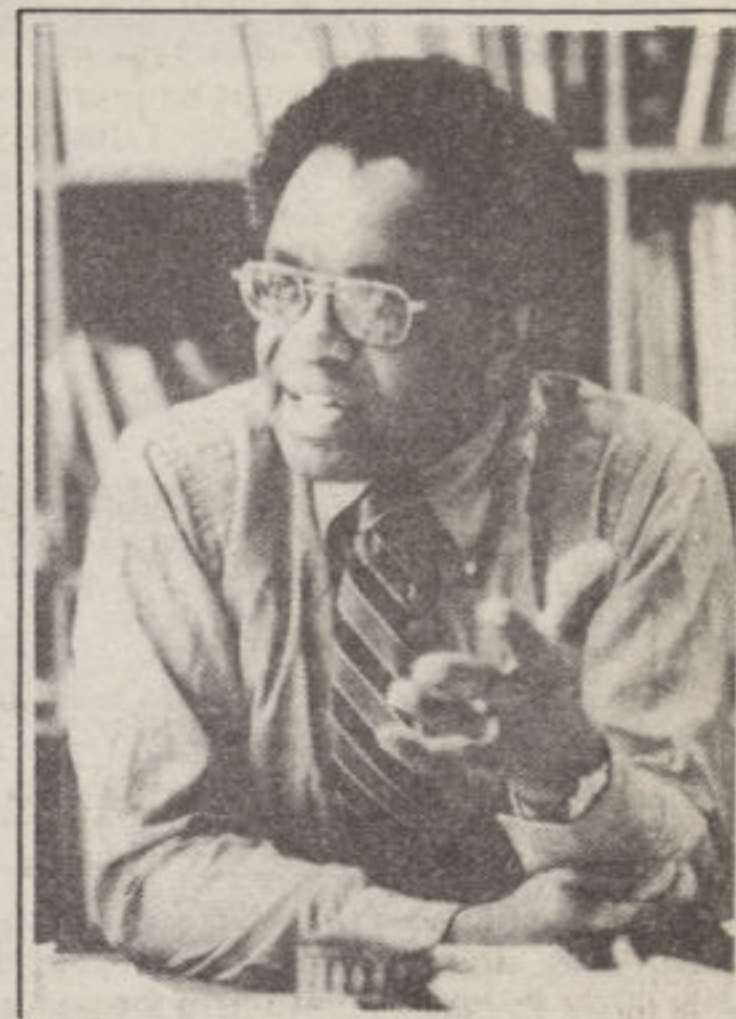
As a possible solution to the problems he encountered this year, Bell predicted that in the future, he will tell students that their self-assigned grade will "presumptively" be the grade they receive for the course, "to leave room for similar adjustments on my part."

Participants interviewed expressed extremely positive reactions to the grading experiment and to the seminar in general. One student described a level

of intimacy which developed between the students and the professor, so that Bell "could feel comfortable putting the responsibility on the individual student to assess her performance. The course assigned a high value to interaction. How do you assign a grade to that, like you would in a first-year contracts exam?"

Tynia Richards, 2L, audited the seminar. She agreed with Bell's theory behind the self-grading experiment. Throughout the semester, she said, "people were thinking and writing about the issues presented. It wasn't a class where you could fall through the cracks."

Bell's philosophy is to "treat people as adults, and to trust them. The grading system was a function of this trust," Richards said. For those who might criticize the system Bell employed, she responded that "it is absurd to sit in a class with him and to believe that something like that would lower the quality of education at the law school. The whole experience was a great learning opportunity."



Prof. Derrick Bell

Williston Winners Announced

By Erick Hachenburg
Managing Editor

The winners of the 1989 Williston Negotiation Competition were announced at the annual Williston awards banquet on Feb. 9. Doug Rappaport, 1L, and Janet Taylor, 1L, matched up against Jacqueline Fuchs, 1L, and David Rockwell, 1L, and won best contract honors.

"It was a cooperative effort," Rappaport said. "The only way to get a good contract is to have all four people working together and each one making a significant contribution," he added.

This year's competition pitted the Koke Corporation, a fictitious manufacturer of a diet cola, and Flojo, a hypothetical athlete-superstar, in an

endorsement contract negotiation. Tom Barnett, 3L, head of the Williston Committee of the Board of Student Advisors, said that the issues included determination of the salary, whether Flojo should be tested for illegal and performance-enhancing drugs, and whether the parties should deal exclusively with each other with respect to promotional activities.

"We had a lot of fun," Fuchs commented. "It's a lot of work but really worthwhile. Contracts class makes more sense now," she said.

Barnett said, "The contracts this year were all excellent." He added, "As a group they were better than the contracts I judged last year." Barnett also said that 124 first-year students participated and every team submitted a contract.

The Williston Competition also recognizes the negotiators who achieve the best contract for their side. Jed Arkin, 1L, and Brian Mathis, 1L, drafted the best contract for Koke. Ellen Bublick, 1L, and David Deakin, 1L, drafted the best contract for Flojo.

The overall winners each receive \$100 and the winners for each side each receive \$50. The winners' names are also engraved on a plaque hanging in the Langdell Library.

In reference to awards, Fuchs said that Professor Ian McNeil, the section III contracts professor, "congratulated" Fuchs and Rockwell "for upholding the honor of section III."

Barnett said the teams were rewarded by the judges for creativity. According to Barnett, one team included a bonus provision in its contract that paid Flojo additional money if, after winning a race, the first thing she said was: "I want a Diet Koke." Another team, he said, required Flojo to paint the Diet Koke logo on her longer-than-normal finger nails.

The runner-up team in the overall competition consisted of Kenneth Cain, 1L, David Isaacs, 1L, Maura Barry, 1L, and Michael Savitz, 1L.

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Around The Law Schools

U. Of Chicago Bans Firm For Offensive Interview

The following was taken from The National Law Journal, (February 13, 1989, p.4, col. 3).

Swift, Strong action by the University of Chicago Law School capped a week during which the school — and the nation's biggest law firm — grappled with an outrageous and unusually well-publicized job interview.

On Feb. 2, Dean Geoffrey R. Stone of the University of Chicago Law School decided to bar Baker & McKenzie from on-campus interviews during the 1989-'90 academic year. His decision, which followed the recommendations of the school's placement committee and demands from student groups, represents the first time a firm has been formally suspended from on-campus interviewing at Chicago.

The decision follows an extraordinary call-back interview between litigation partner Harry O'Kane and a third-year Chicago student in December.

According to reports of the interview, which were never contested by the firm or the school, Mr. O'Kane asked Linda Golden, who is black, how she got into the University of Chicago, and sought

her high school, college and law school grade point averages.

Mr. O'Kane asked Ms. Golden how she would react to being called a "black bitch" or "nigger" by adversaries or colleagues. Learning the student played golf, he asked, "Why don't blacks have their own country clubs?" concluding that "there aren't too many golf courses in the ghetto."

Robert W. Cox, the chairman of the firm's executive committee, says Mr. O'Kane intended the comments as "some sort of stress test" for the student. Mr. O'Kane, who was not available for comment, has been on leave from the firm since Jan. 31, when local newspapers reported the incident.

At a meeting that night, the firm asked the school for more time to formulate a response. But Dean Stone chose fast action.

"If we delayed, we would be primarily judging not the incident, but the adequacy of the firm's response," he said. Yet Dean Stone's decision to penalize a large and powerful law firm could not have been easy. According to university

(continued on 10)



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Kunin Says States Must Fill Reagan Gap

By Michael Hughes
Staff Writer

State activism is finding creative solutions to problems largely abandoned by the Reagan administration, Vermont Governor Madeleine Kunin said in a Feb. 13 speech sponsored by the HLS Forum.

"We became innovators, often ex-

"Now is the time to inaugurate a new era of state and federal partnership."

perts" in new solutions to problems, she said. Kunin, a Democrat who is serving her third two-year term as Governor, said that state activism in a variety of issues, such as the environment, child care, and medical care, had its roots in the early years of the Reagan administration.

Reagan and his advisers hoped that the states would follow the lead of the federal government and reduce their role in the activities of their citizens. Instead, she noted, the states stepped into the vacuum left by Washington and took action on a range of problems previously handled by the federal government.

Kunin described several instances in which activity by state governments initiated a national policy. One example she cited was welfare reform, in which a number of states, including Vermont, instituted programs designed to get people off the welfare rolls and into permanent jobs. State governors also

provided the framework from which arose a national welfare reform bill, and developed a consensus for its passage. Without the efforts of state governors, she said, "I'm confident the welfare reform law wouldn't have been enacted."

State government has also been at the forefront of educational reform, Kunin said. She noted that many state governors, notably those in the South, have immersed themselves in education issues — a field traditionally the domain of local authorities. Much of the impetus for this state government action, she stated, sprang from the realization that state economic growth would suffer without a well-educated workforce to support development.

Another issue receiving greater attention on the state level is the environment, Kunin said. Due to a Reagan policy she described as "not-so-benign neglect," states have taken action on such issues as toxic wastes and air and water pollution.

Besides the inaction of the federal government, another reason for problem-solving on a local level, Kunin observed, is that state authorities see firsthand the effects of environmental damage, and can design programs better suited to specific problems. As an example, she cited efforts her administration has taken to stem the spread of a new insect that threatens her state's vital maple tree resource.

State governors have also planned coordinated policies on such issues as energy, which until recently had been a source of dissension among states.

Although states have had considerable success dealing on their own with these issues, Kunin stated, other problems require programs beyond the means of individual states — particularly those of small and moderate incomes. To remedy issues such as housing, access to health care, and the global environmental threat, Kunin called for a renewed partnership of the federal



Vermont Gov. Madelaine Kunin

Patricia Lee

government and its state counterparts.

Kunin noted signs that the Bush administration recognizes the need for this partnership, alluding to Bush's "thousand points of light" reference as an example. "States have ignited these, and are now ready to ignite them in Washington," she continued, with the warning that federal money and support is necessary to transform these hopeful words into results.

"Now is the time to inaugurate a new era of state and federal partnership," she said. "It is important that the federal government reassert its traditional role, which is to assure equal opportu-

nity for all Americans."

Kunin also urged those interested in service in the political sphere not to be discouraged by the increasingly hostile tone of election campaigns. Kunin especially encouraged women and members of other groups traditionally outside the power structure to strive for greater representation in government. She held up her own experience as proof of the rewards of public service. "The greatest reward for choosing public life," she said, "is that one has the chance to have the exhilarating feeling of having an effect on life in our times."

Firm Interview Angers Students

(continued from page 9)

records, founding partner Russell Baker was an alumnus of Chicago, class of 1925. The firm has bankrolled one faculty research fund and two student scholarship funds, and both the firm and its partners have donated in excess of \$1 million to the school.

The Chicago incident is not the first time Baker & McKenzie has had to answer to angry law students. The firm created a stir at Stanford law School during the 1987 fall interviewing season after students read about Geoffrey F. Bowers, an associate at the firm who filed a complaint with the New York state Division of Human Rights claiming he was fired because he had AIDS.

Mr. Bowers has died, but the firm continues to contest the complaint. (NLJ, 12-12-88.)

Nor is it the first time Mr. O'Kane asked interview questions that startled a law student.

Attorney Elizabeth Davis says she encountered Mr. O'Kane in December 1978 as a third-year student in California seeking a post with Baker & McKenzie's litigation department. He refused to shake her hand, she says, and asked what kind of contraceptive measure she intended to take. After the interview, another partner at the firm later apologized for Mr. O'Kane's "unconstitutional comments," recalls Ms. Davis, now a partner at a Chicago litigation firm.

Apologies were quickly offered this time, too. Baker & McKenzie took pains to send apologies via messenger upon receiving a letter from the Chicago student detailing her interview experience.

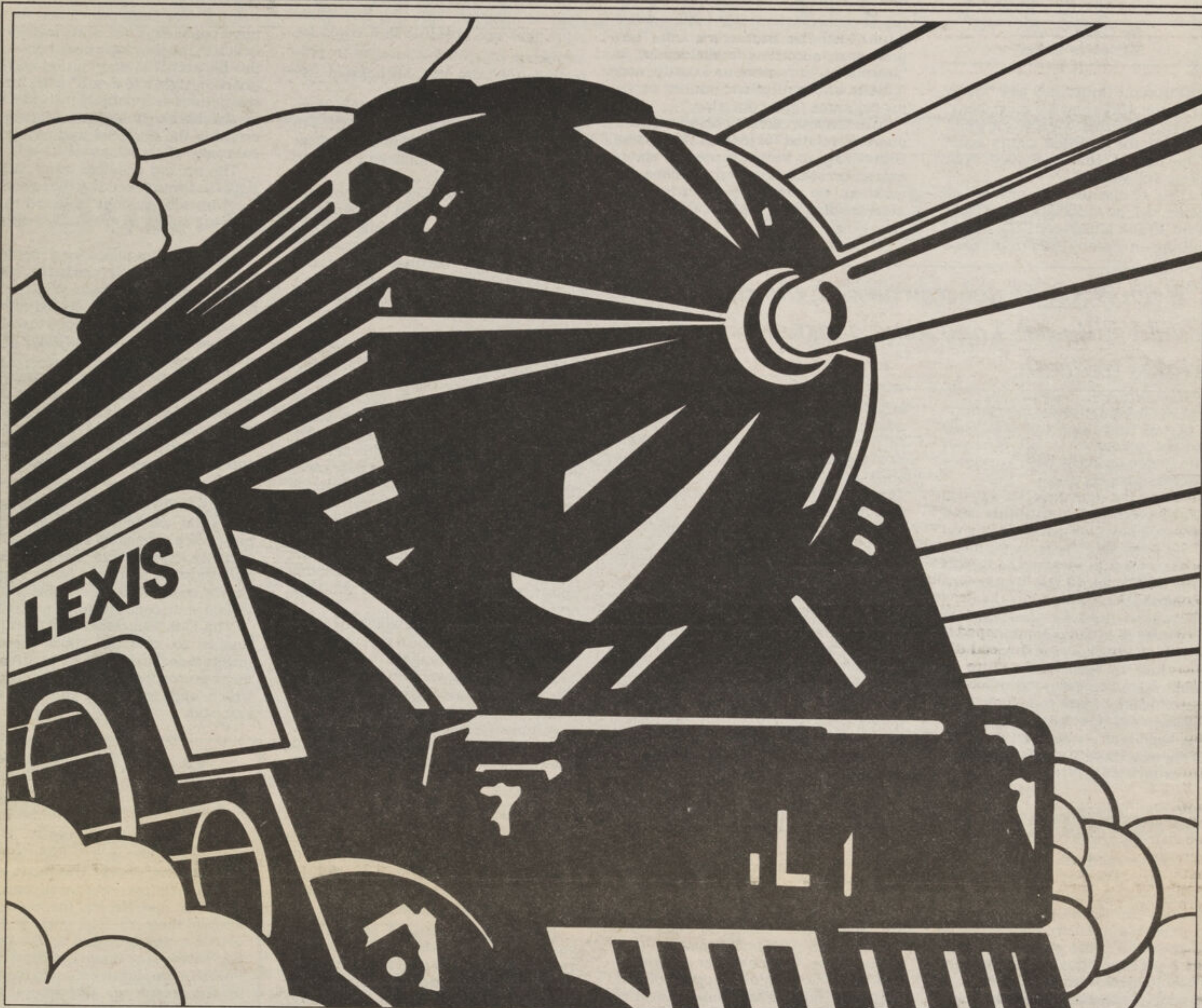
But this time, sorry wasn't enough.

"I accept the firm's apologies on good faith," says Ms. Golden, but "the reason I wrote the letter was hopefully to ensure this kind of thing doesn't happen again."



Elaine Fry, 2L, finds a Valentine's Day carnation in her Hark box.

Patricia Lee



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Profs Predict Cutbacks, Continuation Of Roe

By Chris Crain
Editor-In-Chief

The Supreme Court may well "throw bones to the anti-abortion movement" rather than overturn *Roe v. Wade* when it confronts the abortion rights issue later this term, according to Asst. Prof. Kathleen Sullivan '81.

In a Feb. 13 discussion sponsored by the Womens Law Association, Sullivan and Prof. Frank Michelman '60, who is submitting an amicus brief in the case

has been made about the viability of the fetus outside the mother's womb. That procedure, according to Michelman, is "strenuous, intrusive, and costly" and "clearly unconstitutional under existing Supreme Court doctrine."

The Missouri statute also prohibits abortion-related activities, including counseling, to be performed at state-owned or state-financed facilities. In addition, no physician receiving any state funding may conduct such activities.

Michelman indicated that these re-

right to abortion. But like any other right, it is not absolute and could be overborne by a state's interest in protecting potential life, Michelman hypothesized.

Sullivan added that not only is *Webster* the wrong case for conservatives to use to overturn *Roe*, it is not at all clear that there would be sufficient votes to accomplish it.

Justice Sandra Day O'Connor has only voiced doubts about the trimester scheme employed in *Roe*, while Justices Scalia and Kennedy are presumed to be anti-abortion only because they are both practicing Catholics, Sullivan said.

Sullivan added that O'Connor has "tended to surprise conservatives on sex-related issues."

Sullivan suggested that, rather than overrule *Roe* outright, the Court may pacify the anti-abortion movement by upholding the statutory provision restricting abortion activities in state-owned facilities, requiring only an extension in logic from an earlier series of abortion funding decisions. These cases ruled that the government may decide not to subsidize abortions by refusing to allow Medicaid and other public money to pay for abortions.

The Court could also reverse the Eighth Circuit's holding that restricting abortion counseling violates the First Amendment, she added.

The only provision on which the Court must uphold the Eighth Circuit's finding of unconstitutionality to avoid serious undermining on *Roe* is that requiring "viability investigations" after 20 weeks of pregnancy before an abortion may be performed, Sullivan said.

She added that there are two "worrisome trends" short of actually over-

turning *Roe* that pro-choice activists must consider. First, state legislatures, which in the past have been beholden to pro-life activists, may "nickel and dime abortion rights to death" with funding restrictions and viability tests like those in the Missouri statute, thereby "increasing the financial and psychological costs" of abortions, she said.

The second possible trend, according to Sullivan, would be the rejection of the trimester scheme outlined in *Roe*, allowing states to criminalize abortion earlier.

One question posed by a member of the audience, which puzzled both Michelman and Sullivan, was whether anti-abortion statutes not repealed since the *Roe* decision would be good law if that decision finding them unconstitutional is overturned.

Sullivan said the continuing legitimacy of such statutes would be determined under state law, and suggested that it could be argued that those statutes fell into disuse in the 17 years of non-enforcement since *Roe* was decided.

Both Sullivan and Michelman added that state courts might be a refuge for pro-choice advocates should the Court overturn *Roe* and state legislatures pass anti-abortion statutes. State supreme courts could find that these statutes violate state constitutional protections.

The U.S. Supreme Court would be unable to overrule those decisions unless it declares life (and 14th Amendment protections) begin at conception, which appears highly unlikely, Sullivan said.

"Even if Roe is not overturned, the states could still nickel and dime abortion rights to death."

of *Webster v. Reproductive Health Services*, agreed that the Court will likely ignore the preamble to the Missouri statute under scrutiny, which declares life begins at conception.

"This isn't the right case. No way will the Court overturn *Roe* with this case. Of course, I have no money riding on this," Sullivan said. "There are too many other ways for it to reverse the Eighth Circuit," which found the statute unconstitutional.

"There's no need for the Court to reach the issue of the preamble unless it is used to back up enforcement," Sullivan told the audience of about 50 students. "The Court is not going to try to control what a state can think."

The Missouri statute, as well as stating life begins at conception, requires that pregnancies of 20 weeks or longer not be terminated until a determination

strictions were a response to cost accounting schemes used by some medical personnel to conduct such activities in state facilities and then refund the state for the costs, thereby avoiding direct state financial support for abortion-related activities.

"The betting would be that any time in the past umpteen years the Court would reverse the Eighth Circuit" and not allow such cost accounting schemes, Michelman said. The Court will likely uphold that portion of the statute which allows states to prohibit the use of its funds in abortions or abortion-related activities, he said.

If the Court were to overrule *Roe*, Michelman said, it would probably preserve the right to privacy on which it was based. He said the Court would reaffirm the cluster of rights giving rise to the right of privacy, which includes a

Registrar Defends Present Pre-registration

(continued from page 1)

for over two years. Savage said the Committee was formed in the spring of 1987 after two-thirds of the student body signed a petition calling for a major overhaul of the present pre-registration process. "The Committee met with faculty and [with Robinson], and was told to present a committee report with suggestions," she said.

The Committee went further and actually wrote an algorithm, which specified each step necessary for programming the proposed pre-registration system into the registrar's computer system, Savage said. She said that the algorithm was offered for consideration to the registrar and others in the fall of 1987. While it was her understanding that the system would be implemented in the spring of 1988, other high priority projects and a reorganization of HLS's computer service intervened. Consequently, Savage said, the proposed system has not yet been pro-

grammed, tested or implemented.

Savage said that in Oct. 1988 she became concerned that the project "would fall through the cracks" unless she, one of the few original Committee members who had not graduated, took up the cause. "It seemed like a shame to just let it die without people noticing that the students had done what they were told to do, and that it still wasn't enough," she said.

Savage presented the results of the Committee's efforts on Nov. 7, 1988, to the LSC, which voted unanimously in favor of the new system.

Along with Cindy Ferris, 2L and current chair of the Committee, Savage then met with Reagor, Robinson and Slawson to push for the implementation of the system in time for the upcoming pre-registration. Ferris stated that on Feb. 13, Reagor requested that she draft a memorandum outlining the issues relevant to the project to be sent to Reagor, Robinson and Dean James

Vorenberg '51. Reagor explained to Ferris that upon review of the memorandum, Vorenberg will decide who will make the ultimate decision.

Robinson encouraged students to make their views about the proposed system known. She said that the deans were somewhat disappointed by the low student turnout at a Feb. 8 meeting, called for the purpose of providing students with information about the proposed system, at which only ten students showed up. Robinson, however, said she realized that student attendance at meetings is not always an accurate measure of student concern.

Robinson suggested that students send notes to her expressing their views about the proposal, or simply drop by her office to discuss the issues.

Because of the tight time schedule, students interested in the proposed pre-registration changes should act right away, she said.

Sessions: Advanced Techniques Nab Criminals

(continued from page 1)

ion totally compatible with the Constitution of the United States," Sessions stated.

Sessions referred to three sensitive investigative techniques utilized by the FBI: informants, court-authorized electronic surveillance, and undercover operations.

Sessions called the use of informants "the single most important investigative tool in law enforcement."

"A strategically placed informant has been at the core of virtually every major long-term investigation in the past two years, into organized crime, drug trafficking, white-collar crime, and domestic terrorism," Sessions remarked.

Court-authorized electronic surveillance was characterized by Sessions as "one of the most effective and valuable techniques used in both criminal and national security investigations." Sessions noted that because of the intrusive nature of electronic surveillance, the FBI has stringent criteria which must be met before this method of investigation is employed.

The third sensitive investigative tech-

nique discussed — undercover operations — has been used for many years, according to the Director.

Sessions remarked that although the undercover agent's job has been glamorized, "the agents are trained professionals, they work long hours, and it is not easy to infiltrate criminal organizations. Also, it is not easy to associate with criminals every day for extended periods of time, and our agents do need special counseling because of the effects of that type of association."

Sessions feels these three investigative methods, and the products of their use, provide an "unbeatable combination" of evidence when their results are presented in a court of law.

"The undercover agent's testimony, the physical evidence, and the information obtained from electronic surveillance increases the chances dramatically of having a conviction," Sessions said.

"By utilizing these methods it is not necessary to offer immunity, or reduced charges to defendants. Nor is it necessary to use convicted felons or former confederates in order to prosecute higher echelon subjects."

Advanced sensitive investigative techniques are needed because the criminals are advanced, Sessions said. "Today's criminals are sophisticated. They have taken advantage of the advances in communication and in technology. We are dealing with an entire new class of criminals — criminals like terrorists and drug kingpins who know their trade very well and are experts in all phases of it."

Sessions noted various ways the rights of individuals are protected in connection with FBI investigations. "The FBI is always accountable to the public through the provisions of the Freedom of Information and Privacy Acts, the close scrutiny of the media, and through the various congressional oversight committees to whom we answer concerning our activities," he said.

Sessions said the balance of effective law enforcement with individual rights can be achieved "by conducting lawful investigations; by closely following our statutes, our guidelines, our rules and our regulations; by striving for fairness; and by seeking to always balance the concerns for liberty and constitutional sensitivity."

Review Staff Praises President

(continued from page 1)

dential election process as "a long, arduous day's work." Candidates declared their interest several weeks in advance, and *Review* members examined their editorial work, but the actual voting began at 9:30 a.m. in the Ropes-Gray Room in Pound Hall. Fourteen candidates entered the race for the presidency, but several successive ballots narrowed the number down to two — Brown and Yu. By 9:30 p.m., Kahan said, Yu was the new president. Kahan stated that 2:30 a.m. was the usual finishing time for previous years, and that this year's relatively smooth and swift conclusion was "a sign of confidence in the new president."

"I've seen more divisive things on the *Law Review*," Kahan added. Coleman said that "the process didn't go as well as it could have last year," but that this year "brought a lot of people together."

"We're all still friends," commented Nix.

Uhlrich seemed to sum up the reactions of all the candidates when she said that "the process was remarkably pleasant, and everyone agreed with the result."

Kahan predicted that "Peter Yu will have a large impact. He is an extremely intelligent, articulate and dynamic editor, and I am sure he will have many ideas on how to improve the magazine." He concluded that "Peter Yu will be an excellent president and a tremendous leader. Everybody is very excited about the beginning of his tenure. I'm excited about getting a rest," he confessed.

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