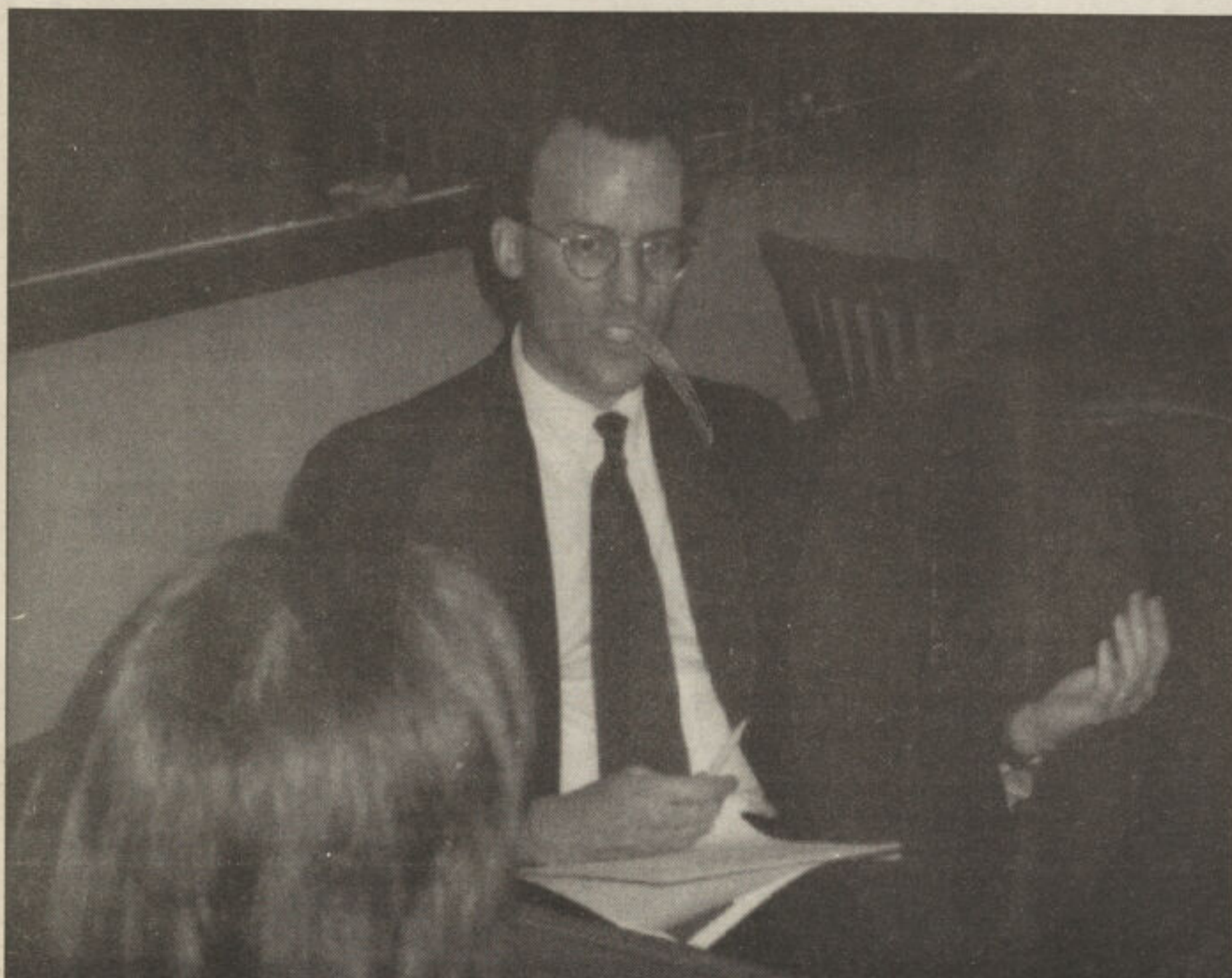




RECORD Photo

Richard Kahlenberg '89 speaks to the RECORD about his book and ideas about economic affirmative action.

"Broken Contract" Author Takes Aim at Affirmative Action

By Emily Ryo

"Affirmative action goes to the question of what we mean by equal opportunity and the question of how we relate to each other as people of different races," said Richard Kahlenberg '89 on Tuesday in a speech sponsored by the Harvard Law School Forum. Kahlenberg, the author of *Broken Contract: A Memoir of Harvard Law School*, has reinvigorated the continuing public debate on affirmative action with the recent publication of his book on class-based affirmative action, *The Remedy: Class, Race, and Affirmative Action*.

Kahlenberg identified positive arguments on both sides of the traditional debate over affirmative action.

"On the one hand, I think the conservatives are right to say

that the color-blind ideal is worth holding on to. On the other hand, the liberals are also right to say that we have had an egregious history of discrimination in our history and that there is a strong legacy that continues on today which needs to be addressed."

Kahlenberg pointed out that class-based affirmative action will resolve this moral and political dilemma by helping the disadvantaged generally in a "color-blind" manner. The "Bakke Straddle," which rejects strict racial quotas in favor of accepting race as only one factor in admission and hiring policies, is an unsatisfactory compromise because it still confers "preference" based on the immutable characteristic of race, he argued.

Rejecting such an "un-American" ideal, Kahlenberg instead urged a turn back to the

ideas of Martin Luther King.

"As a matter of fairness, we ought to also raise what King called the 'forgotten white poor.' In 1968, [King] moved away from a sole focus on race and took on larger questions of class by heading up a campaign to bring together disadvantaged people of all races."

In place of race and gender based affirmative action, Kahlenberg argued for a system of preferences for the economically disadvantaged, regardless of race and gender, in education, employment and contracting. When one student asked how he proposed to define "class," Kahlenberg suggested combinations of measuring class that included parent's income level, education, employment, and oth-

please see **AUTHOR**, page 13

Female Membership on The Rise at Law Review

Gender Task Force Created to Review "Lingering Concerns"

By Michelle A. Jones

Despite a 40 percent increase in female membership at the Harvard Law Review, a new gender task force will be created to determine the reasons for the rise and to address any remaining concerns.

"I think this was pretty significant and indicative of the fact that our recruiting efforts paid off," said Law Review President David Panton '97. "More women picked up the packet and turned in the competition than last year."

Jenny Martinez '97, the managing editor, agreed. "It just feels like there are more women around."

"It is an encouraging start," said Martinez. "Maybe with another year [of increases] we can resolve the issue without having to tinker with the selection process."

Although the number of women selected for the Law Review rose from ten to fourteen, Panton noted that the percentage of women selected was still less than the percentage of women who applied.

"I still have two lingering

concerns," Panton continued. "The number of women is still not proportionate to that of the student body. And there was a slight drop off in the selection process."

Panton however conceded, "It is largely up to the 2Ls — it is definitely an issue our new editors have to think about."

The new gender task force, chaired by Laura Rosenbury '97 and Matthew Mark '97, will address these concerns and evaluate the Law Review's recent admission data.

please see **REVIEW**, page 3

Job Market Strengthening

Students Prepare for October Rush of 600 Employers

By David Lenter

Second year students anxious about on-campus interviews should get some comfort from the numbers, according to Career Services Director N. June Thompson.

"The job market really looks quite healthy," Thompson said.

Thompson said the job market has "crept up" for two or three years. In the early 1990s firms remained chastened from earlier tough times, she said. But in the last few years employers have increased their hiring.

All cities are strong, especially New York, which Thompson called "the leading city for growth."

The number of organizations interviewing on campus this year should be about the same as last year, Thompson said, with between 600 and 630 employers coming to the Law School. Thompson expects to have about 600 firms and 25 to 30 public interest organizations. In addition, McKinsey and Company and Merrill Lynch will interview on campus, and other consulting firms and investment banks plan to do presentations.

The Big Cities

New York will provide the most interviewers. It also is the place to which the greatest number of graduating students go — about 20 percent of each class. After New York come Boston and Washington, D.C. Of the 527 graduates from 1995 who reported employment to Career Services, 157 worked in New York, 65 in Boston, and 57 in Washington, D.C.

Other top cities include Chicago, which drew 30 students from the 1995 class, and Los Angeles, which took 42. Thompson warned that "San Francisco, as always, is tight."

"Every other student I see

wants to work there," Thompson said. Among 1995 graduates, only 14 ended up in San Francisco.

"Too Many Interviews"

Students last year averaged 22 on-campus interviews. Students seeking law firm jobs had more interviews than students seeking public interest positions.

"No matter what the job market is, students do too many interviews," Thompson said. At one point in the 1980s, about 900 firms came to campus. Even then, with so many jobs to be had, students interviewed at the same pace as they do today — in part, because there were so many possibilities, she said.

Thompson said students thinking about how many interviews to sign up for should know that, based on Career Services surveys, "overwhelmingly, students get their first or second choice firm and city." That fact relates to some wisdom Thompson hoped to impart to students: "People should keep in mind that Harvard Law School students are much sought after," she said. That means interviews largely should be a pleasant experience: lawyers do not come here to scare students since they have their firms' reputations and future interests in mind, Thompson said.

More generally, Thompson said students should relax and keep the hiring process in perspective. "Maintain a sense of humor," she said. "That is my personal plea."

The biggest mistake job-seekers make, according to Thompson, is seemingly mundane: they are not careful when completing the interview request forms. "Doing it right up front," Thompson said, will make October easier.

see **JOB MARKET**, page 11



HLS students celebrate the start of classes at the "All Law School Party" under the tent at Jarvis Field. The Party was hosted by the Dean of Students Office.

Eight Years Ago in the RECORD ...



Harvard Law Record

Volume 89, No. 1

America's Oldest Law School Newspaper

September 8, 1989

Clark Cuts Public Interest Position

By Patrick Miles

Dean Robert Clark '72 has eliminated the position held by Ron Fox '63, the man who for six years has directed the law school's trend-setting career counseling office for students interested in public interest jobs.

The move was described by Clark in a national publication as a "reorientation of resources, away from things in the past that have been for symbolic, guilt-alleviating purposes [rather] than to get a real result."

The decision to eliminate the office of career counseling angered some students and faculty who have feared that the newly appointed Dean would scale back clinical programs and de-emphasize public interest law. Clark became Dean July 1 and dismissed Fox on Aug. 9.

Because Fox was a national leader in the field of public interest counseling, his dismissal has drawn the attention of the national legal press and from officials who monitor public interest activity at the nation's law schools. Harvard in the late 1970s was the first law school to create the position of public interest counselor.

Clark summoned Fox to his office the morning of Aug. 9 and in a seven-minute meeting informed Fox that his position had been eliminated, along with that of his administrative assistant, Dana Bullwinkel. Fox said he was "stunned" to hear the news.

"It was totally unexpected," Fox said this week. "I sat there during the meeting and tried to figure out if he was saying what he was saying. I couldn't believe it."

(continued on page 7)



Clark welcomes first-year students at Memorial Hall September 1.

Photo By Jan Van Horn

Accused Rapist, Barred From School, Sues Harvard

By Greg Herbert

Kevin T. Watkins, 3L and former president of a student organization named the Society for Black Professional Entrepreneurs (SBPE), sued Harvard University and the law school for \$150 million over the school's handling of a Harvard College student's allegations that Watkins raped her and that he sexually harassed her in connection with the SBPE. The law school has disbanded the SBPE and forced Watkins to leave school.

The woman, a former lover of Watkins' and former officer of the organization, filed criminal

charges last May with the Middlesex County District Attorney's Office. The *Bay State Banner* (5-11-89) reported that the woman claimed Watkins had raped her at his apartment repeatedly over a three hour period. When contacted by the RECORD, the woman declined comment.

In late Aug., Middlesex County Judge Lawrence Feloney found probable cause that Watkins had committed the crimes that District Attorney L. Scott Harshbarger had charged him with—two counts of rape and one count of assault. Watkins now faces potential indictment by a grand jury on the three counts.

In a Sept. 1 letter to Watkins, HLS Dean Robert Clark '72 stated that, based on the finding of probable cause, Watkins was "required to take a leave of absence" from school pending resolution of the criminal proceedings. The letter stated that the "administrative leave" was required "without prejudice" and would not be noted in Watkins' transcript.

These developments are the latest chapter in a bizarre scenario that has unfolded in light of shocking allegations made by the woman and a Harvard Divinity student last spring. The allegations, first printed by the *Bay State Banner*, included claims that Watkins had videotaped himself, the woman and a divinity student in the nude as a requirement for becoming an officer in SBPE. Watkins admitted that the three appeared nude in a videotape, but vehemently denied that the tapes had anything to do with SBPE or that the tapes were coerced by him in any way.

In an extensive telephone interview with the RECORD on Sept. 1, shortly after he received Clark's letter, Watkins disputed the charges against him and blasted the law school's treatment of him. Watkins stated, "Get any girl to accuse you of rape. What can you do? They kick you out of school, publish your name as a rapist and a child molester, your friends say 'that's rough, but I don't want to associate with you.' All I'm asking for is a fair shot. These profes-

sors illegally interfered with a criminal trial. Who's to say what they'll do? They think they are above the law."

Watkins' major complaints with HLS centered around what he claimed was the gross unfairness of the HLS Administrative Board's proceedings and the impropriety of investigating aspects of his private sex life that had nothing to do with the law school.

The Ad Board, which serves as the disciplinary body for HLS, dealt with the woman's major allegations separately. The Board first proceeded on her claims that Watkins coerced members of the SBPE to appear nude on videotapes in order to become an officer in the organization, while postponing investigation of the woman's rape and assault charges. Watkins asserted that the Ad Board members "made up" the charge of "unauthorized videotaping" so they could view the videos and "satisfy their sexual palates."

The Ad Board concluded its investigation of the charges surrounding the SBPE in May, finding Watkins guilty, by "clear and convincing evidence" of "extreme abuse of his authority as the head of a law school organization" for engaging in "unauthorized nude videotaping under the auspices of the SBPE," according to Dean of Students and Ad Board member Sarah Wald. The Board issued a reprimand to be filed with Wat-

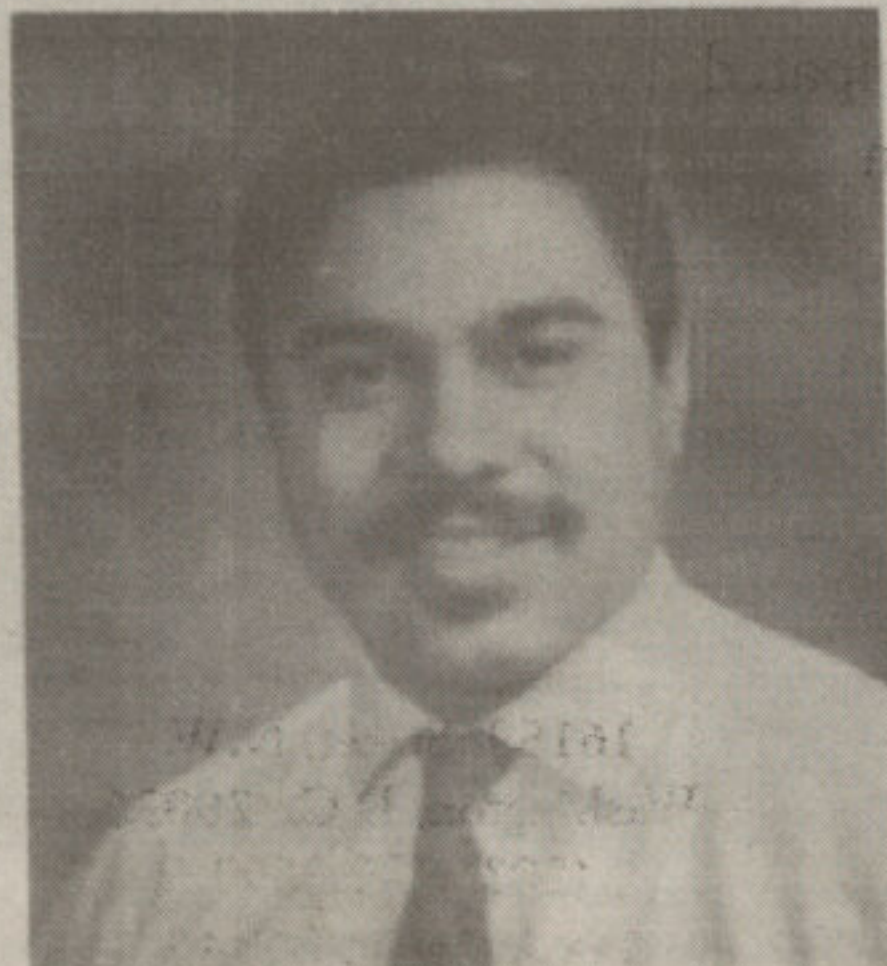
kins' permanent transcript, suspended the SBPE for six months, and prohibited Watkins from heading any other law school organizations.

The Ad Board has postponed its investigation of the rape and assault charges pending resolution of the criminal proceedings.

The divinity student, in a telephone interview with the RECORD, repeated his prior allegations that the nude videotapes in which he appears were part of the "security regulations" of SBPE. Watkins and the divinity student both state that the student was at one time named "acting vice president in charge of security."

The divinity student denied any suggestion that he was sexually involved with Watkins, although he said he slept at Watkins' apartment several times. "I do not find Kevin attractive, so there was no lust involved" he said. "I am still a Christian, if I'm going to go to hell, it's going to be for something better than Kevin."

David Wright, 3L and former SBPE member, told the RECORD that he believes the videotapes had nothing to do with the SBPE because he never heard anything about videotapes mentioned by anyone in connection with the organization. "I really think it was something they did among themselves as friends," he said. "I also believe that someone charged with a crime should be presumed (continued on page 2)



Kevin T. Watkins, 3L.

Review Task Force Continues Evaluation

continued from *REVIEW* page 1

"Our purpose is to look at the things we have done before and evaluate their impact," said Mark.

Rosenbury agreed. "One of the first things is to evaluate the changes we implemented last year."

A similar gender task force was created last year by former president David Friedman '96 to address the lack of female representation on the Law Review after a record low number of women were selected.

After distributing 2L and 3L surveys on the issue and comparing the Law Review's admission data to that of other law reviews, the task force proposed the elimination of grades as a selection criteria. Alternatively, it proposed the inclu-

sion of women in the Law Review's affirmative action category.

The Law Review rejected the proposals. Instead, it implemented new recruitment methods and de-emphasized grades in the selection process by decreasing the number of people selected based on a 70 percent grades and 30 percent writing competition ratio and increasing the number of people selected on the writing competition.

A goal of the new task force will be to analyze this year's admission data to determine why the female membership increased and whether the increase is attributable to the Law Review's aggressive recruiting.

The Law Review does not currently have any data regarding the grade differential between men and women. Panton

anticipates that the task force will give their recommendations early next semester.

"It will take a substantial amount of time [to evaluate the data]," said Mark.

"We have a proclivity towards reanalyzing," said Panton. "Every issue is likely to be discussed and rediscussed."

The task force will also examine the reason for the drop in the number of men who applied for the Law Review this past year.

"It would be interesting to see if there was some sort of backlash among men," said Panton.

Citing the relatively constant percentage of minority members on the Law Review as the reason, Panton maintained that the task force will not address the minority selection. This year, fourteen

newly selected Law Review editors belong to a minority group.

"The Review's policy on minorities is decided by the whole Law Review membership," Panton stated. "The policy has proven to be relatively successful — it has been a remarkably resilient policy."

Furthermore, the Law Review will not provide a gender breakdown of the discretionary slots.

"We feel it would be counterproductive to make public the breakdown of the discretionary slots because those slots can be used for anything," Panton explained.

Discretionary slots can be used in the event of ties, and for minorities and individuals with exceptional personal statements.

The new task force will hold its first meeting later this week.

	Students Who Handed In the Application Packet		Students Selected For Law Review		Total Number of Law Review Editors
	Number who were women	Percentage who were women	Number who were women	Percentage who were women	Number
1990	62	36%	9	24%	38
1991	76	42	15	37	41
1992	82	39	11	29	38
1993	75	37	11	28	40
1994	71	38	15	38	40
1995	81	37	10	23	43
1996	104	48	14	33	43

Foley, Hoag & Eliot LLP

Foley, Hoag & Eliot will interview
2L and 3L Harvard Law School students
for our Boston office on
October 10 and 11, 1996
at the Harvard Faculty Club

Register with the Office of Career Services by September 23, 1996

For further information regarding FH&E,
contact Dina M. Wreede, Director of Legal Recruiting
at (617) 832-7060 or dwreede@fhe.com

or speak to your HLS classmates who participated
in our 1996 summer associate program

Andrew D. Friedman, Harvard '97
John A.E. Pottow, Harvard '97
Susan A. Snyder, Harvard '97
Jamie Wacks, Harvard '98

One Post Office Square
Boston, Massachusetts 02109
(617) 832-1000
Fax (617) 832-7000

<http://www.fhe.com>

1615 L Street, N.W.
Washington, D.C. 20036
(202) 775-0600
Fax (202) 857-0140

Across the Wire ...

Clinton Threatens Veto of Chafee Amendment

WASHINGTON (AP) — U.S. Interior Secretary Bruce Babbitt will ask President Clinton to veto the 1997 spending bill for his agency if it blocks the Narragansett Indians from launching high-stakes bingo on their tribal lands in southern Rhode Island.

At issue is an amendment drafted by Sen. John Chafee, R-R.I., that would thwart the Narragansett plan and, more broadly, impose a one-year moratorium on other, new Indian casinos.

Babbitt told Chafee, in a Sept. 12 letter, that he will recommend that Clinton veto the bill if it includes the amendment, which Chafee is expected to offer on the Senate floor this week.

The amendment would "unfairly single out an individual tribe (the Narragansett Tribe of Rhode Island) by permanently denying them the ability to engage in any gaming on their reservation," Babbitt wrote.

Also, the moratorium on new compacts would deny tribes the ability to use gambling revenues to improve their people's lives, Babbitt said. Since 1988, Indian gaming has provided benefits to over 120 tribes and their surrounding communities in over 20 states, he added.

"As required by law, revenues have been directed to programs and facilities to improve the health, safety, educational opportunities and quality of life for Indian people," Babbitt wrote.

The amendment "would deny similar economic opportunities for additional tribes and communities," he said.

Chafee had no comment on Babbitt's letter, said Steve Bentfield, a spokesman. The amendment, to be offered this

week as the Senate considers the Interior appropriations bill, would block the Narragansett gaming plan by removing the tribe from the jurisdiction of the federal Indian Gaming Regulatory Act (IGRA).

That would leave the gambling proposal solely in the hands of the state, where it has little support.

Gov. Lincoln Almond has refused to negotiate a gambling compact with the tribe, saying that such an agreement would run counter to the wishes of Rhode Island

residents, who in 1994 overwhelmingly rejected five casino proposals, including one by the Narragansetts.

The Narragansett's plan has also long been opposed by Sen. Claiborne Pell, D-R.I., and Chafee, who argues that the amendment

would only restore an exemption for Rhode Island that Congress intended to grant in 1988, when IGRA was passed.

By prohibiting the Interior Department from spending funds to review or approve compacts, the amendment would effectively freeze any new compacts negotiated between tribes and states during fiscal 1997, which runs from Oct. 1, 1996 to Sept. 30, 1997.

Under federal law, states and tribes negotiate compacts to regulate gambling, subject to final approval by the secretary of the Interior.

Last week, the Narragansetts were working Capitol Hill to find sympathetic lawmakers to oppose the amendment.

Senators who have historically supported Indian rights, such as Daniel Inouye of Hawaii, the ranking Democrat on the Senate Indian Affairs Committee, can be expected to fight it.

Last week, the Narragansetts were working Capitol Hill to find sympathetic lawmakers to oppose the amendment.

Court Rules Against Alleged Drug Kingpin

SAN FRANCISCO (AP) — Charges against a man accused of running an international heroin ring were reinstated Monday by a federal appeals court, which relied on a recent Supreme Court ruling on property forfeiture.

All but one of 42 felony charges against Pius Ailemen of Oakland were dismissed by a federal judge in May 1995 because federal agents had seized Ailemen's 1993 Alfa Romeo and \$4,900 in cash after arresting him in a Washington, D.C., hotel room in December 1993. The property was later forfeited to the government as the alleged proceeds of drug dealing.

In a previous ruling, the 9th U.S. Circuit Court of Appeals had declared that property forfeiture in a civil suit was a form of punishment; therefore, filing criminal charges against the same person in a separate proceeding violated the constitutional ban on double jeopardy, or multiple punishment for the same acts.

But the Supreme Court disagreed this June, saying civil forfeiture was not the type of punitive action that barred a

criminal prosecution. Citing that ruling, the 9th Circuit in a 3-0 decision on Monday reinstated 41 charges against Ailemen.

The restored charges include operating a continuing criminal enterprise, which is punishable by life in prison with a mandatory minimum sentence of 20 years. The 42nd charge, which had not been dismissed, is conspiracy to launder money.

Federal prosecutors accuse Ailemen of directing an operation that brought large quantities of Asian heroin through Africa and Europe into the San Francisco Bay area. He is free on \$300,000 bail.

The appellate court also reinstated charges against codefendants Sidney

Gladney and Robert Tinney that had been dismissed because agents seized small amounts of their cash.

Ailemen's lawyer, Gail Shifman, said she was not surprised by the ruling. She said several pretrial issues are still pending before U.S. District Judge Vaughn Walker, including her claim that the government failed to prove the necessity of wiretapping Ailemen.

In a previous ruling, the 9th U.S. Circuit Court of Appeals had declared that property forfeiture in a civil suit was a form of punishment; therefore, filing criminal charges against the same person in a separate proceeding violated the constitutional ban on double jeopardy.

Federal Anti-Smoking Rule Would Use Minors in Stings

WASHINGTON (AP) — In a little-publicized provision, President Clinton's crackdown on youth smoking encourages states to use teen-agers in sting operations to detect illegal tobacco sales — or risk losing federal aid.

The government says its new rule generated a healthy dose of responses from citizens about the physical and psychological safety of undercover children and their ability to understand legal issues like entrapment.

But it says examples around the country — including an Illinois town where stings using junior high school students have had a dramatic impact — show that such problems can be solved with proper adult supervision.

"We took into consideration the impact on youth in any of these sting operations," said Mark Weber, spokesman for the Department of Health and Human Services agency that implemented the rule. "We are working with the states to do it in a way that is acceptable to us and that is acceptable to them."

The rule was issued in January by the Substance Abuse and Mental Health Services Administration, which distributes \$1.2 billion a year in drug treatment and prevention funds.

It mandates that all states have mandatory inspection programs by next year to catch businesses that illegally sell tobacco to children. Those that don't comply risk losing federal drug prevention money.

The rule leaves it to the states to determine how to catch illegal sales, but strongly urges the use of undercover stings with children at least two to three years younger than the 18-year-old legal

smoking age.

"The department believes that the use of minors in inspections is very effective," the rule states.

For states where officials are considering alternatives, the government warns,

"The department has not identified evidence of any other workable or valid method" and the department's system to determine whether states are meeting expectations "is based on the 'sting' method."

States begin submitting their enforcement plans for federal approval this month.

The tobacco industry's trade group says it supports crackdowns on illegal sales but has reservations about using minors.

"Any time you use kids essentially to break the law, it does send a mixed message," said Walker Merryman, vice president of the Tobacco Institute. "And it's obvious on its face that 13-year-olds are not terribly sophisticated about the intricacies of the law."

Experts say most communities that do stings use students ages 12 to 15.

Parental permission is obtained, and the children aren't paid.

"I think it really has become that age group because it is really about then that they begin talking about it in their health classes," said Ginny Markell, the Parent Teacher Association's vice president for programs. "For them, it is something they can do for their communities that is positive."

Although the national PTA would not ordinarily advocate stings, some local chapters have participated, she said. "It seems to grab the policymakers' attention when you can have a 13-year-old walk into any convenience store and actually purchase tobacco," she said.

The Child Welfare League of America, one of the country's oldest child advocacy groups, said it was concerned about the undercover dangers to children including possible retribution. "What's next? If this seems to be successful how do we know we won't get kids to do hard-core drug stings," said spokeswoman Joyce Johnson.

The government says it got numerous negative comments during the rule-

making process, although it could not immediately identify anyone who contributed.

"A number of commentators expressed concern that a child may not be sufficiently mature to understand undercover procedures and inadvertently entrap a retailer," the government said.

It said many others were concerned that such an approach "could have a detrimental impact on minors" if their undercover role were discovered or they were forced to testify and be cross-examined.

Weber said his agency proposes that states follow several safeguards in stings, including:

- Obtaining parental consent;
- Ensuring the children are supervised by adults with proper legal training, preferably an agency that can provide proper insurance;
- Providing proper training;
- Making sure the children conduct stings only at stores where they are unknown.

In the Chicago suburb of Woodridge, Ill., more than 80 percent of its three dozen outlets used to sell tobacco products to minors. That dropped to 11 percent since stings began in the late 1980s, said Deputy Police Chief Geoff Korous.

At the start, the stings mainly involved police officers' children. But the department now recruits at the local junior high school. Written parental permission is required, training is provided and students can participate only once.

"We are very pleased by the response we have received from the community," Korous said. "It can be kind of exciting for them to go out with a police officer on an undercover thing."

"A number of commenters expressed concern that a child may not be sufficiently mature to understand undercover procedures and inadvertently entrap a retailer," the government said.

Across the Country

Miranda Rights: Still Being Defined

NASHVILLE, Tenn. (AP) — Suspects should be advised of their Miranda rights when they reasonably feel deprived of freedom associated with formal arrest, state Supreme Court justices said Monday.

Joe L. Anderson's lawyer argued in Decatur County that his statement to investigators should be suppressed because he had not been informed he was an arson suspect and had the right to a lawyer, as required in the U.S. Supreme Court's 1966 Miranda decision.

"We have concluded that in determining whether an individual is 'in custody' and entitled to Miranda warnings, the relevant inquiry is whether, under the totality of circumstances, a reasonable person in the suspect's position would consider himself or herself deprived of freedom of movement to a degree associated with formal arrest," Justice Riley Anderson wrote in the 4-0 decision.

Justice Penny White did not participate in the decision.

Criminal Court Judge C. Creed McGinley suppressed Anderson's statement, saying he was in custody at the time it was given.

The Court of Criminal Appeals agreed, saying in a split decision that the focus of the investigation is the relevant factor in determining when a suspect is in custody.

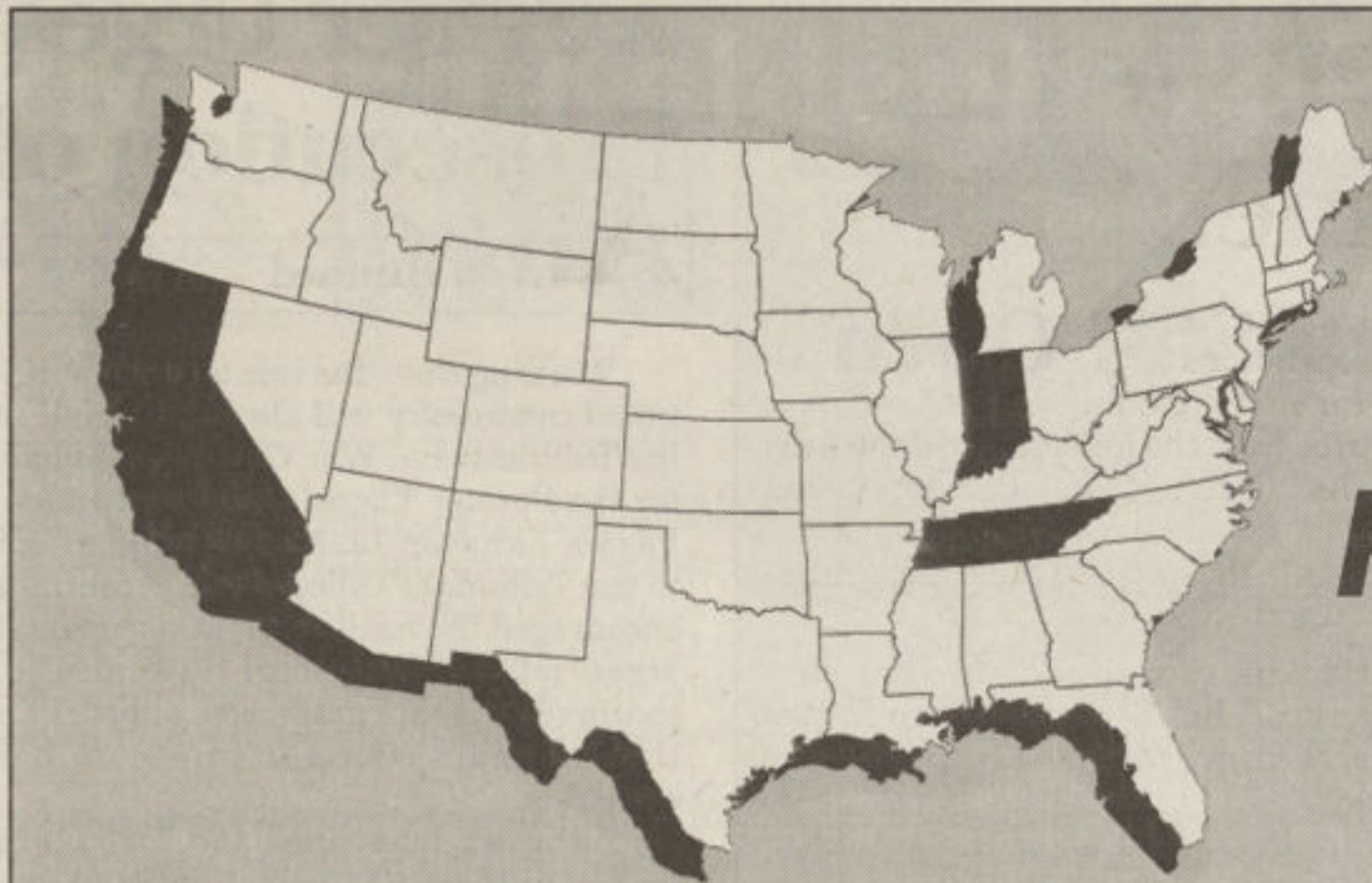
The high court rejected the focus factor and settled on the reasonable person theory as to when a suspect is considered in custody.

Anderson wrote, "Some factors relevant to that objective assessment include the time and location of the interrogation; the duration and character of the questioning; the officer's tone of voice and general demeanor; the suspect's method of transportation to the place of questioning;

"The number of police officers present; any limitation on movement or other form of restraint imposed on the suspect during the interrogation; any interactions between the officer and the suspect, including words spoken by the officer to the suspect and the suspect's verbal or nonverbal responses;

"The extent to which the suspect in confronted with the law enforcement officer's suspicions of guilt or evidence of guilt; and finally, the extent to which the suspect is made aware that he or she is free to refrain from answering questions or to end the interview at will."

Justices sent the case back to Decatur County for the trial judge to apply the new set of relevant factors.



**This Week,
Reports
From Across
the Nation**

Bork Judges America As Rotting, Wants to Curb High Court

WASHINGTON (AP) — Former federal judge Robert H. Bork says America is in decline and "the rot is spreading." As cures, he proposes censorship of "the vilest aspects of our popular culture" and allowing Congress to overrule the Supreme Court.

"It is the courts that threaten our liberty — the liberty to govern ourselves — more profoundly than does any legislature," Bork says in a new book.

He calls for a constitutional amendment allowing the House and Senate to overturn high court decisions by majority vote in each house. That would represent a sharp departure from the current constitutional balance that gives each of three branches of government — the courts, Congress and the presidency — equal power.

Without naming them, Bork said some justices appointed by Presidents Reagan and Bush have disappointed him.

"Having no firm judicial philosophy," he said, they "migrate to the left."

Bork, whose own nomination to the Supreme Court by Reagan in 1987 was rejected by the Senate, 58-42, spells out his views in "Slouching Towards Gomorrah." In the book, he says decadence permeates most of American culture — its "popular entertainment, art, religion, education, scholarship, economic activity, science, technology, law and morality."

Of those, only science, technology

and the economy are healthy, Bork says, "and it seems highly unlikely that a vigorous economy can be sustained in an enfeebled, hedonistic culture, particularly when that culture distorts incentives by increasingly rejecting personal achievement as the criterion for the distribution of rewards."

Bork is now a scholar at the American Enterprise Institute, a think tank. In January, 1988, three months after his rejection by the Senate, he resigned his seat on the U.S. Court of Appeals here to rebut the "essentially unanswered campaign of information and political slogans" that was mounted against his nomination.

His book is a tart critique of American society. While this country is resilient, he said, it cannot be denied that "there are aspects of almost every branch of our culture that are worse than ever before and that the rot is spreading."

His villain is "modern liberalism," which he said Bill Clinton, a child of the 1960s, exemplifies.

"Modern liberalism" is characterized by "radical egalitarianism" in which people believe that outcomes — and not just opportunities — must be equal for all, he said. Another characteristic, he said, is "radical individualism" in which personal gratification has almost no limits.

Bork acknowledged that even many conservatives — including GOP presi-

dential nominee Bob Dole — do not share his advocacy of censorship. But he said nothing less is required to curb "the obscene prose and pictures available on the Internet, motion pictures that are mere rhapsodies to violence and the more degenerate lyrics of rap music."

Bork did not say how censorship would be applied or by whom. He was in London and did not respond to a telephone message.

But in the book he argued that the imposition of censorship would not be an unusual step.

Through 175 years of U.S. history, "we endorsed and lived with censorship," some written in city ordinance and some informally imposed as when Hollywood censored itself, he said. "Without censorship, it has proved impossible to maintain any standards of decency."

Bork aimed some of his sharpest comments at judges and the "intellectually corrupted" judiciary. He quoted one decision, by the Ninth Circuit Court of Appeals, upholding the right of one person to aid another in committing suicide.

The court wrote, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."

Bork's comment: "One would think that grown men and women, purporting to practice an intellectual profession, would themselves choose to die with dignity, right in the courtroom, before writing sentences like those."

Buyer, Hyde Want to Override Abortion Bill Veto

INDIANAPOLIS (AP) — U.S. Reps. Steve Buyer of Indiana and Henry Hyde of Illinois on Monday promoted efforts to override President Clinton's veto of a ban on late-term abortions.

"It's because of our belief in the substance of the issue, not because of the jaundice of politics," Buyer said at a Statehouse news conference.

As described by the ban's supporters, the bill would prohibit a procedure that involves partially extracting a fetus, legs first, through the birth canal, cutting an incision in the skull base and then draining the brain through a suction tube, causing the skull to collapse.

The House has passed the ban twice, both times gaining more than the two-thirds it would take to override a veto. But two-thirds is also needed in the Senate, and its 54-44 passage is far short of that needed for an override.

Hyde is chairman of the House Judiciary Committee, which drafted the legislation. He acknowledged an override in the Senate would be difficult, but said an override vote in the House would come this week or next. Congress is expected to adjourn by the end of the month.

"His veto of this bill, which was overwhelmingly passed in both chambers, indicates an extremism on the subject of abortion that may or may not have political consequences (in the presidential election)," Hyde said.

Opponents of the ban say Republican conservatives have zeroed in the procedure to gain the first specific ban on an abortion procedure since the 1973 Supreme Court decision granted women the right to abortion.

Clinton, in vetoing the measure last

April, said the procedure was "justifiable as a last resort when doctors judge it necessary to save a woman's life or to avert serious health consequences to her."

"I have received more mail on this issue than any other; more than Medicare, Social Security, and a balanced-budget combined. This issue has tapped a nerve and people are responding overwhelmingly," Hostettler said.

Abortion rights groups estimate there are about 500 such abortions a year.

Opponents say the number is far higher.

Hyde said the procedure belongs "in the horror movies, if there."

"It doesn't belong in the hospital or is something that is tolerated by a compassionate America," he said.

Buyer said he had thousands of letters from constituents, "many people who are pro-choice" that support the ban.

"My concern about partial birth abortion is how it defines us as a society," he said.

Douglas Clark, a Democrat trying to unseat Buyer in the 5th District, did not immediately return a telephone call to his campaign office for comment.

Also Monday, U.S. Rep. John Hostettler, R-Ind., said at a news conference in Washington, Ind., that his office has been overwhelmed by grass roots support for overriding Clinton's veto. Hostettler displayed more than 8,000 post cards his office has received urging him to vote for the override.

"I have received more mail on this issue than any other; more than Medicare, Social Security, and a balanced-budget combined. This issue has tapped a nerve and people are responding overwhelmingly," he said.

BRIEFS



Seven LSC Positions Still Open

Seven positions remain open for 3L representatives to the Law School Council after Wednesday and Thursday's LSC elections, said the chair of the Independent Elections Committee.

Jol Silversmith '98 said the deadline for nominating candidates to these open spots is 4:30 p.m. today (Friday) in the Dean of Students Office.

Thirty-two new representatives were elected after this week's two-day election. The results were not available by press time, but Silversmith confirmed that unopposed candidates Allen Wang '97 and Siew Luan Low, who is in the International Tax Program, had won their races.

Melissa Brown '97, who also was running unopposed for a 3L spot, later decided to decline an LSC position, Silversmith said.

The election sought to fill 32 positions: two per section for 1Ls, eight for 2Ls, eight for 3Ls, two for LL.M.s, one for S.J.D.s, one for students in the International Tax Program and four at-large seats.

Bloomberg Endows Professorship for Five Faculties

The Law School will benefit from a \$3 million gift from a Harvard Business School graduate to establish the William Henry Bloomberg Professorship.

Michael Bloomberg, founder and president of the business information-services company Bloomberg Financial Markets and a 1996 graduate of the Business School, gave the gift in honor of his late father.

The new chair will support research, teaching and course development in the fields of philanthropic policy and practice, public service and volunteerism, and the effective leadership and management of nonprofit and public institutions.

In a unique arrangement designed to provide a multidisciplinary, university-wide perspective on the study of philanthropy, appointments to the chair will be made from Harvard scholars, visiting faculty or accomplished practitioners such as leaders of foundations, nonprofit organizations or other philanthropic institutions.

Five of Harvard University's faculties — Law, Arts and Sciences (Harvard College), Business, Divinity and Government (Kennedy School) will share the professorship.

According to the terms of the gift, occupants from each faculty will hold the chair for a maximum of two years.

"I hope that this endowment, made on behalf of the entire Bloomberg family ... will enable faculty from the various disciplines who hold the William Henry Bloomberg Professorship to enrich the study of philanthropy," said Bloomberg.

"Scholars at the Kennedy School and the Law School, for example, might focus on the policies and legal structures that affect philanthropy, while a study of the accountability, effective management and use of resources by nonprofit and public institutions would fall within the domain of the Business School," he said.

Panel Describes Problems Facing Foster Care Children

Students on Tuesday heard a panel discuss the need for child advocates to break the institutional links between foster care and prison.

The panel, sponsored by the Children and Family Rights Project and the Office of Public Interest Advising, included professionals who work with Los Angeles and Boston foster care agencies.

Athena Brodsky, from the Massachusetts Families for Kids, said that while the Massachusetts foster care system is in "disarray," the state is far ahead of the nation in pushing reforms.

Andrew Bridge, executive director of the Alliance for Children's Rights in Los Angeles, painted a much worse picture of foster care in Los Angeles, and emphasized the tie between foster care and crime.

"Seventy percent of the people in prison in L.A. were in foster care," he said.

Robert Kinscherff, who provides law and psychiatry services at Boston Juvenile Court, said the government needs to reconsider its current allocation of resources.

"If the government can build things for people to live in, it should be good foster care, not the prisons that many end up in due to the system," he said.

HLSA Committee Sponsors Public Interest Fellowship

A Harvard Law School Association committee is sponsoring a summer public interest fellowship designed to encourage law students to provide legal assistance to the Asian Pacific American community.

The Asian Pacific American Alumni Committee will award its first fellowship this spring. The fellowship is open to any Harvard Law School student who demonstrates a commitment to working on legal projects of importance to the Asian Pacific American community.

For additional information, contact Anders Yang '94 at Hale and Dorr Legal Services Center at 522-3003, or send e-mail to yang@hulaw3.harvard.edu.

International Tribunal's Adviser Urges Support for Prosecution of War Criminals

By Warren Binford

Warning that "the role of the international community will also be on trial" in the International War Crimes Tribunals for the Former Yugoslavia and Rwanda, Payam Akhavan LL.M. '90, legal advisor to the Tribunal's Office of the Prosecutor encouraged the media, non-governmental organizations and "moral statesmen" to continue to create grassroots support for the Tribunal's efforts to prosecute war criminals.

Akhavan bemoaned the Tribunal's lack of authority to arrest indicted war criminals

and urged the 70 members of the HLS members in the audience to continue to place public pressure on political leaders to take a resolute stand against genocide and other war crimes.

He likened the tribunal to "a giant with no arms and no legs" which is wholly dependent on the political will of the international community for the success of its prosecutions.

He expressed frustration that, to date, there has been no serious effort to arrest war criminals in the Former Yugoslavia by NATO forces policing that region while there are 70,000 suspects being held in Rwandese prisons.

Akhavan reminded the audience that there is a critical relationship between justice and international peace and security and expressed hope that the Tribunal will instill fear in the hearts of present and future architects of genocide both to prevent further tragedy and to ensure that those who have committed such a heinous crime never again enjoy "a single, comfortable night's sleep."

He also noted the importance of creating a forum in which victims will be able to tell their stories and feel that justice has been done and to hold individuals responsible for the crimes they have committed in order to prevent entire groups from being perceived as guilty of actions taken by a minority of its members.

Finally, he explained that in both Rwanda and the Former Yugoslavia, various political groups are denying that widespread rape, killing, torture and mutilation occurred during the wars. The Tribunal is playing a critical role in creating a true and accurate record of the history of these wars so that the brainwashing and propaganda being spread by these political groups will not be able to take

hold.

The Tribunal is the first international court with the authority to prosecute war criminals established since WWII's Nuremberg and Tokyo trials. The international community's outrage at the atrocities committed during the Holocaust gave rise to the international human rights movement and various international conventions outlawing war crimes such as genocide and crimes against humanity. The Tribunal is applying the Genocide Conventions for the first time since 1948.

However, whereas the Nuremberg and Tokyo trials were administered by the Allied

Forces and, thus, are sometimes criticized as "victor's justice," the Tribunal is the first international court established as a non-partisan body to prosecute war crimes and represents a

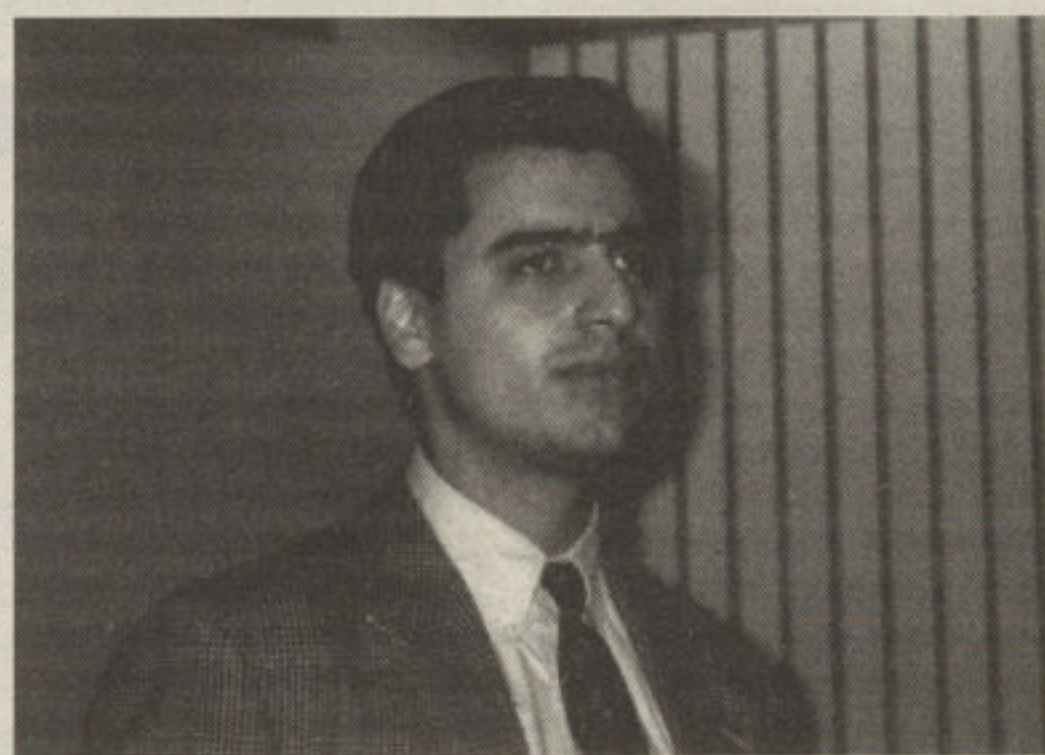
"tremendous revolutionary development in international law," according to Akhavan.

The Tribunal began operating in August 1994 and issued its first indictments soon afterwards. Those indicted in the former Yugoslavia include several top political and military leaders such as Radovan Karadzic and Generals Ratko Mladic and Tihomir Blaskic. However, most of those indicted are still at-large.

In fact, only one person, Dusko Tadic, is in the Tribunal's custody and will be the subject of its first prosecution. Tadic is believed to have participated in rape, mutilation and torture in and near the Omarska detention camp.

Even while the Tribunal commences its first prosecution, Akhavan stressed that the massacres that occurred in both Rwanda and the Former Yugoslavia could have been avoided and that international efforts should also focus on identifying and preventing "genocides-in-the-making." In both cases, there were numerous warnings from people in those countries that ethnic hatred was being fostered and that tragedy was looming. In fact, the international community decided not to have its troops on the ground intervene even during widespread killing.

In addition to fully supporting the Tribunal by arresting indicted war criminals and providing the Tribunal with adequate resources, Akhavan encouraged the international community to actively engage in preventive diplomacy in order to prevent future genocides.



Payam Akhavan LL.M. '90, S.J.D. '96

**GIVE
ANOTHER CHANCE.
GIVE BLOOD.**



American Red Cross



SPORTSGUY

Let the Games Begin



By Todd Stillerman '97

Sports Editor

DESPITE dozens of clutch receptions, accurate bombs, and bone-crushing sacks, the most impressive sight at Webster Field last weekend was the weather. Although a sunny Cambridge Sunday in September is usually as rare as a yarmulke at a Pat Buchanan campaign rally, the proud attorney-footballers of the HLS Football League genuinely glowed under the warmth of a sunny afternoon sky. With eleven of the thirteen teams in action, Sunday's games provided plenty of chills and thrills for pigskin fans.

HLSFL Commissioner Chris Manning '97 arrived early to christen the field with new orange safety cones developed by Lockheed Martin for optimal end zone visual clarity. Manning also unveiled a shiny new batch of Velcro flags designed by Ralph Lauren to showcase the muscular hips of the league's previously polyester players: "available in dazzling azure and passionate crimson, the snazzy design of the rugged Polo Tear-Away offers a crisp sassiness for the cornerback-on-the-go without sacrificing utility," noted Manning as Posse Comitatus star, Todd Prewitt '97, modeled the designer creation to a captive audience. Head official Juan Zarate marveled at the new Fox40 Classic whistles carried by the league's referees: "The brilliant innovation of the pea-less whistle provides for a sharper, more masculine intonation. I feel empowered!" The league's improved look left spectators in awe. "Those were regulation footballs. Doesn't that just reek of class?" asked Mona Mitrani '98, attending her first HFLFL game as a spectator. "I'll be back for more gut-wrenching excitement."

One-L dominated The Happy Gilmores opened the day with a two-game sweep, thrashing Illegal Motion 41-12, then closing out Forrest Krump 32-18. Gilmores' quarterback Jim Walsh '99 reeling from a weekend spent trying to break up Brenda and Dylan, recovered to run for four TDs and threw for four more over the two-game set, while Derek Squire grabbed two interceptions to pace the defense. Squire's timely interception highlighted Forrest Krump's obsessive reliance on an ineffective passing game, leading disenchanted spectators to cry: "run, Forrest, run!" Krump did account for the play of the day when Dave Baxter '99 let fly a deep bomb with no time remaining in the first half. After the pass bounced off the hands of two defenders and a Krump receiver Andrew Kratenstein '99 tucked the ball away for six points. Gilmores' captain Raj Pai '99, who delivered the first sack of the 1996 season early in the first game, refused to criticize his opponents, stating that "Forrest Krump was a worthy opponent, and that's all I have to say about that."

The Sons of Jor-El basked under the glow of Earth's yellow sun as they raced to a 2-0 start. Bolstered by the passing of quarterback John Lammers '97 and the receiving of Pat Rodriguez '97, the Sons dumped two of last season's semifinalists, the Chupacabras and the Great Danes, in a mere two hours. Despite holding Lammers and his men of steel to two scores, the Chupacabras failed to make more than a token appearance in the end zone, falling 14-6. Team Captain Zach Stern '97 crashed through a stunned Chupacabras line to seal the victory with a crucial sack. Even less effective were the Danes, who managed only one first down in a 27-6 walloping. The Krypton Kids easily won the battle of the line, using brutal sweeps to the right to devour the Danes' defense with the voracity of Marlon Brando at the Shoney's Breakfast Buffet. Asked how his team might have better defended against the run, Danes' captain Mike Castellano '98 muttered but one word: "Kryptonite."

Despite sluggish play against the Sons of Jor-El, the Danes did manage a win in the most exciting contest of the day. The Danes trailed perennial title-contender, Posse Comitatus by 13-12 with time expiring. Posse Comitatus, fresh from a 40-8 thumping of the Chupacabras, had just taken the lead on a perfectly-executed loft pass from quarterback Zarate to Chris Handy '97 for a crucial PAT. Undaunted by the pressure, aging veteran, Chris Niewoehner '97 (once considered the "Boy Wonder from Minnesota" for his stellar stats as a One-L) calmly found receiver Matt Hong '97 in the end zone on fourth and goal. Hong, who patterns his receiving game after personal heroes Eddie Goines (the ex-N.C. State wideout) and Mike "Daytona" Beach '97 (currently active with the HFLFL's Who's Your Daddy? squad), went vertical to haul in the winning TD while delicately keeping one foot inside the end line. "I learned to keep that foot behind the line by watching the Beach-master drill three-pointers in the Gym. I think he'd be proud." Hong and Beach comprised the back court of now-legendary HLS intramural basketball power Sweathogs II: Deep Penetration.

The day's finale also featured last-second heroics as the Sensitive 90s Men topped Who's Your Daddy? 24-18 on a Hail Mary pass at the buzzer. Quarterback Steve Mudder '98 got in touch with his inner child and hit Sean Becker '98 in the end zone to secure the victory. James Rhee '98, despite playing with a broken hand suffered earlier in the day, came up with two TD receptions for the 90s Men. "I needed some time just for me, but I chose to put the needs of my teammates first," said Rhee. "After the injury, the guys and I had a meaningful dialogue in the huddle where we got in touch with our feelings. I'm just glad I could be facilitator on the road to accomplishing our goals." The 90s Men had earlier skunked hapless Blur 30-0 in a game that was not as close as the score indicates. Becker attributed his team's 2-0 start to the law school admissions office: "if they hadn't relaxed admission standards for HFLFL athletes, Steve Mudder would never have stepped onto the field. The guy's a Florida State graduate, for crying out loud." Mudder, believed to be one of the few Seminoles in captivity who can form complete sentences, declined comment.

In other action, Who's Your Daddy nipped Blitzed and Bombed 7-0, and Blitzed and Bombed overcame a suddenly rejuvenated Blur squad 33-32 in an offensive showcase. HFLFL action resumes this Sunday at Webster Field.

III

H.F.L.F.L. Standings

Rockne Division

Happy Gilmores	2-0
Sons of Jor-El	2-0
Blitzed & Bombed	1-1
Great Danes	1-1
Posse Comitatus	1-1
Illegal Motion	0-1
Chupacabras	0-2

Lombardi Division

Sensitive 90s Men	2-0
Who's Your Daddy	1-1
Freshies	0-0
Stormin' Mormons	0-0
Forrest Krump	0-1
Blur	0-2

HLS Takes Its Toll

By Jacob Appel '99

Guest Columnist



LIFE had almost passed my cousin Irving by when he had the good fortune to fracture his pelvis. The cause of this blessed occurrence was a '72 Dodge Dart driven by a retired undertaker from Sandusky, Ohio. The undertaker, whose name has long vanished from the annals of my family but whose reputation lives on, had dropped a lit cigarette in his lap; and, when stooping to find it, crossed the guard rail on the Garden State Parkway and collided with an oncoming vehicle at the toll plaza. This incident proved to be my cousin's moment of glory.

In order to appreciate the fractured pelvis' significance, you must picture my cousin Irving: pot-bellied, few strands of hair combed over his bald spot, the willingness to stuff used tissues into his sleeve. Cousin Irving, returning to an empty apartment to watch reruns of "Hard Copy" and "Lifestyles of the Rich and Famous." Cousin Irving, showing the women behind the counter at the corner store, pictures of his nieces and nephews. Cousin Irving, counting down his days until retirement, looking for love in the personals and sending Christmas cards to relatives long since deceased. Yes, my cousin Irving, toll collector at Exit 87 on the Garden State Parkway, a man who finds life's surprises at the bottoms of crackerjack boxes and in the results of rub-off lottery tickets....a man you have driven past, exchanged money with, greeted, thanked, and thoroughly forgotten.

It is with great relief that I inform you that my cousin Irving will never serve on the United States Supreme Court; he will never work 14-hour days at Cravath; he will never make partner, garner a clerkship or join the law review. His only experience with legal success will be limited to the \$2500 settlement his lawyer ("a man with a Jewish name and a large ad in the Newark Yellow Pages") reached to compensate him for his broken pelvis — a body part he had no intention of using in the first place. Yet, despite my cousin's shortcomings, he makes it to the toll booth every morning and never pockets the change.

I have heard it said — and I trust upon good authority — that one's success in life is determined by one's first semester grades at HLS. If you survive the cocktail parties, the alienation, the brow-beating professors, and Walter Gropius' postmodern Versailles, you have the opportunity to be enshrined with Learned Hand and Skelley Wright in the Judicial Annals of America. Dean Clark, a man who at middle age has

I have heard it said — and I trust upon good authority — that one's success in life is determined by one's first semester grades at HLS.

earned himself at least two columns in the New York Times obituaries, instilled in us all the potential to become learned scholars and household names (although, for most Americans, the only judges with name recognition are Pontius Pilate and Roy Bean). Amid all this potential, what happens to that misguided individual who "would prefer not to?"

First, the logical corollary to the belief that first year grades determine success is that failure at HLS dooms one to a life of insignificance and misfortune. Alas, only a small fraction of HLS graduates will receive A's. In all likelihood, neither the author of this column nor the readers will fall into this category. Most of us will struggle through here, learning to tolerate the law rather than love it. We will not end up in corner offices or hold the G. Gordon Liddy Chair in Legal Ethics. As a result, most HLS graduates lead lives of not-so-quiet desperation, dreaming of the "could have beens" just as my cousin Irving recollects the ever strikeout at his minor-league tryout. To these individuals, trapped in jobs they despise to support lifestyles they never really wanted, I recommend a healthy dose of transcendental literature and darwin.

Much more easily forgotten, however, are the perspicacious souls who never sought immortality at the hands of the Great God LAW. There are approximately 30,100 living alumni of this institution. They include small town solo practitioners, house husbands and even the unemployed. They will never earn portraits in Austin; they will never be the subject of journal reminiscences; they will never earn \$500,000 annually; they will never go out and strive for great causes, uphold human justice, and carry an index-card listing the solutions to the problems of race and class in America. They achieve small victories, maybe the daily victory of getting to work each morning or feeding their children; and they achieve an elusive goal often forgotten amidst the scramble for prestige and power....they may find a tranquil happiness, a safe place, and a refuge in common decency.

If you provide legal assistance to the poor of Boston, and you don't greet the dormitory janitors, the time has come to reassess the notches in your dashboard. If you want to change the world rather than wanting the world to change (two very distinct concepts), it ought not be forgotten that other people actually have to live with — and through — your revolution. And if you believe that attending HLS is a badge you can wear on your sleeve, you should ask yourself whether three years of your life is worth an armband.

I mention all these things in the context of my cousin Irving's shattered pelvis because the initial reaction of any good law student to that incident is a cry of "TORTS," and an analysis of my cousin's potential for recovery. Either that, or you pity my poor cousin and his life of bland repetition. How easy it is to forget Irving, neither the richest nor the poorest of man, to whom a wayward automobile provided a story he could tell the woman at the corner store. For most people in this world, they neither concern themselves with achieving the fame of Ozymandias nor keeping their children from being shot on the streets of the ghetto. Most people — serving food at the Hark, arranging funerals, collecting tolls — find joy in spring flowers and the excitement that comes with crackerjack boxes, lottery tickets and even broken pelvises.

So next time you drive down the Garden State Parkway, searching to tell Henny Penny that the sky is falling, make note of my cousin Irving. Recognize that he is doing something you would never do; yet he does it with a smile and never complains to passing motorists. Remember that he will still be there when you reach your destination, when you garner your clerkship, when your bust is enshrined in the rotunda of the capitol. And, if you don't have exact change and the line isn't too long, remember to ask him about his pelvis and his nieces and nephews...

Harvard Law RECORD

Founded in 1946

Rob Friedman
Editor-In-Chief

Hope Yen
Publisher

Rethinking the Affirmative Action Calculus

Anyone who has ever thought deeply about affirmative action policy should pick up a copy of Prof. Edley's new book, "Not All Black and White: Affirmative Action and American Values." The book is unique in that, while written by a confessed "liberal Democrat" and an adviser to President Clinton, it develops a moral framework for thinking about affirmative action policy that transcends political divisions.

If we can agree with Edley that racial and gender discrimination remains a problem in America today, then we are struck by the choice of either accepting the social cost of discrimination or paying the appropriate price to eliminate it.

The core of the debate in Edley's framework thus becomes an economic calculation based on utilitarian value. Conservative opponents of affirmative action often argue that race-conscious decision-making can lead to efficient outcomes when, for example, a restaurant employs a white waitress instead of a black waitress because its customers prefer the former. But the stakes extend much further.

While Edley couches his analysis in terms of "balancing values," his analysis is not incompatible with an economic utility analysis. Affirmative action is a temporary program, Edley asserts, and is narrowly tailored to achieve certain moral ends. That is, the program pays a price to eliminate a greater social cost. When Edley speaks of ending racial and gender discrimination "at any cost," he does have a utilitarian calculation in mind.

The difference between Edley and utilitarian opponents of affirmative action is that Edley's moral framework attempts to capture the true cost of racial and gender discrimination in America today. The "moral cost" of discrimination is the cost of race-based decisions that don't show up on corporate balance sheets or government budgets. Edley reaches for this cost when he argues that, as its base cost, discrimination damages Fourteenth Amendment doctrine. A precise calculation of the full cost of discrimination is impossible to grasp.

We must continue race-based affirmative action because its value continues to exceed its cost. We must continue the policies because there is a cost to widespread violations of our nation's moral values. It means calculating more than the cost of the lost productivity of the African-American worker who is denied a job because of her race. It means attempting to measure the cost of such a decision on the social and economic structures that form the base institutions of our society and form base American values.

You can call it internalizing the cost of discrimination if you like. But it means expanding the calculus of affirmative action policy beyond the incidental, and recognizing the huge moral costs the program seeks to remedy.

Edley's framework for thinking about affirmative action may not lead opponents to change their minds, but it should expand the debate to include the true costs and benefits of the program. The moral cost at stake, if not perfectly calculable, emerges too large and too deep to leave to a narrow calculus, or, worse still, an even narrower political calculus.

— Friedman

Staff

EXECUTIVE EDITOR Jaclyn Liu
MANAGING EDITOR David Liu
SENIOR PRODUCTION MANAGER.....Karin Kysilka
PRODUCTION ASSISTANT Cathaleen Bryant
ENTERTAINMENT EDITOR Colin Meeder
COLUMNIST Todd Stillerman
CONTRIBUTORS.....Jacob Appel, Warren Binford, Kristina Hoy,
Michelle A. Jones, Renee Kaplan, David Lee, David Lenter,
Hal Poret, Jeremy Rist, Melissa Rodgers, Emily Ryo, Tony Wang
CARTOONISTS.....Scott Selby, Alfred Steiner,
Stuart Rees, Bill Zimmerman
BUSINESS MANAGER Craig Buckser
ADVERTISING MANAGER.....Chih T. Cheung
ADVERTISING ASSOCIATE.....Steve P. Chen

Printing By The Harvard Crimson

Editorial/Letters Policy

The Harvard Law RECORD (ISSN 0017-8101) is a publication of the Harvard Law RECORD Corporation, a non-profit, independent, student-owned and run corporation of the Commonwealth of Massachusetts. Harvard Law RECORD, Harvard Law School, Cambridge, MA 02138-9984. Telephone (617) 495-4418. Fax (617) 495-8457.

The RECORD is published weekly on Fridays throughout the academic year and is distributed free of charge to Harvard Law School Students and at a minimal charge to Harvard Law School Alumni. Copy and photo deadlines are 5:00p.m. on the Monday preceding publication. Advertising deadlines are 5:00p.m. on the Tuesday preceding publication.

Submissions may be sent to The RECORD at the above noted address, dropped in the RECORD box located in Harkness Commons, or left in the 2L Hark box of Rob Friedman. All copy must be typed, double-spaced, and submitted on paper and on a computer disk (Macintosh or IBM). The RECORD reads and appreciates every letter we receive; we reserve the right to edit letters for space as necessary. We will return your disks. Off-campus subscriptions are available. Subscription price: \$45.00 year mailed; \$50.00 year mailed outside U.S. Individual copies: 35 cents at newsstands, 50 cents at the Law School, \$1.00 mailed, \$2.50 for back issues and reprints. Second-class postage paid at Boston, MA and additional mailing offices.

© 1996 by the Harvard Law RECORD Corporation and by the contributors.

THE RECORD IS COMMITTED TO EQUALITY AND DIVERSITY. WE STRIVE TO PROVIDE A FORUM FOR THE FREE EXCHANGE OF IDEAS. AS A RESULT, THE OPINIONS REFLECTED IN ARTICLES, EDITORIALS, AND CARTOONS ARE THOSE OF THE AUTHORS AND DO NOT NECESSARILY REFLECT THE OPINIONS OF THE RECORD.

"Congress shall make no law...abridging the freedom of speech, or of the press;..."

—First Amendment, US Constitution

HLS Needs More Criminal Law Faculty

I am writing in response to Dean Clark's statement in the Sept. 13 RECORD regarding hiring new criminal law faculty. Clark said that "[c]riminal law isn't something that pops into my head as a top priority" when hiring new faculty.

HLS offers only one advanced criminal procedure course this year, and that course has a waiting list. This compares with 11

upper-level classes in taxation. Moreover, visiting professors have taught all the advanced criminal procedure courses offered during the last two years.

Hiring new criminal law faculty is needed in order to maintain a balanced and uniformly strong curriculum. Even more important is the relationship between a strong criminal law faculty and a strong public interest

law community. Whether they do so as prosecutors or defense attorneys, virtually every HLS graduate who goes into criminal law does so as a public interest lawyer. Strengthening the criminal law faculty will also strengthen Harvard's commitment to public interest law.

Timothy Kiefer '98
September 14, 1996

Have Great Ideas?
Want to Get Involved?

Join the RECORD

Celebrating Our 50th Anniversary

Positions Available:

News Writers
Columnists
Copy Editors
Photographers
Restaurant Reviewers

Call Jaclyn at 5-4418 for more information.

Excerpt From "Not All Black and White: Affirmative Action and American Values"

By Prof. Christopher Edley '78

Only a very rare person opposes absolutely all preferences; opposition focuses on race-conscious measures. On the other hand, supporters of affirmative action can believe (consistent with either Vision II or Vision III) that the inevitable moral cost to race-conscious decision making should be minimized without allowing unacceptable losses. Therefore when opponents and proponents search for common ground, they often think they may find it in preferences based on geography or socio-economic class. Hard opponents insist on replacing all race-based preferences, while affirmative action supporters acknowledge that in some situations a race-neutral alternative may make sense. After all, we know there is a correlation in the United States between race and measures of poverty, including geographic concentration of poverty. Preferences based on class and place are therefore only seemingly ("facially") neutral with respect to race because, to use Title VII language, they have a decidedly disparate impact. Ironically, some of the same conservatives who oppose using disparate-impact analysis to establish employment or other discrimination (burdening blacks) are willing to construct policies with intentionally disparate impacts (burdening whites) in order to replace race-based affirmative action. (Supreme Court Justice Robert Jackson, dissenting in a famous administrative law case, said in criticizing a twisted majority opinion: "I give up. Now I realize fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it'." Exactly.)

Discussions of race-neutral measures frequently make one of two errors: the error from the right, neglecting to consider dilution and other issues of effectiveness; and the error from the left, neglecting to consider that sometimes these measures are a sensible, reasonable concession to the moral cost of race-based decision making. The first error bespeaks inattention to, or lack of concern for, the need to effectively close the opportunity gap. The second error bespeaks lack of concern for the moral and political consequences of treating race as though it were no more problematic than geography or income — to me, a patently wrong view.

The advantages of seemingly neutral approaches are obvious. They sharply reduce the moral cost associated with race-based decision making — although an intentionally disparate impact seems to me to carry at least some moral cost, not generally acknowledged. The tensions and conflicts around the scope of remedial justifications are put aside by — well, by ignoring the idea of remedy entirely and focusing instead on the social welfare idea of opportunity — enhancing investments. While social welfare programs have their own political baggage and ideological controversies (for some other book), at least the battles are not so directly about the great problem of race. On the other hand, class- and place-based alternatives share five problems: dilution, overinclusion, underinclusion, disingenuousness, and the retrenchment in social welfare policy.

Deciding on the seriousness of these five drawbacks depends on the context, of course, and on the weight you accord the various under- and overincluded subgroups. A good way to understand this is to return to the coal miner's daughter: should there be a college admissions preference for the well-to-do black son of a Pittsburgh neurosurgeon as against the white daughter of an Appalachian coal miner? A preference based on place or economic need would not reach the black applicant. How concerned are we about leaving him out? In part your answer turns on whether you agree with most African Americans that the race problem

will burden the young man in comparison to comparably situated whites, and that institutions and society will benefit from a broader inclusiveness brought about with

the aid of affirmative action. And in part it turns on how important you believe it is to remedy or offset that burden, how weighty the benefits of inclusion to the college are as regards this individual. Instead, suppose we have a race-conscious preference benefiting the black son and for need, then it is underinclusive as regards the girl and overinclusive as regards the boy. How we might feel about this depends upon what else is going on. Why isn't there a separate preference for poor people or for residents of distressed regions? How substantial are

the diversity benefits from including the black? I believe that while such questions deserve a national conversation, they require careful consideration and decision in light of the context and that careful process must take place in organizations and communities throughout the country.

To sum up, moving to facially race-neutral preferences involves several conclusions:

- We must abandon the remedial goals of affirmative action since the neutral preferences are not designed to combat or prevent discrimination or its lingering effects.

- We must accept the inevitable dilution of resources, either because we calculate it to be acceptable in the circumstances or because we don't care that much about effectiveness anyway.

- We must accept levels of under- and overinclusion, since we are attaching greater moral or political weights to the groups who are made better off by the "reform" than we do to those who are made worse off.

If these aren't troubling enough, there is a fundamental moral problem for adherents of color blindness who offer race-neutral appeasement. To the extent

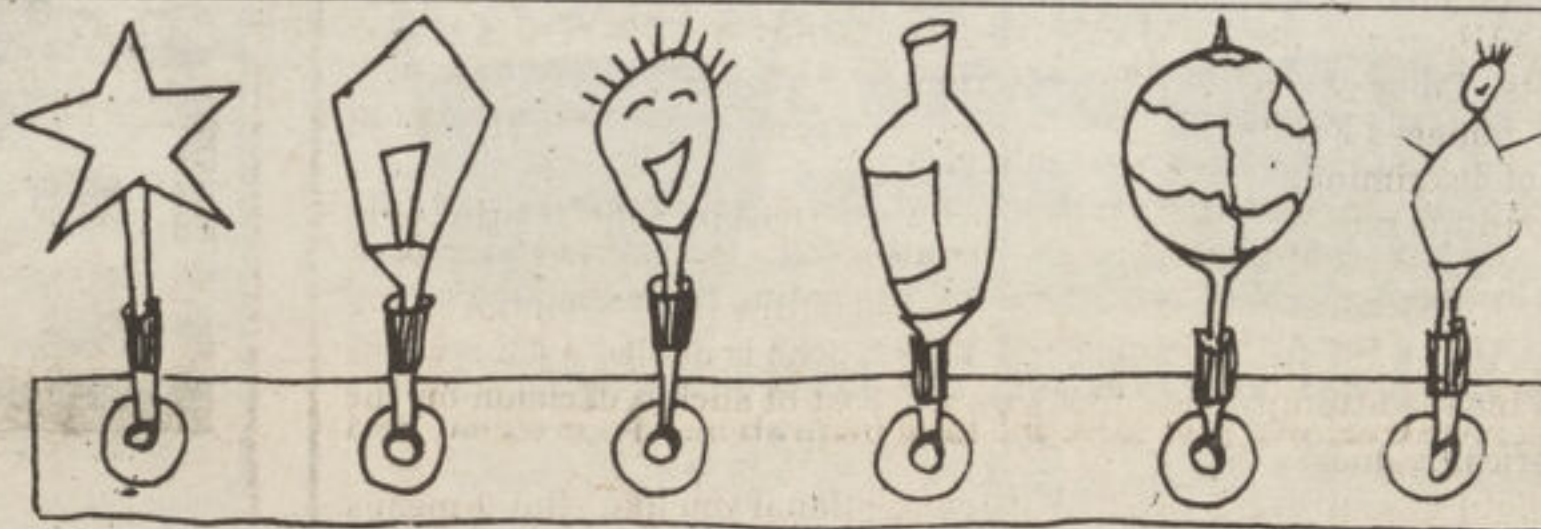
that we propose and design race-neutral measures to substitute as closely as possible for race-based measures — with demographics and projections to ensure that "enough" benefits continue for minorities — have we not taken on much the same moral burden as race-based measures have? This is certainly true from the absolute

position of the color-blind vision, because we would be considering race as we test the acceptability of the substitute measure. But more generally, we cannot

believe that the ultimate moral calculus is different because motives are unspoken and costs disguised. Indeed, judges who purport to demand color blindness would be required by judges who purport to demand color blindness would be required by their principles to strike down as intentional discrimination any public or private measure, race-neutral on its face, if its designers purposefully used race as even one of several flexible factors just in the design, not even in the actual operation of the scheme. (Thus, perhaps racial diversity could be a goal, but you would be forbidden to take any steps specifically intended to advance that race-based goal, even using proxy variables.) This is unthinkable sweeping, even Kafkaesque. But we come to this only by using a moral and doctrinal framework, the colorblind one, that fails to acknowledge the possibility of distinguishing between benign and invidious attention to race.

If nothing else, this discussion indicates that moving to race-neutral preferences is far from costless, and it is impossible to come to sweeping conclusions about when such preferences make sense. It is not the remedy. Unless, of course, you just ignore the hard questions.

While social welfare programs have their own political baggage and ideological controversies (for some other book), at least the battles are not so directly about the great problem of race.



CAMBRIDGE COMMON

1667 MASS. AVE., CAMBRIDGE, MA. 547-1228
(ONLY FOUR BLOCKS NORTH OF HARVARD SQUARE)

24 BEERS ON TAP

"World Class Onion rings" NATHAN COBB, BOSTON GLOBE

Homemade Chicken Pot Pie • Meatloaf Dinner
Big Bad Burgers • Satanic Wings • Steak Tips

SERVING FOOD UNTIL MIDNIGHT
'TIL 1AM THUR. THRU SAT. /

DOWNSTAIRS
LIZARD LOUNGE
Live Music

Wednesday thru Saturday Nights

Every Wednesday night join our House Band, The Lizards, and a different guest vocalist each week for Boston's Best original jam!

"...Hip New Lounge" STEVE MORSE ~
BOSTON GLOBE

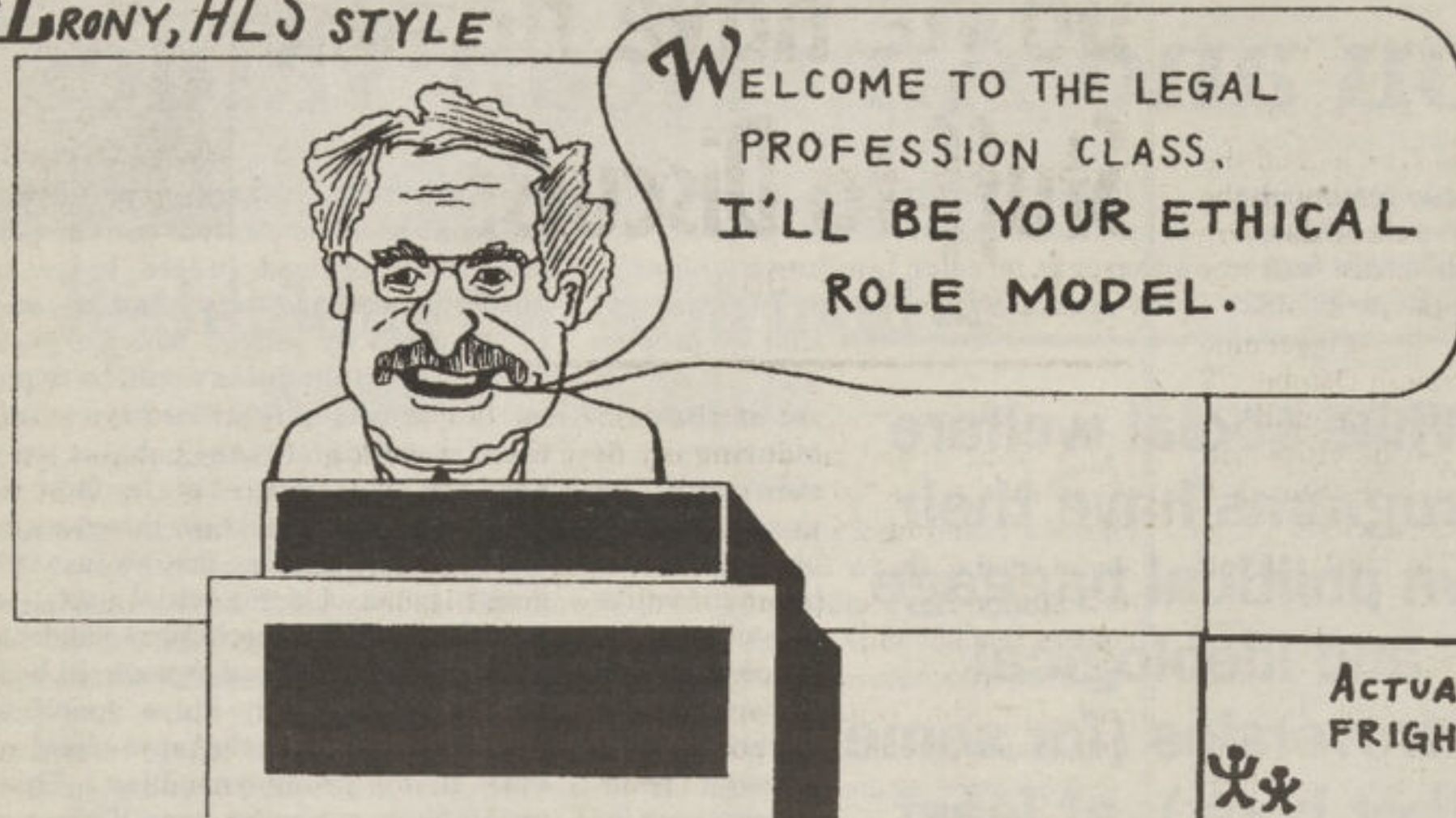
WEDNESDAY NIGHT SPECIAL!

\$2.00 COVER CHARGE
NO COVER CHARGE BEFORE 9:00PM

Ad Hominem

By Stuart Rees and Bill Zimmerman

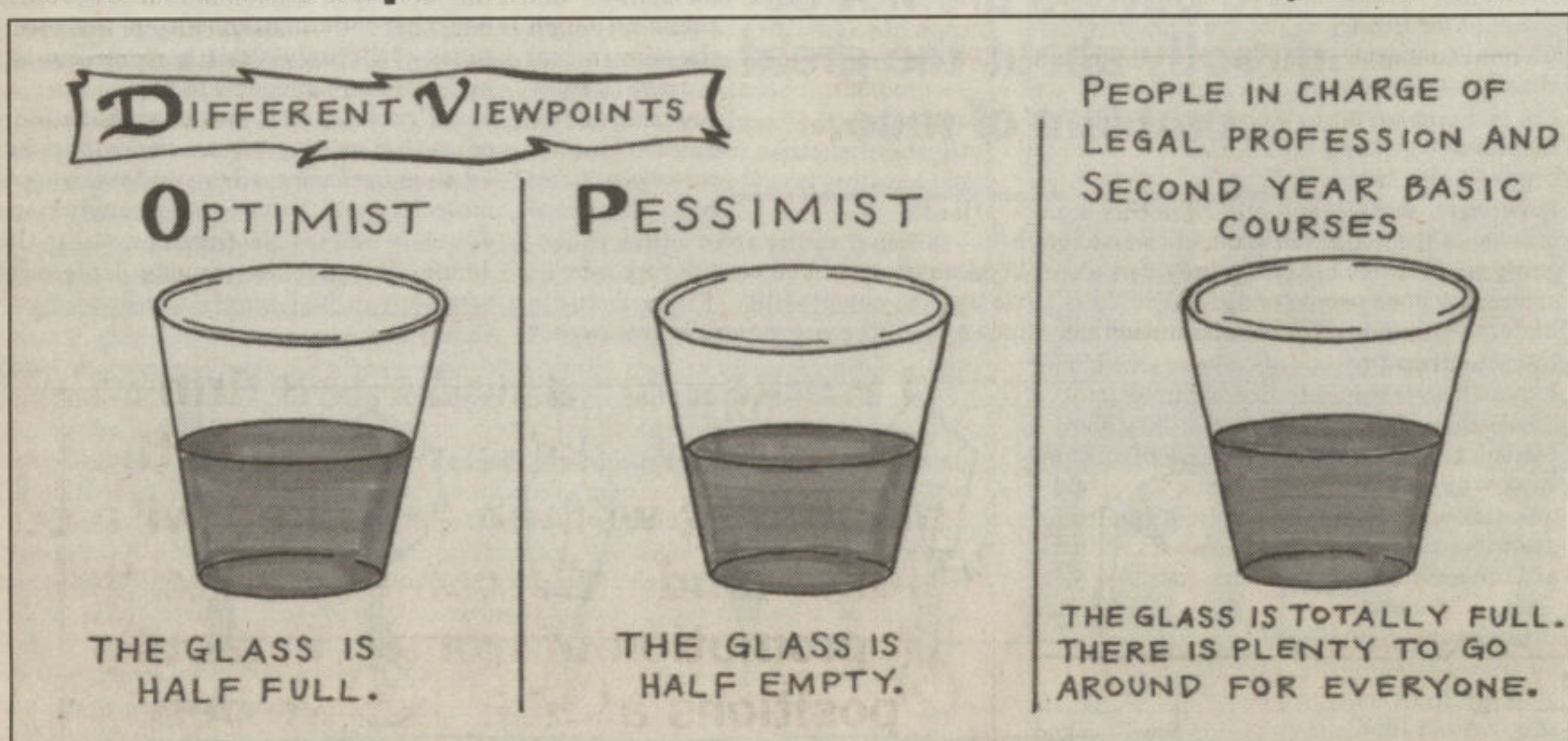
TRONY, HLS STYLE



ACTUALLY, ITS MORE
FRIGHTENING THAN
IRONIC.

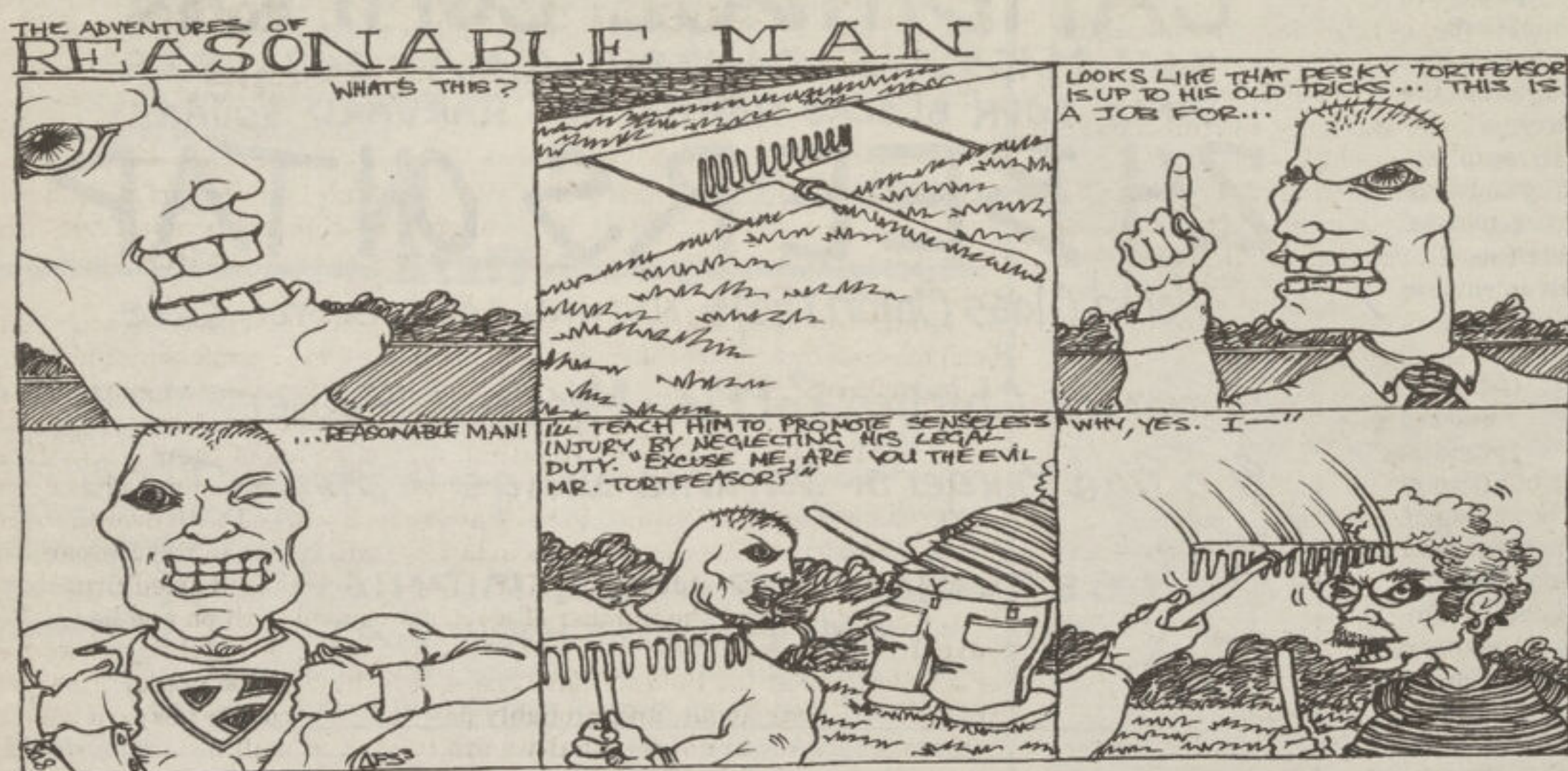
Different Viewpoints

By Stuart Rees



Reasonable Man

By Alfred Steiner and Scott Selby



POSTMASTER: Send address changes to Harvard Law School Association, Harvard Law School, Cambridge, MA 02138.

ALUMNI/AE ADDRESS CHANGES:

Alumni/ae who receive the RECORD as a result of membership in the Harvard Law School Association should mail change-of-address information to the Harvard Law School Association, Harvard Law School, Cambridge, MA 02138.

Each alumnus/a receiving a RECORD subscription through the Harvard Law School Association should be on notice that \$5.00 of H.L.S.A. annual dues are used to purchase the RECORD subscription that he or she receives. Dues paid at any time during the H.L.S.A. fiscal year that began on July 1, 1995 and ends on June 30, 1996 purchase a subscription that begins in January 1995 and expires in December 1996.

Return Address:
Harvard Law School Assn.
Harvard Law School
Cambridge, MA 02138

SECOND CLASS POSTAGE PAID AT BOSTON, MA AND ADDITIONAL OFFICES.

CALENDAR

By Colin Meeder

Perhaps my eyes have I deceived me, but I swear that I have spotted among the ab fab class of '99 a Goth Girl and a Ska Boy. I have also seen at least two long hair dudes. Now, since I myself was a long hair dude until August (I cut my hair for love, not money), I ought to know better than to trade in the following generalization, but I just know that at least one of you long hair 1L dudes is a Nineties Alternametal Type. If I've nailed my stereotypes correctly, you guys will just love the Greater Boston music scene, 'cause once the winter arrives, it's just goth, ska, and alternametal ad nauseam.

But other acts do play here — they just don't play here as often as bands with names like My Lady's Dark Symphony of Sadness, the Two-tone Skankin' Cantabridgians, or Plod. It's my job to scrape all of the other bands together and plop them in an aesthetically pleasing manner onto y'all's musical buffet table. It's a hard job, but I appreciate your feedback.

This Thursday (9/19) brings soulful chanteuse Phoebe Snow to the House of Blues (497-2229). Fifteen minutes of listening to her powerful performance will likely leave you wondering why the pop radio demands so little ability of those its names "diva." Phoebe's cool.

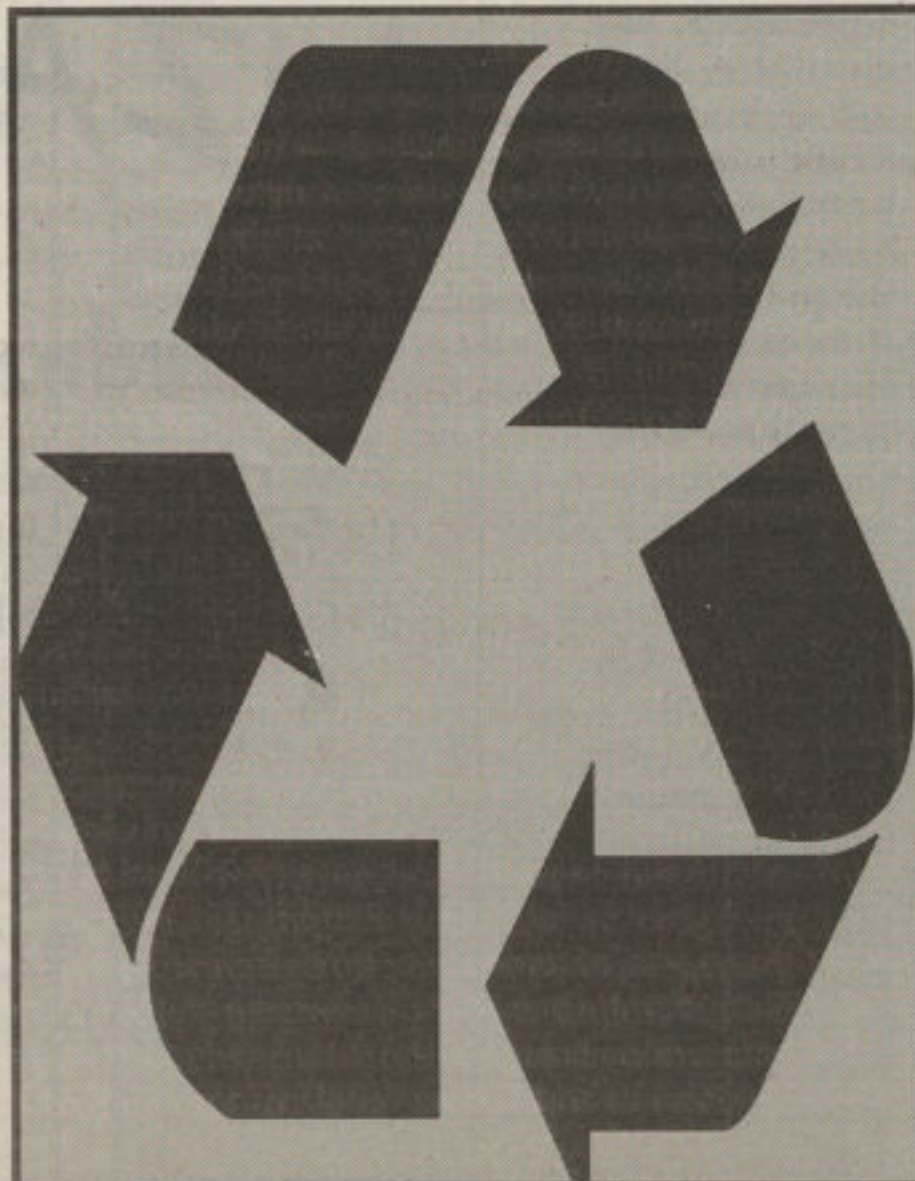
The delightfully squeaky-voiced Mary Timony brings her appropriately named band Helium to the old bowling alley at the Middle East (864-EAST) on Friday (9/20). Victory at Sea and the inexplicable local favorites Syrup USA will open. Those more interested in tasteful pop from tasteful Canadians should check out Barenaked Ladies at the Orpheum (423-NEXT) on the same evening. Opening will be the number one contender for Worst Band Name of '96, Geggy Tah.

Saturday night (9/21), rockabilly guitar madness will be on hand at Johnny D's (776-9667) in Somerville courtesy of Bill Kirchen and Peter Parcek.

Few of you guys have heard of J.J. Cale, and that's a damn shame. It's not that he needs your money — he's got it, very likely, courtesy of Eric Clapton's version of his song "Cocaine" — but he's a hell of an interesting singer, not despite but because of his limited voice, and what he does with it. He'll be performing the oughtta-be-hits from his new record "Guitar Man" at Mama Kin (536-2100) on Sunday (9/22). You can start off your Sunday in the most traditional of ways, by checking out the New England/Boston KISS Expo at the Valley Expo Center in Methuen (508-681-9000). In addition to an "All Day KISS Video show" and "Over 100 international KISS and Rock Dealers!", you can meet KISS' former choreographer and the drummer from Ace Frehley's multi-platinum post-KISS supergroup, "Frehley's Comet" (you remember them from their big hit — uh, wait a minute — it's coming to me...). Remember, kids: it's Kool to like KISS!

Tuesday night (9/24), it's the eternally touring My Life with the Thrill Kill Cult at Axis (262-2437) along with Death Ride. Wednesday (9/25) brings what passes for punk these days, Orange 9mm, to the Middle East, and crucial ska masters The Selector to Mama Kin.

Coming up: Sebadoh, Spalding Gray, Richard Thompson. Stick around for joy!



Job Market Revives

cont. from **JOB MARKET**, page 1

Internet Sign-Up

Students who worry about filling in the bubbles correctly can choose to sign-up over the internet. Career Services administrator Peggy Tuitt said electronic bidding, in which students at Duke, Tulane, and Howard law schools also are participating, "seems to be going o.k." But Tuitt wants more than the approximately 45 students who chose their first interviews over the internet to do so in coming weeks. "Ideally, I'd like everyone to try it," she said.

The only way to test the system is to have many students using it, Tuitt said. And she said the internet system has advantages of convenience and accuracy: students can sign up and be done right when they wake up or just before they go to sleep, and they see an input report before sending the form to the computer service.

"People who have done it have been pleased with the ease and accessibility," Tuitt said.

Only two problems with internet sign-up have arisen. First, because of the volume of information, the internet connection sometimes is slow. Tuitt said students can avoid the slowness by using Harvard network computers that transmit data over the Local Area Network.

Second, Career Services offered law firms the chance to link their web pages with Harvard's bidding site. A half dozen did, Tuitt said, but the links are not working. Career Services hopes to fix the problem for next year.

Tuitt said Career Services hopes that within a few years internet sign-up will become the norm. And Thompson said that someday she hopes to have the entire process electronic: students will sign up for interviews and submit their resumes via

computer, and the resumes will go electronically to employers.

The Place To Be

Staff Assistant Paula Garvin said the career office will remain hectic through the third week in October. Deadline days are especially busy and the office will get busier when interviews start, she said.

The Career Services office is open nine to five on Saturdays through October 27 and until 8:00 p.m. on weekdays until the end of interviews. While the office will remain busy throughout the interview period, Garvin said staff often will stay late to finish their work. "Normally, if you come after 8:00 p.m., you can find someone here," she said.

Ann Marshall '98 said she has found Career Services to be a pleasant place. "I don't dread coming in here," she said, "unlike other offices around Harvard which aren't always great."

"I don't think [interviewing is] going to be painful. As long as it comes out that I get an offer from one of the firms that I'm interested in, it should be fine," Marshall worked in Exxon's tax department last summer and plans to interview this fall mainly with New York firms.

David Kong '97, who worked in Chicago at Kirkland and Ellis this summer, said second year students should get as much information as they can about firms they are considering.

"It's important to keep an open mind about firms," he said. Students should pay attention not just to firm resumes and to what people say about firms; they should also see what they can observe in on-campus interviews and call-backs, Kong said.

Students concerned about quality of life "should see whether lawyers at firms they visit keep their doors open and how many of the attorneys have bags under their eyes," Kong said.



The 1L looked lost, lonely, and frustrated, so Fenno mercifully offered it a sip from his hip flask.

"Oh, gee, thanks, mister," gushed the neophyte, "but I'm not really thirsty."

"Probably a good thing," said Fenno. "This stuff would bring a wildebeest to its knees." He took a swig.

"Are you a 2L," asked the 1L, its Bill Keane-esque eyes glittering with admiration and respect, "or a 3L?"

"I'm Fenno," said Fenno. "You need assistance?"

"Gosh, Mr. Fenno," said the 1L, "I don't know where to begin! I mean, while-liners, but this place is big!"

"Oh, my poor, dear child," said Fenno, his voice oozing sympathy and his breath alcohol, "you're looking at this all wrong! Sure, the actual physical plant is big, but so much of it is so easily stricken from your mind because you'll never use it."

"Whatever do you mean, sir?" asked the 1L, quivering with anticipation and excitement.

"Well, let's just go down the list. Do you ever go in Langdell?"

"What's a Langdell, Mr. Fenno?"

"My point exactly. Austin?"

"That's where I have Legal Reasoning and Argument with Prof. Nesson," said the 1L.

"Oh, don't worry about showing up for that class," said Fenno sagely, "and you're sure to get a good grade. Now, Hauser — is there any reason you should go into Hauser?"

"I have Crim with the famous Alan Dershowitz," gushed the 1L. "Gosh, am I excited about meeting him!"

"Perhaps you didn't hear my question," said Fenno, patiently, "is there any reason you need to go to Hauser?"

"Well, there's the computer lab."

"If you really want to go into a place crawling with viruses, my uncle runs a joint in Tijuana where the employees are a lot more friendly and reliable. Langdell

West?"

"Isn't that called Areeda now?" asked the 1L, meekly.

"Yeah, well, whatever. Any reason to go in there?"

"I — I'm not sure how," admitted the 1L.

"None of us are, my child. ILS?"

"It's leaky and noisy and full of books I won't read?" attempted the 1L.

"Now you're getting it! Try Pound!"

"It's leaky and noisy and has no books that I need!" shouted the 1L, falling into the spirit.

"The Hark?"

"Too smelly," said the 1L.

"Griswold?"

"Too scary."

"Hemenway?"

"Too scary and smelly!"

"Gannett? Hastings?"

"Books above and crooks below — and vice versa!"

"Wyeth?"

"Bad painter."

"Gropius?"

"Sounds like a disease."

"There, now. Don't you feel better, you cute little thing?" drawled Fenno, in a most unappealing manner.

"Yeah," chortled the 1L in its glee, "but you left out North. It's yukky, too! It's just a dumb ol' Holiday Inn!"

"Ah, but that's where Fenno's room is," Fenno said, with a lecherous wink, "and that's where your education can truly begin. Come along, my child. And leave ol' Mr. Gilbert behind — he can't help you now."

Quote of the Week

"It just feels like there are more women around."

—Jenny Martinez '97

THE REASONABLE WOMAN

Do We Have Women's Stuff to Discuss?

By Kristina Hoy '98

RECORD Columnist



A female attorney at the mid-west law firm I worked for last summer approached me during my first week of work and extended an invitation to discuss "women's stuff" with her. My initial response was that "women's stuff" sounded like a phrase a woman might use to explain to a friend why she needed to find a restroom, and I did not seriously consider how my experience as a summer associate may involve women's issues. Upon reflection of my first year of law school, and my experience at a law firm, I recognized that as female law students and attorneys, we will confront issues that result from choosing a profession that remains predominantly male. As Harvard women, however, we also have tremendous opportunity and ability to impact the legal profession.

As female students, we confront the fact that we do not see an abundance of female role models. Eleven seems to be the magic number for women in law right now. There were eleven new Congresswomen elected two years ago, and in the last two years, HLS has nearly doubled the number of women in tenure or tenure-track positions to eleven. Although the number of female faculty is alarmingly low, it is appropriate to note that it appears HLS has made it a priority to consider women for tenured positions. We applaud extension of a tenured position to Lani Guinier of the University of Pennsylvania Law School and hope that she will join the prestigious group of women professors at HLS. We also hope that HLS will continue its efforts to recruit qualified women to open and newly created positions.

Does the fact that you will not have many women professors significantly detract from your experience at HLS? A woman's experience as a professional

I worked for a mid-sized firm this summer, and could count the number of women I worked with on one hand. We can advocate the promotion of women in faculty positions at HLS, but we need to acknowledge that the field we have chosen continues to be predominantly male.

may be significantly different from that of her male counterpart, and there is no doubt that gender socialization tends to produce different perspectives and communication styles between the sexes. There are students at HLS who are understandably concerned.

However, I personally do not feel like my experience as a law student has been affected by the fact that I have only had one female professor. I have noticed male professors' deliberate care to call on male and female students in equal proportions, and although I am not a class talker, it does not appear to me that women raise their hands any less than men because of their discomfort as a woman. The proportion of female to male professors in my courses has been similar to the proportion of female to male attorneys I worked with over the summer.

The fact is, when we accept jobs in law, we will not be in the company of 40% women, as we are as students at HLS. I worked for a mid-sized firm this summer, and could count the number of women I worked with on one hand. We can advocate the promotion of women in faculty positions at HLS, but we need to acknowledge that the field we have chosen continues to be predominantly male. We will see, hear about, and probably personally encounter experiences in our careers where we do not feel that we are treated as well as a male would have been treated under the same circumstances.

I personally had an experience this summer where I did not feel that I fit in with my firm because I tend to puke if I drink too many beers; and at five feet, I am about the worst basketball player I know. In short, social bonding primarily involved male attorneys and traditionally male activities. It was frustrating to know that factors totally irrelevant to work performance could influence my desirability to a law firm.

However, as Harvard women, we are in a unique position. We do not have to work for employers who do not treat us well, and when we advocate a position, we will be heard. We acknowledge that women are underrepresented as students, faculty, and in many legal settings. We can share our frustrations in the fact that there are times when, as women, we may not be warmly accepted by or feel comfortable in the legal profession. We must also give credit where credit is due, to the women who paved the way before us and made it possible for us to enter the legal profession, and the Harvard professors and administrators who have acknowledged women's issues and made them a priority.

The point is, as women entering the legal profession, we face unique issues as the result of entering a career that remains predominantly male. Some may feel that there is still a long way to go, and others may believe that we are already there. I would like to extend an invitation, on behalf of the Women's Law Association, to use this forum to discuss women's issues in the legal profession and at HLS. Please share your thoughts, concerns, and experiences, and we will compile your responses, investigate when necessary, and present perspectives on women's issues to the HLS community.

Please e-mail responses to hoy@law.harvard.edu.

Journal of a One-L

By Renee Kaplan '99
Guest Columnist



I expect that as soon as I articulate the phrase, it will deflate like an overblown balloon — whizzing around defiantly before plopping down, empty. You see, merely to think (ever so discreetly) this expectant thought provokes those greedy providential forces that wait, lurking, eager to rebuke any madbrained optimism, to snatch the now irretrievably materialized words and with reproving twists of fate, make them wither into desiccated, ironic parodies of themselves. In brief, what I mean to say is that I think I'm rather enjoying HLS, so far. I've said it now; of course, I've offered myself up on the altar of the cosmic forces that tear the beating heart out of any positive affirmation just to prove to you that you can never be sure of anything, and that you should have known better than to think, for a single nano-instant, that anyplace is a good place, especially law school. These guys intend strict liability; full-blown, unpleadable punitive damages for a reckless, foolhardy thought: happy? here? at Harvard? Who are you kidding, foolish 1L? So since it's all over for me anyway, I may as well explain, in a last-chance blow-out of bright hopefulness, why I am—had been—enjoying my first few weeks here.

Objectively speaking, I've had the easy life, so far. I'm a lucky member of what's come to be known as section Club Med: there's the 8:30-classes-four-mornings-a-week section, there's the extra-class-and-hard-ass-civ-pro-prof section, and then there's my section, blessed with just the right number of classes, Club Med Reps (CMPs) masquerading as convincingly engaging professors, and predetermined panels of on-duty students in every one of those precious few classes. Socratic schmocratic then—though I come prepared, mind you, as I am sure everyone in my section does. We all presume all the others come prepared, and then, of course, we know who does for a fact: the daily dutiful hand-raisers. They say that every section's got 'em, and though you don't know who you are, we do. An observer in another section

We all presume all the others come prepared, and then, of course, we know who does for a fact: the daily dutiful hand-raisers.

has isolated a few of that group's most frequently recurring genres: the left arm holding up the right arm alternating with the right arm holding up the left arm until professor accordingly calls upon said steadfast hand-raiser; the eager moaner specimen who thinks that nobody but the professor can hear his sottovoce whimpers and see his hyper-extended fingers trembling.

But I actually find none of my own section's hand-raisers at all obnoxious. I manifest surprise only because of the supposed asshole-factor. I don't think I'm alone in having been warned of the type; we all arrive with the subconscious premonition of it—he, she—the famous nemesis of Harvard Law folklore: the steroid-inflated ego muscled with self-righteous convictions, abrasive self-assurance and arrogance. The place is supposed to be swarming with those ee-vill guys, right? Maybe I've just been lucky, but so far no assholes have actively interfered in my life since I've been here. I've actually found class itself to be the most interesting part of law school so far (consider that statement to be the final foolhardy leap of innocence into the vindictive jaws of impending reality). Issues brought up in class initially emerge only two-dimensionally from the drone of rules, and from the over-analyzed language of statutes, as mute and flat as their genitors. Then by some proposition thrown into the conversation—perhaps by some hand-raiser, more likely by the CMR—the issue seems to gain substance as the conflict becomes a live idea—a veritable potential instance in our immediate material world.

And what a wonderful material world it is: RA-groups, A-groups, LRA-groups, and cheery, crimson-clad, well-informed advisors accompanying each one. I arrived in my Gropius dorm room to loads of shelf space, lots of light, and a hearty handshake from my RA. I vacillate between feeling relieved and feeling embarrassed about this, but it's all been strikingly reminiscent of freshman year. We put our names on our doors, introduced ourselves to each other, went out to bars together in orientation week—thronged of fifteen or twenty 1L's. There's even a wee bit of college anti-conformity. I've dubbed it the Noir Contingent: by some strange fluke, the only three people on campus who all go in for candles, blacked-out rooms, gargoyles, peroxide, and tin foil, all happen to live next door to each other on my floor, affording our little residential nest the definite majority of body piercings on campus. Among them, I believe they boast a total of three nipple rings, innumerable earrings, an occasional tongue bar, three eyebrow rings, a hood ring, and perhaps others that I have the good fortune still to ignore. I didn't expect to encounter much deviance from the norm (to come here is intrinsically not to deviate from the norm) in any aspect of law school or law (which intrinsically defines non-deviance from norms). But nothing has surprised me more than the flexibility of the law as I've discovered it so far; I didn't imagine that such a complex and totally regulated system could permit itself, deviance into discretion, particularities, and very conscious temporality and localness.

But all that could describe the first few weeks at any law school, really. No, what truly makes Harvard Law School so particular, so very much unlike any other law school, is the lingo, a certain kind of elite patois—otherwise known as acronyms: HLS, LSC, DSAC, DOJ, RA (resident adviser, not to be confused with) RA (research assistant), EALS, APALSA, BWAP, BLSA, OPIA, HALB, ITS, IPP (not to be confused with opp, yeah you know me), NAPIL, IJL, WLJ, HNLR, HLR, JOLT, HMP, PLAP (my personal sonorous favorite), ADR, TAP (tap, who's there), and BSA (it's all BullShit Anyway). And I haven't even touched on the abbreviations, diminutives and bynames: Dersh, Tree, crim, Usenet, Netscape, Hollis, Eudora, WestLaw, WestMate, playmate, Lexis, Nexus, solar plexus, and so much more I still don't know.

Indeed, there is so much more left to learn, but these were but the first impressions of the first few weeks in the life of a now doomed 1L. And if I've hastened the hatchet of ill-humored fate by letting on about the kind-of-liking-it-here thing, it's only because I know that come cold, stressful November, life sucks for everyone anyway.

On the RECORD with Richard Kahlenberg

The RECORD caught up with Richard Kahlenberg shortly after his speech Monday to answer a few questions about affirmative action.

What prompted you to write *The Remedy*?

In college, I did my thesis about Robert Kennedy. He was able to get blacks and disadvantaged whites — at a time when the two groups were at each other's throats — to vote for him and to believe in him. He did that not by emphasizing racial divisions or racial preference programs but by emphasizing their common interests, [the fact] that they both faced disadvantages and [that] we ought to address those aggressively.

Do you see the same kinds of racial divisions today as existed in Robert Kennedy's time? Where do you see those divisions most manifested?

I think we're very divided. Clearly, after the OJ Simpson trial, we saw a lot of racial division. For a lot of white Americans, the OJ Simpson verdict was a manifestation of racial preference. The argument was made that a lot of whites have committed crimes against blacks throughout history and have gotten off, and this was evening the score. I think that's a very poisonous attitude and one that whites reacted strongly against.

You state that advantaged people of color benefit from affirmative action at the expense of others who are less privileged. Have you looked at empirical studies that show this trend?

At Harvard College, 70 percent of the African Americans are sons and daughters of professionals. The black [admissions] percentage is now 7-8 percent. Some of them will be disadvantaged, but many are not. Even if it were true that most of the people of color who are benefiting from affirmative action were disadvantaged anyway, then they wouldn't lose out at all under a disadvantage system. It's really only the upper middle class people who would lose out.

Do you find the same kinds of statistics in other areas like employment or contracting?

It depends on the context. If you're talking about firefighters or policemen, then no. In the contracting area, often times people are advantaged. There was a big "to do" about a year ago about tax certificates that the FCC was giving out to millionaire African-American businessmen. OJ Simpson and Colin Powell were two beneficiaries of the preference program.

Your proposal suggests that the racial discrimination issue could be addressed under a class-based scheme. Could we also include the class issue within already existing racial categories?

There are two ways to combine race and class. One way would be to means-test. So, that would say the only people who could benefit were people of color who are poor. Then, you'd have to say, why shouldn't poor whites who face lots of obstacles also be included? The other way to do it is to say, we'll have race preferences for all economic groups and then add in the poor whites. But then, you have to say, why do advantaged people of color deserve a preference? I think that's a hard argument to make.

Civil rights advocates often argue that affirmative action is needed because the cause of poverty lies also in race-based historical factors like immigration or African American ghettoization. How would your proposal deal with this criticism?

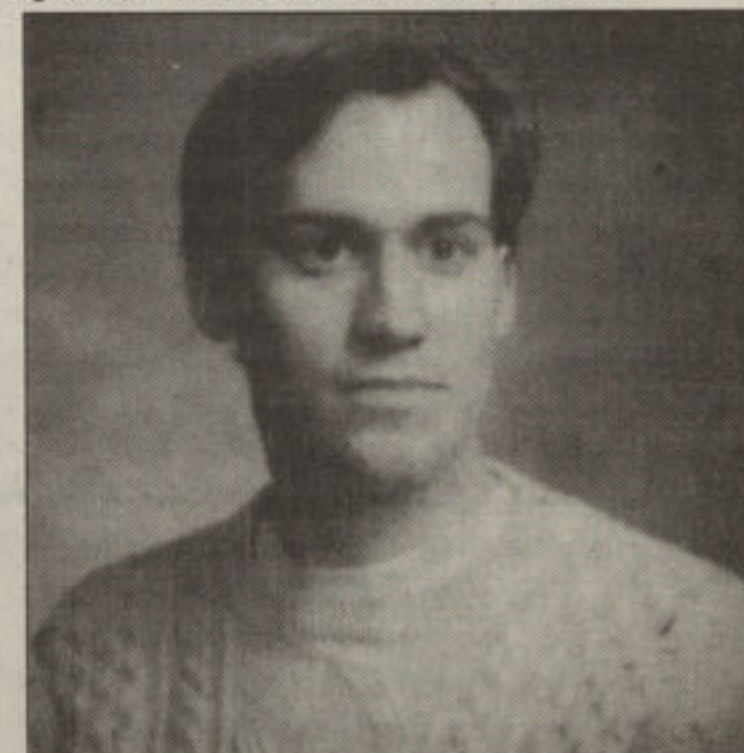
That's what I think is good about a class-based system, it is precisely because of our history of discrimination that people of color are disproportionately poor. It's not by accident. There's a clear link between discrimination and the fact that certain groups are disproportionately poor. So, a class-based system reflects that because it would benefit these people who have been disproportionately disadvantaged. So, unlike a system of straight merit, which ignores history, a class-based system implicitly addresses history. Yet, it does it in a color blind way that doesn't anger people and divide people by these genetic factors.

Considering the unpopularity of class-based analyses in public policy — for example, welfare cutbacks and other attacks on the poor — how optimistic are you that affirmative action without the race component will be embraced politically? Is there a danger that without affirmative action, people of color will be excluded from all social policies completely?

I'm advocating for a simultaneous trade, that is opposing the California Civil Rights Initiative while at the same time reforming affirmative action. I would gradually phase out race and gender preferences and phase in some kind of attention for disadvantaged people. I think you're right to say that many class-based programs have political problems, welfare obviously being the prime example. But, [there's] an important distinction between what I'm arguing for and a welfare program... What I'm arguing for is more analogous to funding for education in that it's providing disadvantaged people with the chance and the opportunity to move ahead if they work extremely hard, if they want to go to college, and if they're trying to enter the workforce in an entry-level job. I think the problem with the welfare program is that it cuts against American values to say that we're going to cut a check out to someone who's not giving anything back in return.

What is your sense of how communities of color would respond to ideas like this? Affirmative action has traditionally been a strong civil rights issue. How would those groups respond?

There was a big divide in 1968 after Martin Luther King's assassination, and racial and gender preferences, initially race, became the centerpiece of the civil rights strategy. So, criticisms of affirmative action are not taken kindly in the civil rights community today. I think it's important that we look back to the earlier history where we were arguing for color blindness and saying that it shouldn't matter what someone's race is, and to look at King's approach of providing a leg up to disadvantaged people generally because that's the way to deal with civil rights questions in a non-divisive manner.



Richard Kahlenberg as a 3L ('89)

Author Offers Alternative

continued from AUTHOR, page 1

er socio-economic indices. Kahlenberg projected one student's suggestion that instead of completely eliminating the race and gender based affirmative action programs, class should merely be added as another category: "Studies have shown that class-based affirmative action will disproportionately benefit the racial minorities anyway," said Kahlenberg.

"To keep the system as we have now is to endorse a morally unjustifiable argument that we want well-to-do minorities to benefit just because they are minorities," said Kahlenberg. He noted that such a system only perpetuated white racist attitudes — contrary to the goals of equal opportunity espoused by affirmative action.

In refuting another student's argument that class-based affirmative action will mislead the public into thinking that problems of race and gender are no longer significant, Kahlenberg emphasized that his model did not deny the existence of present day discrimination based on race and gender.

"However, race-based affirmative

action is not the appropriate solution to fight the on-going present day racial and gender discrimination," argued Kahlenberg. He pointed out that strong anti-discrimination laws were already in place to deal with current racial and gender discrimination. Instead of "resorting to disease as cure" by instituting race and gender based preference systems, Kahlenberg urged greater enforcement and strengthening of the already existing anti-discrimination laws.

Acknowledging the growing attack on race and gender based affirmative action, Kahlenberg predicted a bleak future for the traditional form of affirmative action.

"We are likely to see California Civil Rights Initiative pass in November. We are likely to see more Supreme Court cases that curtail even further race-based preferences," he said.

In this process, however, he also foresaw an eventual change in public opinion to the point where class-based affirmative action will be seen as the only viable alternative for helping the disadvantaged.

"In the end, I hope to rediscover Martin Luther King's vision of a color-blind and compassionate society."

Prof. Edley Explores Values at Stake in Affirmative Action Debate

By David Lee

As Special Counsel to the President on affirmative action, Professor Christopher Edley '78 told Clinton to "Mend it, don't end it." In his new book, *Not All Black and White: Affirmative Action and American Values*, Edley explains why.

Not All Black and White is an outgrowth of Edley's work at the Office of Management and Budget in 1995. During that time, Edley ran the affirmative action review under George Stephanopoulos, the Senior Advisor to the President for Policy and Strategy and helped craft the President's famous July 19, 1995 speech of "Mend it, don't end it" at the National Archives.

The book provides insight as to what questions are raised when our value system is faced with the issue of race-based affirmative action. Rather than addressing individual policy details, it focuses on "the deep, underlying value questions at stake" in the affirmative action debate," Edley said.

In uncovering the tough questions faced in deciding the issue of race-based affirmative action, Edley first asks whether discrimination is still significant in social and economic life today. His own personal answer is that discrimination today is "inescapable," directly evident in housing discrimination and indirectly evident in statistical wage disparities.

Edley's next question is whether there is a moral loss in making decisions based on color. It is this point that Edley breaks with conservative commentators who believe that decision-making based on race and gender is a perfectly acceptable means of achieving economic efficiency. Edley points out that race-based decisions are "inconsistent with

Fourteenth Amendment doctrine."

"If we believe having a color-blind society is an important value," Edley explains, "then we must pay any cost to avoid [discrimination]."

In addressing Rick Kahlenberg's '89 arguments in favor of class-based affirmative action, Edley argues that Kahlenberg's ideas do nothing to achieve diversity and fight racial and gender discrimination. "Economic redistribution is a social value independent of the goals of battling discrimination," Edley said.

While Kahlenberg maintains that class can substitute for race, and desires to replace race-conscious programs and rely exclusively on class-based actions, Edley asserts this argument is not persuasive because it would be ineffective in remedying the problem of racial discrimination. While Edley agrees that class-based preferences serve important social goals, "[they] are not the only part of the opportunity agenda."

Edley criticized the Fifth Circuit's decision in Hopwood for failing to be candid about the effect of ending race-based preferences. "Either the court should [say that it] believe[s] there is a reasonable expectation of continuing diversity [or that] diversity will be destroyed, but that value is not as important as [some] other value."

Edley warned that the Hopwood decision and Kahlenberg's policy preferences would "re-segregate higher education [and have] grave consequences for education at these institutions," he added.

Edley points to the need for diversity in law enforcement agencies in urban areas as an example of the importance of continuing race-based affirmative action. "Police officers trying to do a good job need to reflect the society in which they serve. That's the reality of race in America today."

A Radical Idea

By Melissa Rodgers '98

Guest Columnist



MY classmates from my IL section will laugh when they read this: I have spent the better part of the summer wondering why I was called a "radical" last year. I even looked up the definition of "radical" in a friend's old Webster. Here it is, for the record:

(a) marked by considerable departure from the usual or traditional; extreme; (b) tending or disposed to make extreme changes in existing views, habits, conditions, or institutions; (c) of, relating to, or constituting a political group associated with views, practices and policies of extreme change; (d) advocating extreme measures to retain or restore a political state of affairs.

While I am flattered by the somewhat romantic notion that I am on the sidelines, fighting the good fight on my own, the truth is a lot less grand. In reality, my worldview and professional aspirations only look extremist when measured against unbending loyalty to conservative politics or the status quo.

Why does this matter? Because the incoming ILs who come in thinking that everyone finds a niche at Harvard are in for a shock. That Harvard Law School is a training ground for corporate America is no secret. More elusive, however, is the truth about how conservative the school is. Many incoming (and graduating) law students think that HLS is a "liberal" institution—a myth that I found had made its way even to the small southern Texas organization where I worked this summer. This same myth fuels the notion that I hold extreme views. I was taught, growing up in France, to fear the radical right. But at Harvard Law School "radical" means left wing.

I am writing this piece because I did not realize, when I started my first year here, how overtly hostile the school culture would be to me and my beliefs. Having been called a "commie Frenchwoman" more than once (not a compliment) — I am sure that I speak from experience. I have also been called a "bleeding heart." It unnerved me to find that I would spend three years in a place where the shape of my heart is measured by whether or not my professional interests have the potential to be lucrative. To hear people speak, one would think that I was planning on practicing "touchy feely" law.

There is no such thing. To begin with, there is nothing easy about rejecting the circular but comforting logic that leads us to believe that having and achieving is, in and of itself, proof enough that we deserve every shred of our privilege. That being said, civil rights work requires as hard a head and as strong a heart as any other area of law. And it is as much of a challenge to represent poor clients as wealthy ones.

So why the hostility? Why are those of us who choose less popular paths so vigorously dismissed? The term "radical" alienates, separates, delineates. "Oh, you're going to do your radical thing" was the reaction I got from people who asked about my summer plans. This condescending attitude makes it easier not to listen to or take seriously opinions that challenge the majority's. It fosters complacency. This is not how a law school should be.

Unfortunately, Harvard Law School is not a place that nurtures dissident voices and there is hefty pressure on new ILs to conform to a money-oriented, prestige-hungry, competitive mindset—to the point where even most public-interest oriented students feel they should "try out a firm job one summer to see if it's for me." The reverse rarely happens.

Being called a "radical" because one questions the majority viewpoint invites debate (and defensiveness) but not dialogue. Perhaps this is trial by fire, where those of us who survive the process with our values unscathed come out stronger for it — but we pay a high price. When "shape up or ship out" is the dominant message, many choose to adapt. "I really wanted to do public interest work but ..." is a common tune among HLS students and alumni.

There are wonderful people here students, professors and staff — and resources for those of us who are interested in working in areas of law that need us but can't pay us. My hope is that we can make this school a place that is more welcoming to those of us who reject the big-money culture — and one that meets our voices and choices with respect.

BOOK NOW FOR YOUR FALL GETAWAYS!

DETROIT	\$ 69
MIAMI	\$ 98
SAN FRANCISCO	\$175
HOUSTON	\$178
LONDON	\$195
PARIS	\$275
BERLIN	\$299
ATHENS	\$335

FARES ARE EACH WAY FROM BOSTON BASED ON A ROUNDTRIP PURCHASE. FARES DO NOT INCLUDE FEDERAL TAXES OR PFCs TOTALING BETWEEN \$3 AND \$45, DEPENDING ON DESTINATION OR DEPARTURE CHARGES PAID DIRECTLY TO FOREIGN GOVERNMENTS.

CALL OR DROP BY FOR A FREE STUDENT TRAVELS MAGAZINE!

Council Travel

12 ELIOT ST. • HARVARD SQUARE
CAMBRIDGE, MA 02138

(617) 497-1497

<http://www.ciee.org/travel.htm>

EURAILPASSES ISSUED ON-THE-SPOT!



**Everybody
Who is
Anybody
Reads the
RECORD!**

**Please See Page 8
for an Excerpt from
Prof. Edley's Book**

The WestBar Pass Rate Challenge

WE'LL SHOW YOU OURS, IF THEY'LL SHOW YOU THEIRS

- West Bar Review is committed to having the highest pass rates possible.
- West is also committed to accurate and verifiable pass rates.
- Therefore, West Bar Review makes the following challenge:

West Bar Review is so confident of our pass rates that we will release the names of ALL the thousands of West Bar Review students from our summer 1996 courses, if Bar/bri agrees to do the same. These names will be released in confidence to the world's largest accounting firm, Arthur Andersen, or to any other Big 6 firm.

We will do this BEFORE the exam results are published in most jurisdictions. Arthur Andersen can then determine accurate pass rates after each state releases the names of successful candidates.

As a prospective attorney, you should trust only accurate, verifiable pass rates, computed by a nationally recognizable, authoritative source.

West Bar Review is prepared to have our pass rates verified by a disinterested third party and to publish only accurate, statistically verifiable information.

You should expect no less.



Guardians of the Law

By Jeremy Alexander Rist '98

RECORD Columnist



WELCOME to my column. Or, should I say, welcome to the important part of your education. Forget what the quasi-Socratic Overlords intone in the compact beige classrooms of Pound; dismiss the somber lectures once uttered in that building now surrounded by dirt and debris. Forget those solemn words inscribed on Austin's frieze: "Teach them Laws and Ordinances so that They May Make Lots of Money Defending Those Who Violate Them." All you need to know will be in this column. Provided, of course, that your life — like mine — consists of sitting in front of the Hark day after day, pontificating on any subject to anyone who makes the mistake of happening by. Sometimes, our mission here will be serious; sometimes trivial. So, if you don't like the tone of this week's column (I know I sometimes write like Antonin Scalia after he's had a couple of pitchers of margaritas), tune in next week, when the topic will be: People Who Claim to be God in Federal Court. Wholesome family fun is promised.

As I'm sure many of you are aware, Governor Weld's recent appointment of Harvard University General Counsel Margaret H. Marshall to the Supreme Judicial Court has raised the ire of many activists in Massachusetts' minority communities. Not that they find Marshall unqualified. Far from it. While praising her accomplishments and temperament, Weld's detractors have concentrated instead on the fact that a jurist of minority background has never served on the SJC.

Let us shift now to Washington. Since Bill Clinton assumed the Presidency in 1993, he has had the opportunity to alter significantly the composition of the federal judiciary. In doing so, he seems to have been operating from a mindset similar to that of Weld's critics. As if he were trying to quickly correct the two-hundred-year underrepresentation of women and minorities on the bench in the few years before a once-suspected defeat in the 1996 election, Clinton has appointed members of such groups at a disproportionate rate, all the while labeling each nominee — as Presidents always do — the best person for the job at hand. Although I won't mention any names, a quick computer search of the federal circuit courts in particular will show you what I mean. And, worse yet, they aren't exactly the best-educated or most-accomplished bunch of buggers God has ever put on this earth.

The attitude of the hyper-liberals in Washington, the minority activists in the Commonwealth, and, to be fair, conservative mouthpieces who advocate filling judicial robes with unthinking Bork clones (often a far cry from the real thing) reveals a bankrupt — and worse, a dangerous — conception of the judiciary. Judges should not be advocates deceptively swaddled in black; there should not be "representation" on the bench. If the ideologues believe that the Caucasian men who have historically comprised a vast majority of the judiciary in this country cannot fairly dispense justice, do they think that members of the under-represented groups will? Such a position is intellectually untenable. The primary impetus, of course, is the ideologues' desire to make the judiciary yet another policy-making branch of the government. This we cannot allow.

If the majority of the cases litigated in state and federal courts addressed questions concerning our nation's fundamental values ("political" questions on which, it should be noted, the courts should not speak but usually do), then perhaps a bench populated by judges cum activists would be appropriate. But this is not the case. The great bulk of cases decided in our courts concern technical, complex issues of statutory interpre-

The judiciary should be the haven of the best and brightest, not the home of merely the best member of Group X that one can find.

tation and reconciliation. How many times have we, as students, been told by a professor (usually correctly) that a particular judge's opinion represented a particularly ignorant interpretation of a statute or of a complex common law doctrine? I am reminded, for example, of a tax professor who once described Oliver Wendell Holmes as a "hayseed from Iowa" in tax cases (and please, no letters from those of you from Des Moines). If even the Great Holmes could be confused by our often-impenetrable statutory law, how do we expect political hacks and judicial quota babies to fare? CERCLA, ERISA, the Internal Revenue Code... these are waters into which the intellectually mediocre should not wade. We all drown when they do.

The judiciary should not, like Clinton once said of his Cabinet, "look like America." The judiciary should be the haven of best and brightest, not the home of merely the best member of Group X that one can find.

Ideally, a judge should be an individual who has spent the greater part of her life steeped in deep contemplation over the law. We should have a bench populated by professors — and perhaps a few very thoughtful practitioners — who, having completed law school, have spent the years thereafter carefully researching and examining the law, surrounding themselves with intellectually passionate colleagues from whom the judges-to-be can gain new perspectives and insights. These are assets and opportunities one can not experience in the "real world," but they represent qualities which are essential to the proper disposition of cases as a judge. How can we expect the life-long corporate defense attorney to properly handle a broad array of cases, when his entire career has been devoted only to discovering new ways to massage evidence and manipulate juries? Or the civil rights advocate — how can we expect her to forget her laborious service to her constituents as quickly as yesterday's gossip, and suddenly render fair and impartial rulings from the bench? We cannot. I want judges who see not the shadows dancing on the wall of the cave, but rather can appreciate the brilliant sunlight outside without cowering back to the dark, comfortable recesses they know so well.

The greatest benefit one with the power to appoint can give the people he serves is a spate of judges who will correctly interpret and apply the law. If the study of legal history teaches us anything, the lesson should be how ideologically-motivated, less-than-brilliant judges have wrought tremendous peril on American society through the imposition of their unenlightened views. Nineteenth century liberty of contract? The excesses of the Warren Court? Continuing the process of political representation on the bench will inevitably lead us back into the dark caverns from which we should long to escape.

We need more Posners, Frankfurters, O'Connors, Breyers, and Arnolds. And fewer (Thurgood) Marshalls, Brennans, and Taneyes. Only then can we ever hope to live under a government of laws, not men.

Reasonable Doubt

By Tony Wang '99

RECORD Columnist



HAVING just completed our third week of class, a lot of us are now able to say for the first time: So this is what law school is like. For the 1L's, you've probably already stopped briefing each case and started to play the odds game against the Socratic method. Or maybe you are responsible for those conspicuously empty seats in the early morning classes because you aren't used to having torts for breakfast.

By now you've probably noticed that the minimalist mentality of your undergraduate years of buying only the necessary books has surrendered to a frightful and gluttonous consumption of academic supplies you never thought possible. Maybe you've become so completely obsessed about getting every outline, horn book, case brief and study guide that you've phoned home for an old copy of your Cliff's Notes for Arthur Miller. Or worse yet, maybe you attended one of the study tip lectures and now have no idea what would be helpful; but whatever it is, it won't be found in your case books, your professors, or Emmanuel's. Yes, I too was completely unfazed by the fact that paying \$25 to sign up for a bar review course could give you materials far more useful than what you got for your \$21,700 tuition.

One thing that's safe to say is that if you're living on campus, you've probably already resorted to either the Chinese food truck or the equally ubiquitous Three Aces, or both. You've probably adopted the oral version of shorthand into your Cambridge/Law School vernacular—it's only a matter of time before you confuse unsuspecting out-of-town guests by telling them to meet you at the Hark off Mass. Ave after Civ Pro.

Another indication that we're now well under way in law school is the relative infrequency of the "my-name-is-I-come-from-and-I-went-to-school-at" conversations.

I wondered why it is reasonable for the law to impose on its citizens a standard which resembles no human that has ever existed.

Comments like "oh, really," "did you know so-and-so," and "I've always wanted to visit Des Moines" occur less frequently too. Through that process, however, I've constantly been impressed by the nature and breadth of the experiences we bring to the Law School. It didn't take much effort to meet a former detention officer, a White House intern, an Americorps teacher, and a burgeoning script-writer who worked for Spike Lee. I hear that our professors have accomplished a thing or two as well.

Despite a very diverse student body, I'd have to say that the most intriguing person I've come across is a man in my morning 1L torts class. Unlike the rest of the students here who are no doubt brilliant, he is not particularly bright but simply has an ordinary intellect. At first it was difficult to determine anything about him. He seemed normal enough, until I got to know him better. I found out that he doesn't have a distinct age. In addition, he doesn't have predictable features. At one given moment he is blind, at another he is missing a limb. Sometimes he'd experience epileptic seizures, other times he'd be insane. His penchant for metamorphosis renders him a frightful sight.

Needless to say, I've never met another human like him before. He is subhuman. He is a mystery. But some people ironically choose to call him "the man who takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves." Other people call him "the reasonable person."

In addition to the qualities listed above, there are a few other things we know about this supposedly reasonable person. The reasonable person is actually a reasonable man by virtue of his designers. He has an ordinary intellect that takes reasonable precautions to avoid injury to himself and to others. For that reason, combined with the ability to clone himself with any given disposition, judges and attorneys of our day hold him in high esteem and use him to judge the actions of others in any given circumstance.

Unlike the person who is born excessively "hasty or awkward" and therefore accident-prone, we can count on being reasonably safe around the reasonable person who exercises reasonable precautions to prevent injury. If you stay at his resort, you can be assured that he installs secure locks on your sliding glass door or hires extra security to minimize your chance of being assaulted in your room by an intruder. As a carpenter, you'd be safe from electrocution by wires owned by the reasonable person because he would have properly insulated them or removed them altogether if they hand over an anomalous vacant lot. You can expect the reasonable person not to leave his barge unattended for more than 21 hours during a time when barges are constantly being drilled out. Finally, you can extinguish all your fears of a hay fire due to the way the reasonable person cautiously stacks hay on his property.

Since this reasonable person only exercises an ordinary level of prudence, however, it follows that there are still some occasions when safety is not a guarantee. If this reasonable person starts swinging a four-foot long stick at two fighting dogs, watch out. There's a good chance that he might strike your face and inflict a severe eye injury. Extra caution is needed when you are walking the streets, for this reasonable person will not hesitate to jettison a cab if his passenger's pistol threatens to blow his sacro iliac to pieces. Finally, if you're a thirteen year-old girl who wanders off the street limits with a pail of milk, the reasonable person might well operate his train in reverse and kill you.

Aside from the above, we really don't know much more about this reasonable person, and the reasonable person doesn't know much more about himself either. He is a tautology created by the justice system. Since the law uses him as a standard, he himself does not have an independent standard by which he acts, other than the characteristics imposed on him by the law. We do not know how he would act if he was a child of extraordinary intellect. We do not know whether he would be adequate in assuming other gender or cultural identities. Sometimes we do not even know whether he will act according to the norms common in a given community. We do not know any of these things until the court speaks.

I left torts that morning wondering why this pseudo-human construct is called the reasonable person. He is fictional, we know very little about him, and he is created by a small group of people who happen to be judges. I wondered why it is reasonable for the law to impose on its citizens a standard which resembles no human that has ever existed.

Did you know that...

more than

500

HARVARD LAW GRADUATES

trusted

BAR/BRI

to prepare them for their
1996 Bar Exam?

Speak to Harvard Law alumni and find out why the overwhelming majority of students choose BAR/BRI for their bar exam preparation.

For more information about BAR/BRI's programs and scholarships, stop by our display table across from the Harvard Law Coop, Monday through Thursday 10AM-2PM or call 695-9955.

Harvard Law's #1 Choice for Bar Review



Trust the POWER OF EXPERIENCE™ to Work for You