



Tribe Argues Life and Death Before High Court

By Maria Green

In a case that could have profound implications for the way Americans face death and dying, Prof. Laurence Tribe '66 argued before the Supreme Court last week that terminally ill patients have a constitutional right to doctor-assisted suicide.

"I certainly found the case among the most intriguing and challenging and significant that I've ever worked on," said Tribe, who argued *Vacco v. Quill* pro bono.

"The question of how the constitution defines personal liberty in the context of the decisions people make about their own death when death is imminent and inevitable seems important."

"It has a powerful human dimension," he added. "To force people, when they are already dying, to submit to the total government control that is implicit in saying that the only relief available to them is illegal," is "hard to square with our tradition."

Tribe said that he had enjoyed the oral argument, which he called "quite a workout."

"I felt as good about the oral argument as I've ever felt about an oral argument," he said.

Tribe said he was eager take the discussion beyond "some of the dry, abstract categories in which these issues are sometimes discussed, like the difference between withdrawing treatment

and helping to die."

The Court first recognized a constitutional right to die in 1990, when it ruled that terminally ill people can refuse life-sustaining medical treatment.

Under current law, Tribe said, when patients decide to withdraw treatment they may legally be offered "terminal barbiturates" — essentially, drugs that allow them to fall into a coma

present if we were to bring it out into the open."

Asked if the situation is an issue now because so many Americans are dying alone in nursing homes, Tribe referred instead to advances in modern science.

"If modern medicine hadn't been able to prolong life [so that] people die prolonged deaths rather than quick deaths by infection," he said, the situation would not arise so often and in so many people's lives.

"The profile has changed," he said. "Given antibiotics and modern methods, fewer people die quickly."

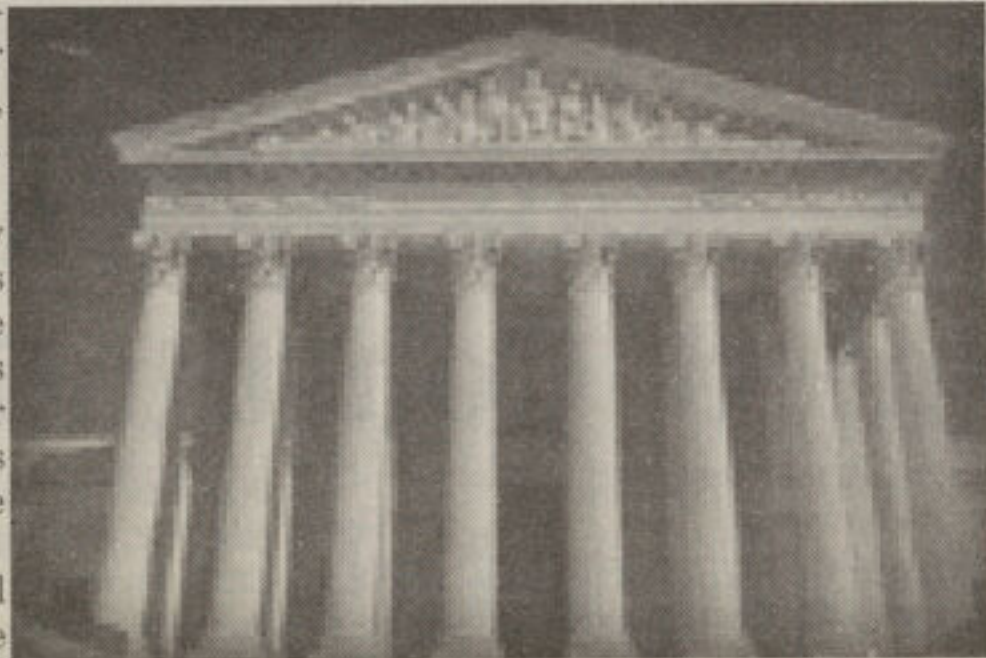
Tribe noted that some in the press had reported that the justices had appeared mystified in the face of the complicated facts at play in the discussion. This was not his impression.

"I think that some of the press was mystified ... but I'm quite sure that none of the justices were mystified in the least," Tribe said.

"I would say that the justices seemed very much on the ball, very focused and very inclined to ask appropriately tough questions."

Some of the justices, he said, "were more inclined to challenge the question of whether the Court

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from which they never awaken, and in which they remain during the week to two weeks that it takes to die from starvation and dehydration.

Although the situation only applies to one to two percent of such patients, "for some it is the only way of avoiding excruciating pain," Tribe said.

The dangers inherent in allowing assisted suicide, such as undue pressure and incorrect diagnoses, are no greater than those already existing, Tribe said.

"The abuses are already present in practices like terminal sedation and would be much less

Student Expelled for Forging Transcript

By David Lenter

A male student has been permanently expelled from the Law School for "extensive forgery" on his undergraduate transcript. No one on the Administrative Board, which recommended the punishment, would release the name or year of the student.

Registrar Stephen Kane, one of two voting administrators on the board, said he came across the problem in September.

"I discovered a discrepancy in what the student offered as undergraduate records," Kane said. He brought the issue to the attention of the Administrative Board, and the board began looking into the matter in September and October.

Kane would not state specifically what prompted him to look at the student's records. He said when he read the records, he noticed that "what the student claimed to have done as an undergraduate and what it seemed he could have done didn't correspond."

"There were time periods that didn't make sense," Kane said.

Kane would not say which school the expelled student attended as an undergraduate, in part because "they may be pursuing litigation themselves," he said.

The board voted to expel the student in December, Kane

said. In cases in which the Administrative Board decides to expel a student, a two-thirds vote of the faculty is required for imposition of the expulsion. This vote, "carried overwhelmingly" according to Kane, at the Dec. 13 faculty meeting.

Kane said the expelled student chose not to appear before

the board and did not request a supplementary hearing. In every disciplinary proceeding a charged student has a right to a hearing before the board, and in cases in which the board votes to dismiss or expel a student, the student has the right to a supplementary hearing before a hearing officer appointed from the faculty by the dean.

The expelled student has left the law school, according to Kane.

As to the precise nature of the forgery, Kane would not provide details. "It was pretty extensive forgery," he said.

The board was scrupulous in examining the evidence against the expelled student, Kane said. "We really were very detail-oriented in gathering all the information, and the evidence was overwhelming," he said.

Once the board studied all the evidence, it did not consider any other form of punishment, Kane said. "If you submit false credentials, that's pretty serious. ... There is some

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Registrar Stephen Kane

HLS Mourns Three of Its Own Louis Jaffe, Ad Law Expert, Dead at 90

By Jacob Appel

Students and faculty returning from the winter holidays were saddened to learn of the deaths of three long-time members of the Harvard Law School community. Louis L. Jaffe, Byrne Professor of Administrative Law, Emeritus, former Assistant Dean of Admissions Molly Geraghty and Kay Lee, the "right arm" of the Office of Career Services were all affiliated with HLS for many years.

Professor Jaffe, a leading authority on administrative law, died on December 11 at a nursing home in Norwood, Massachusetts at the age of ninety. Since his retirement in 1976, he had resided in Cambridge and summered in Martha's Vineyard.

Colleague Clark Byse, another former occupant of the Byrne Chair in Administrative Law, noted that "Louis Jaffe was one of the giants of the Harvard Law School, not only in his field, administrative law, where he was

one of the three outstanding scholars of his time, but in other fields like torts and legislation."

Dean Clark '72 praised Jaffe's contributions to legal education. "Professor Jaffe was a significant force in the post-war development of Harvard Law School," Clark said.

"[He] played a major role in the creation of the field of administrative law. As a former student of

Professor Jaffe, I personally can attest to the skills and unique style that he brought to the classroom," he said.

Jaffe originally joined the Harvard Law School faculty in 1950 and rapidly rose to preeminence in both administrative and tort law. He earned national

recognition for his research into the relationship between courts and administrative agencies.

This groundbreaking work focused on the role of the Federal Communications Commission and the development of the then nascent television industry.

While a student at HLS, Jaffe served on the Harvard Law Review, was ranked third in his class, and with the recommendation of then Professor Felix Frankfurter, secured a clerkship with Supreme Court Justice Louis Brandeis. Finding the Depression era job market difficult, Jaffe returned to Harvard and earned a S.J.D. in 1932.

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Prof. Louis Jaffe (1905-1996)

D.C. Stalking Statute Survives Constitutional Challenge

By Hal Poret

In a recent ruling that will provide strong support for the continued effort to create effective anti-stalking legislation, the District of Columbia Court of Appeals held that a D.C. stalking statute was not unconstitutionally vague or overbroad.

Statutes attempting to criminalize "stalking" have met with various constitutional challenges in recent years. Most prominently, defendants prosecuted under new stalking laws have invoked the void-for-vagueness and overbreadth doctrines, as well as the First Amendment's protection of free speech in attempts to strike down these laws.

The void-for-vagueness doctrine requires that all criminal statutes are clear and specific enough in the definition of prohibited conduct to provide actual notice to ordinary people as to

what actions will constitute violations of the law. The goal of this doctrine is to avoid vague statutes that create the opportunity for arbitrary and discriminatory enforcement of the law.

The landmark void-for-vagueness situation occurred in the case of *Papachristou v. Jacksonville*, in which the city of Jacksonville, Florida had an anti-loitering ordinance written in such vague language that virtually anyone seen in Harvard Square today could be arrested under it. The Supreme Court invalidated the ordinance, holding that it did not sufficiently define the offense so that people could know whether or not their conduct was punishable by law.

In the stalking context, the void-for-vagueness doctrine poses a difficult challenge to legislators, who must write a statute that adequately and specifically defines what will

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At the End of the Day

By Sharon Cohn '97

Guest Columnist



He was wearing a ski mask, pointing a gun and running straight towards me. It was 9 p.m. on a Friday, and I was walking two blocks from one friend's house to another in Washington, D.C. I heard quick footsteps and a voice behind me, turned and saw him. Without thinking I ran into the street. I fell to the ground and covered my head. I thought he was going to shoot me. In falling, my purse flew eight feet in front of me, and the man picked it up and ran away.

Law school has at times overwhelmed me with information, but in my three years here I have learned nothing as significant as what I was reminded of that night. Seven years ago it became evident to me and each day confirms its truth. At the end of the day it is Jesus alone who matters.

Perhaps you are wondering if I hit my head when I fell the other night. After all, I grew up in a kosher, conservative Jewish home, was for the most part a model student in my Hebrew school class, was bat-mitzvah and the like. What happened? Despite growing up in a religious home, after my bat-mitzvah I lost interest in religion and became a contented agnostic, satisfied to consider the religious woman naive and the atheist woman imprudent.

But while I was satisfied, I could not escape the feeling that Someone else was not. Wherever I turned, from debate to literature to my own understanding of right and

You would be surprised at how quickly the cares of the world fade away when faced with death in a moment.

wrong, reality kept interfering with my agnosticism. But for me it was a conversation to be avoided, not engaged. I didn't care what other people believed but I wanted to be left out of it.

Still, hearing others speak my own feelings unsettled me. One friend told me that it didn't matter what I believed about the nature of God, as long as it was true for me. But that can only be correct if we are the creators and God is the created, and however happily agnostic I was, I was not so foolish as to suppose God subject to my definition. It would be like believing you could reroute a hurricane simply by choosing to believe that it was not coming your way.

Another friend told me that I need not struggle to adopt a particular faith because all religions held to the same moral teachings. Yet, the little I knew about Judaism and Christianity suggested the issue was not principally one of morality, but of the character of God. Dismiss it as existential angst if you wish, but whenever I would let my mind wander even for a moment, it would drift perilously back to God's question, "Who do you say I am?"

The English scholar C.S. Lewis writes about this, "We may ignore, but we can nowhere evade, the presence of God. The world is crowded with Him. He walks everywhere incognito." And so it was with me. Agnosticism could be a weigh-station, but I was not to be permitted to settle there.

When I could no longer ignore God, I set out in college to disprove (or at least discredit) Him. Believing I had nothing to fear, I read about Jesus in the Gospels and read everything I could find to prove that Jesus could not have been the Messiah. Surprisingly, the more I read the more nagging became the notion that I might be wrong and, more troubling, that my intellectual assent to the truth was not all that was required of me. Jesus said in the Gospel of Matthew, "If anyone would come after me, he must deny himself and take up his cross and follow me."

Previously, I had thought that knowledge was the source of happiness and that if I could only learn more I would discover worth, purpose and value. To find that Truth was a Person and not a theory came as a thunderous blow. You cannot imagine the strength with which I resisted.

I was Jewish, everyone in my family had always been Jewish, and besides that, I had grown quite fond of my spiritual independence. But still I could find no peace. When I could fight Him no longer, I repented, acknowledged Him and asked His forgiveness. I cannot conceive the Divine humility that accepted me on those terms.

I fear that the above explanation for my faith is abstract for some — even obscure — but it has become for me what is most fundamental. It becomes more concrete when a man is chasing you with a gun. Then you realize that it is not where you will work or even who you are that is significant. You would be surprised at how quickly the cares of the world fade away when faced with death in a moment.

You might be tempted to dismiss as superstition my belief that God protected me that night and continues to watch over me, but you cannot dissuade me. I know in whom I have believed and I am persuaded that at the end of the day it is still only Jesus who matters.

Ad Board Refuses to Name Expelled Student

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individual that is not at Harvard Law School who should be. I think that it is very serious," Kane said.

"There have been past instances of forgery," Kane said. "Three or four years ago," according to Kane, a student was expelled for forgery under similar circumstances. Kane likely was referring to the 1992 expulsion of a second-year student who reported false LSAT scores.

No other details of the case could be obtained. Dean of Students Suzanne Richardson, the Administrative Board's nonvoting secretary responsible for record keeping, refused to provide specific facts about the case, as did board member and Director of Financial Aid Sally Donahue, who also sits on the board.

Administrative Board Chair Prof. Lloyd Weinreb '62 would not answer questions, and board members Prof. Arthur Miller '58 and Prof. James Vorenberg '51 were out of town and

unavailable for comment.

The two student members of the board, J.T. Price '98 and Vivian Hamilton '97, said they could not comment on the case and referred questions to the faculty members and administrators on the board.

Richardson said the Rights and Responsibilities statement in Appendix A of the Harvard Law School Catalog, along with the description of the Administrative Board at page 191 of the 1996-1997 catalog, "in general are the guidelines" the board uses in handling charges against students. The board has four categories of discipline — "Reprimand, Suspension, Dismissal, or Expulsion." The sanction of "expulsion" prevents the student from ever being considered again for HLS admission.

The law school application itself also provides a guideline, Richardson said. "When you make the application, at the bottom you sign your name" to attest that the information contained in the application is truthful, she said.

D.C. Stalking Statute Ruled Constitutional

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constitute "stalking" without leaving major loopholes for stalkers to avoid prosecution.

The concept of "overbreadth" also plays an important role in the writing of stalking statutes because such laws may fall victim to constitutional challenges if stalking is defined so broadly as to prohibit conduct that is protected by the constitution. For example, legislators have had great difficulty criminalizing harassing behavior involving telephone conversations, e-mail or other arguably "expressive conduct" because of First Amendment concerns. If a statute appears to criminalize too much of what could be considered protected forms of expression, then it is subject to an overbreadth challenge.

The District of Columbia statute in question defines a "stalker" as: "... (b) Any person who on more than one occasion engages in conduct with the intent to cause emotional distress to another person or places another person in reasonable fear of death or bodily injury by willfully, maliciously, and repeatedly following or harassing that person, or who, without a legal purpose, willfully, maliciously, and repeatedly follows or harasses another person. ..."

Another component of the statute defines "harassing" as: "engaging in a course of conduct either in person, by telephone, or in writing, directed at a specific person, which seriously alarms, annoys, frightens, or torments the person, or engaging in a course of conduct either in person, by telephone, or in writing, which would cause a reasonable person to be seriously alarmed, annoyed, frightened, or tormented."

Though much of this language was argued to be vague by the defendant in the recent case of *United States v. Smith*, the District of Columbia Court of Appeals upheld the constitutionality of the law, ruling that the requirement that the accused act "willfully, maliciously and repeatedly" sufficiently narrows the application of the law to survive the vagueness challenge. In addition, the court held that the statute's requirement that a reasonable person would be "seriously alarmed, annoyed, frightened or tormented" provides an acceptable standard for the enforcement of the law.

While also rejecting defendant Smith's claim of overbreadth, the court acknowledged that the statute does make criminal certain traditionally protected

conduct. However, the court believed that by adding a <mens rea> requirement that the threatening behavior be done intentionally or recklessly, the legislature saved the statute from overbreadth. In the court's view, since conduct is only made illegal when it is intended to cause emotional distress or put another person in "reasonable fear of death or bodily injury," the statute would not apply to criminalize any speech protected by the First Amendment.

Although the intent requirement makes a stalking violation more difficult to prove, it is an important component in crafting a statute that does not run into the types of problems that have previously hampered law enforcement efforts to protect stalking victims.

For example, Minnesota was recently forced to rewrite its 1993 anti-stalking law when the Minnesota Supreme Court ruled that the state could not punish conduct without a finding of criminal intent. In ordering a new trial for a Minnesota stalking convict, the court argued that without a requirement of intent, people could be convicted of "accidental stalking." As a result, the state added a requirement that the stalker act with reckless or negligent disregard for whether the victim would be intimidated or threatened by the behavior.

Influenced by similar concerns, the Texas Criminal Court of Appeals recently invalidated Texas' stalking law after holding that it criminalizes expressive conduct that is protected by the First Amendment.

By creating hope that such issues can be avoided by adding scienter requirements into stalking laws, the D.C. appellate court's holding is an important step in the battle against this serious criminal enforcement problem. Along with the new federal anti-stalking bill, which was signed into law by President Clinton on Sept. 25, such state stalking laws should help provide an effective means for protecting citizens from various threatening and harassing behavior. The new federal bill makes it a crime to cross state lines with the intent to harass a victim or to stalk victims on federal property. Furthermore, it extends protections to a victim's family and facilitates the enforcement of protection orders across state borders.

The decision of the D.C. Court of Appeals to uphold the D.C. stalking law should therefore provide great hope for efforts to combat stalking with legislation that is both effective and constitutionally permissible.

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Tribe Argues for Assisted Suicide

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had any business addressing the issue at all."

According to the Associated Press, six of the nine justices voiced doubts about adopting a sweeping life-and-death ruling.

"Where should we draw the line?" Justice Ruth Bader Ginsburg '56-'58 asked as the court was urged to prevent New York and Washington state from imposing its assisted-suicide bans. "Is this ever a proper question for courts as opposed to legislators?" Ginsburg asked.

Justice Anthony M. Kennedy added, "You're asking us, in effect, to declare unconstitutional the laws of 50 states."

Justice Antonin Scalia, who repeatedly has spoken out against recognizing any constitutional "right to die," was particularly sarcastic. "Is all this in the Constitution?" he asked incredulously. "This is lovely philosophy."

A number of commentators have compared the case to seminal, society-changing decisions like *Roe v. Wade* and *Brown*

v. Board of Education. Whether that is true will depend on the Court's decision, Tribe said.

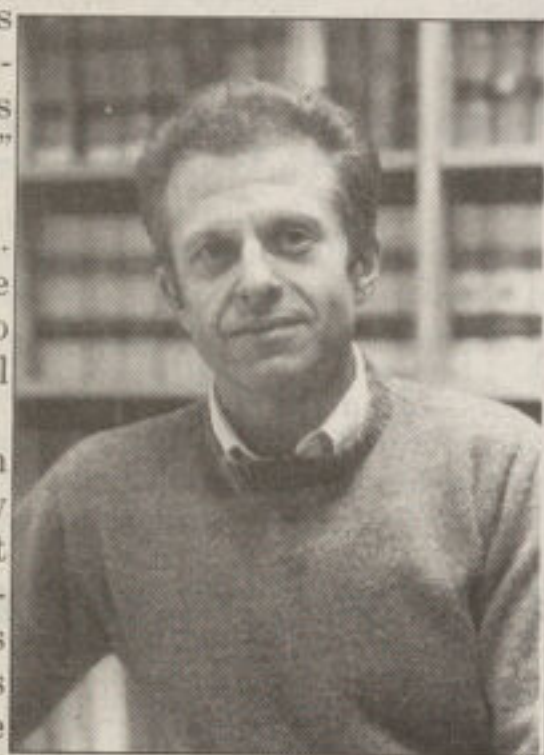
"If the Court ducks [the issue] and in some way declines to recognize a constitutional right or see any equal protection," then the case will not fall into that category, Tribe said. But, he added, "whatever the Court does, the nation's awareness of the issue will have advanced quite a bit. It will no longer be something that just a few renegades like Kevorkian champion."

The case also has implications in other contexts. "The connection between this decision and *Roe* and *Casey* is extremely important," Tribe said.

"If the Court decides that reproductive freedom is not part of a broader liberty of which the freedom to avoid dying in agony is also a dimension, then *Roe v. Wade* and *Casey* may tend to become isolated as precedents and may eventually prove vulnerable."

The court's ruling is expected by July.

This story was supplemented with reports by the Associated Press.



Prof. Laurence Tribe '66

Excerpts from Tribe's Argument

Prof. Tribe: "I don't think so much the issue is how many people violate the law. Charlatans, doctors of death ... they operate in the dark and we don't know. The winks and nods, I think, affect the capacity of the system to respond humanely and rationally to what is actually going on rather than just to bright-line hypotheticals."

"The winks and nods really relate to things that we all accept, the principle of double effect. ..."

"None of these patients is in a state of nature. They're in a hospital or a hospice. And they're receiving chemotherapy, radiation, bone marrow transplants —"

Justice Kennedy: "Yes. But when a person on a life support system wants the systems discontinued, she is not committing suicide, which is what you said earlier. She is not doing that, she's allowing nature to take its course. ..."

Justice Breyer: "What's your response to the proposition that these different groups, interacting with the legislature, are far more suited ... to come up with an answer than a court writing a Constitutional provision?"

Tribe: "... In a sense there are 50 laboratories out there. ... These laboratories, however, are now operating largely with the lights out. ..."

Justice Souter: "... Isn't it fair to say that ... the lights have been out, but the effort to put the lights on is fairly recent? ..."

Kennedy: "... Do they have less light than we do?"

Tribe: "No, not at all. ... When I say the dark, I mean this: Doctors ... when doctors do a lot of what they do in upping the level of

the morphine and actually using more benzodiazepine than is needed to make sure the person is comfortable, but to make sure the person dies sooner, they're not going to talk to others about it because they might be prosecuted because of the lines that are drawn. ..."

Justice Ginsburg: "But the moment this court says liberty interest is broad enough to cover the terminally ill (and) we don't define what that is, there is no law. ..."

Tribe: "I think the liberty interest in this case is ... when facing imminent and inevitable death, not to be forced by the government to endure a degree of pain and suffering that one can relieve only by being completely unconscious. Not to be forced into that choice, that the liberty is the freedom, at this threshold at the end of life, not to be a creature of the state but to have some voice in the question of how much pain one is really going through."

Souter: "Why does the voice just arrive when death is imminent?"

Tribe: "The Court's jurisprudence has identified, I think for good reason, that life, though it feels continuous to many of us, has certain critical thresholds: birth, marriage, childbearing. I think death is one of those thresholds. ..."

Justice Scalia: "All of this is in the Constitution? ... You see, this is lovely philosophy. But you want us to frame a Constitutional rule on the basis of that? Life has various stages: birth, death ..."

— From the Associated Press

Jaffe, Lee, Geraghty Mourned

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During the New Deal era, Jaffe worked for the Agricultural Adjustment Administration and later for the National Labor Relations Board. Yet after only three years in the public sector, the young attorney returned to academia as a professor at the University of Buffalo School of Law in 1936.

His most famous article, "*Res Ipsa Loquitur Vindicated*," appeared on the first page of the first issue of the Buffalo Law Review. Jaffe was appointed Dean of the Buffalo School of Law in 1948.

Upon his arrival at Harvard, Jaffe started to work on a treatise on administrative law, entitled "*Judicial Control of Administrative Action*." When the work



Former Director of Admissions Molly Geraghty in 1979 Yearbook photo

was published in 1965, it became a standard addition to many law school curricula.

Current Byrne Professor of Administrative Law Todd Rakoff explained that "*Judicial Control*" remains important in the field today.

"Not many law books last 30 years," Rakoff stated. "While the cases have come and gone, the issues Jaffe discussed remain at the center of administrative law. His analyses have both a depth and an elegance unmatched since."

Jaffe's other publications included the book, "*Judicial Aspects of Foreign Relations*" (1933); "*Law Making by Private Groups*" (1937); "*Judicial Review: Question of Law*" (1955) and "*Judicial Review: Question of Fact*" (1956), all published in the Harvard Law Review; and "*Trial By Newspaper*" (1965) published in the New York University Law Review. Jaffe also edited a casebook, "*Administrative Law:*

Cases and Materials."

After his retirement, Jaffe remained an expert advisor on issues involving regulation. He worked closely with the Interstate Commerce Commission, the Federal Aviation Commission and the Federal Communications Commission.

OCS Employee Kay Lee

Kay Lee, a popular employee of the Office of Career Services, passed away on Saturday, December 28, after a serious illness. She had worked at the Law School for seventeen years and in her capacity assisted an entire generation of HLS graduates. At OCS, Lee was primarily responsible for fellowship applications, sending out student resumes to prospective employers, and sorting through firm materials for use by students.

"Kay will be very much missed by everyone in the office and especially by the students. She liked working with them and they loved her," said Director of OCS, June Thompson.

Former Director of Admissions Molly Geraghty

Molly Geraghty '67, former Assistant Dean and Director of Admissions, died from a heart attack on Saturday, December 14 in her hometown of Berkshires, Massachusetts. Geraghty was fifty-four.

Prior to her tenure at HLS, Geraghty served as the Assistant Dean at Northeastern University School of Law when it reopened in 1974. She also served for five years as the producer of "*The Advocates*," a weekly public affairs show broadcast nationally on PBS.

Since leaving HLS in 1987, Geraghty worked as the Associate Dean at Western New England College School of Law until 1994.

A close personal friend of Geraghty for six to eight years, Thompson said, "She had a wonderful sense of humor, her death is a real personal loss."

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Reform Winter Term

In 1977, HLS faculty voted on a proposal to break from Harvard tradition and hold final exams before Christmas. The reform added a winter term between the end of fall exams and the spring semester. Professors were irate because the winter term threatened to increase their teaching burden. Then someone noted that professors didn't really have to teach during winter term.

The School could just hire more visitors to teach during the period at a lower cost, suggested Prof. Jerome Cohen. And professors breathed a sigh of relief and the proposal passed.

Today, that combination of convoluted logic and faculty abdication of responsibility remains with us. Its legacy is now our burden.

This winter, HLS has offered 14 courses, most of which are taught by visiting professors and lecturers. They include such marginal subjects as "International Commercial Arbitration," "Human Rights Issues in the African Democratic Transition," "NAFTA," "The Law of Cyberspace," and "Psychiatry and the Law," to name a few.

Many students choose to get away from Cambridge to work on their third-year papers to avoid having to choose their torture. This, while the wait-lists for spring basic courses continue to swell.

There is a better way. HLS should offer at least one section of each basic course (corporations, constitutional law, and taxation) taught by a full-time professor. The courses would be designed for students who wish to be exposed to a basic subject without the full detail of a regular semester course.

Or they could be small seminars designed to give students a chance to experience a major subject in a course with an enrollment under 160 students.

Either option would help vacate the basic wait-lists.

If ninety percent of the faculty are going to continue to abandon the winter term, then perhaps the School should just eliminate it altogether.

If winter term remains, then professors must return and fulfill their teaching responsibilities during the winter.

It's the least they can do to save the winter term, a ruse they created 20 years ago and then just as quickly abandoned.

When the RECORD returns in the spring on Feb. 7, two Co-Editors-in-Chief will lead the way. For the past year, executive editor Jackie Liu and managing editor David Liu have formed the backbone of the RECORD. Now, together, they will make it their own.

And a restructured and revitalized business board will be led by Chih Cheung. It will be another award-winning semester. So keep reading.

—Friedman

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—First Amendment, US Constitution

• Letters •

Ad Board Should Reveal Expelled Students Name

I read with great dismay the notice in last week's Adviser regarding the student who was expelled for falsification of his undergraduate transcript. I was initially disturbed that the Adviser would identify the student's gender as male, eliminating a least a quarter of the law school and making it much easier to figure out

who he is. This has led to a great deal of discussion among the student body as to the identity of the expelled student, making it extremely difficult for us to concentrate on our studies this term and resulting in suspicion falling on a number of wholly innocent students who may have simply taken a leave of absence or perhaps just don't

leave their rooms very often. Please, bring this rumor and innuendo to an end, and just tell us who was expelled.

Beth Hirschfelder '98
January 9, 1997

P.S. Can I have his space in Tribe's class?

Appel Strikes Funny Bone

Several years ago the RECORD had a fine humor writer, a woman whose name (pseudonym) I can't recall. Until [Jacob Appel's] column in the November 15 issue, as far as I was con-

cerned no suitable replacement had been found. I hope you continue the good work. For some Harvard Law School students in my time, and for most in your time, from what I read,

being serious is considered mandatory.

Nathan Hershey
Professor of Health Law
University of Pittsburgh
December 16, 1996

Fenno's Bigotry Unacceptable

Students have a constitutional right to engage in sophomoric parodies of their professors. For the 20 years that I have been associated with this institution as a student and faculty member, Fenno has been a shining example of the exercise of this right. The student exemption from the rules of ordinary civility, however, runs out when sophomoric parody degenerates into racism and anti-Semitism.

Fenno's Dec. 6 sketch about Prof. Hay and I stealing exams is clearly within

the bounds of acceptable student parody. Given my notoriously poor spelling, so is the suggestion that I might need to take an ESL course. But the punch-line — that the "government may only help colored folk and pointy-headed Jews" — is not only not funny and completely beside what seems to be the parody's point, it is blatantly degrading and bigoted.

This kind of "humor" ought to be unacceptable to anyone who wants Harvard Law School to be a community dedicated to free and open

participation by all. I am deeply saddened by the fact that on the same page of the RECORD where the "Quote of the Week" is meant to ridicule an anti-Semitic organization's attempt to disparage efforts to catalogue the spread of hate on the internet, I find similarly hateful sentiments expressed in a column written, edited, and approved by Harvard Law students.

Prof. David Wilkins '80
December 10, 1996

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Advance the Work of Justice

By Ralph Nader '58

Three things that every law student should remember:

1) You can make a difference to society as a lawyer.

2) You can make a difference to society today, as a law student.

3) Nearly everything and everyone you encounter in law school and the legal profession will tempt you away from making a difference and toward making more money.

Here, for example, is some advice that the American Bar Association recently dispensed in "The Young Lawyer: Say NO to Public Service." That was the headline of an item that was illustrated by the universal "No" symbol striking the words "Public Service." According to this item, while public service is valuable, new lawyers "will have to learn when to 'just say no'" to requests to engage in public service activities. "The thing you must do in the first year or two," the Young Lawyers Division's president-elect is quoted as saying, "is to focus on becoming a good lawyer — learn how to practice law."

This is strange advice indeed, advice premised on a conflict that in fact does not exist. In reality, you can be sure that most major public service requests aimed at young lawyers are not to raise barns or coach little league but precisely to practice law — for the poor, for community groups, and for others in need of legal assistance. Indeed, public service requests are likely to give young lawyers hands-on opportunities — to meet with clients, strategize, and try their own cases — far beyond what is offered by the paid business of their law firms. Yet the Young Lawyers Division wants you to minimize such activities — supposedly for your own good.

These are the kinds of messages that bombard the law student — messages that support the prevailing ethos of the legal establishment.

The law school brochures and commencement addresses — law school bookends and windows to the public — show little evidence of the dominant influence on law school culture, particularly at the largest and most selective schools: The big law firms that service major corporations. For first-year students, it is just a matter of weeks before talk of spring-guns, Carbolite Smoke Balls and Blackacre gives way to the corporate recruiting season, with discussion of flybacks, hotels, and summer associate perquisites like Circle Line cruises around Manhattan.

The ways and means of big firm practice become part of a massive grapevine. From friends already ensconced as corporate associations, from the legal newspapers, and from summer jobs and numerous firm interviews, law students learn about what it takes to succeed in those spacious and richly-decorated office suites. The acculturation process is dramatic from the entering school days to graduation less than three years later.

University of Denver sociologist Robert Granfield wrote an insightful 1992 book, "Making Elite Lawyers," about what happens to HLS students between their accep-

tance and the time they graduate. Granfield says that law schools often turn idealists into amoral pragmatists. Especially when the big-firm recruiters arrive. "The first year students see the second and third year students interviewing with corporations and corporate firms," Granfield says. "They hear about the big



Ralph Nader '58

money that can be made and the perks, the six-figure income down the road. Even the most 'socially progressive' students begin to rationalize working for the large corporate firms. They think that is the way to power and that they will be able to reform perceived wrongs from the top down. The only problem is that by the time they get there, they don't push for change because they have become part of the very power system they once disdained."

When the recruiters post their sign-up sheets, there is no time to deliberate. It can't hurt to sign up for the interviews, it can't hurt to try it for the summer, it can't hurt to do it for a few years after graduation...

It can hurt. It can hurt you, and it can hurt society. For a new book I have co-authored, we encouraged corporate lawyers to share their experiences with us. Here

are two typical responses from younger lawyers at large firms:

- "Whatever happened to the belief that being a lawyer was a public service? On some days, I wonder why I went to law school. Many of us who have gone through the big firm experience are sick of the hypocrisy, the over-billing, and the ethical violations."
- "The only thing that counts in my

firm is being 'productive,' which translates to mean billing — not necessarily giving good legal advice. The message sent to young lawyers is loud and clear: Just bring in paying clients and give them everything they want, including false opinions."

Young corporate lawyers wrote to us about endless hours, stifling specialization, unconscionable litigation tactics, and shocking cynicism. Indeed, as power has shifted in recent years away from mega-law firms and toward increasingly demanding multinational clients, things have never looked darker inside the corporate law factories.

At the same time, things are looking up a lot in the law schools, at least as compared to when I attended HLS in the 1950s. Then even more than today, the curriculum was shaped by the job market and business interests. We studied the

division of the will of a wealthy person but never the problems of the poor. Motor vehicle tort cases involved negligent drivers, but never negligent automobile design. In criminal law, we learned about a teller stealing from a bank, but never about a bank stealing from customers. Basic questions about justice — the justice of the legal rules and the justice of the allocation of legal firepower — were rarely even asked.

Today, there are still too few law professors who attempt to instill idealism in their students. Many come from corporate law backgrounds and, indeed, maintain lucrative corporate law practices on the side. Others pursue their critical legal studies, which, while taking apart conventional assumptions about the law, have generated much cynicism among students about the law ever being able to restrain power. The other discernible school of thought on the law school campus is the empirically starved, narrow ideology of "law and economics," which provides business with convenient formulae — ones that downplay hard-to-quantify human costs — to block health and safety regulations and antitrust enforcement. The dogma also provides handsome fees for a sizable number of its professorial adherents.

But the law school of today does at least offer courses on topics like consumer law, environmental law, and civil rights. Good professors sometimes pause to ask

not only what the rule is but what, in a just society, the rule should be. You have clinical programs in which students get a chance to discover how the law can assist, or thwart, people of modest means. And corporate interviewers, if they sense it matters to a bright recruiting prospect, will trumpet their firms' pro bono activities, which, at some firms, are quite substantial and impressive. (At others they are window-dressing, and lawyers who pursue them are unable to count their efforts toward the billable-hours race.)

These changes did not come out of nowhere. Nor did they spring from the self-enlightenment of deans. Your predecessors — students in the sixties and early seventies — made them happen. Law students organized civil rights work and even to jail for their beliefs, illuminating the conscience of cloistered law professors. Law students demanded that corporate firms who wanted to recruit disclose their pro bono efforts so students could take such activities into account when considering their job options.

Times are quieter now. The great injustices of today — embodied by the dominance of large corporations on our politics and policies — are no less insidious but are more subtle. Overt agitation by students rarely occurs. But that does not mean law students cannot use their new skills and status to improve society. A glimmer of how law students can still inspire their elders is seen every year at the annual meeting and dinner of the non-profit National Association of Public Interest Lawyers (NAPIL) in Washington, D.C. There the efforts of NAPIL in expanding its year-long public interest fellowships, encouraging summer internships, and nudging law schools to establish loan forgiveness programs draw almost wistful admiration from the corporate attorneys

who choose to attend.

Finding a public cause or two — on campus or off — and devoting energy and passion to it can keep your legal education empirically rooted and normatively fired up. This is important, because if you do not have a sense of injustice, you can't have a sense of justice.

The doors opened by your predecessors give you opportunity. There are not only a range of clinics — serving clients with legal problems in areas like housing, disabilities, welfare, immigration, and consumer protection — but also, in some schools, programs to assist students who want to pursue good works after graduation. There are summer stipends, loan forgiveness policies, public interest coordinators in placement offices.

But it still isn't easy. Many schools lack such programs. And notwithstanding the growth of non-profit public interest organizations since the 1960s, there are still a relatively small numbers of positions. Congress has cut, and threatens to destroy, the federal legal services program for the poor. Teaching positions, too, are hard to come by. So, for many, especially the less well-connected, it is not really a choice between a high-paying job and a low-paying job. It is a choice between good pay and a clean office the day after graduation, or months of job-hunting and maybe sleeping on a friend's couch in pursuit of a job that

will put you, as *The Young Lawyer* or some other publication is likely to tell you, in the bottom salary decile.

The intrepid will find the rewards of a public-spirited career well worth the hardships. Compare the world described above by disenchanted corporate lawyers to the one noted in a recent *New York Times* letter to the

editor from a lawyer with the Legal Aid Society:

My salary will never reach the stratospheric levels enjoyed by those in corporate law firms, but there are other compensations. I deal with clients personally and try the most serious cases myself. Therefore, I get the satisfaction of seeing direct results from my efforts. Before I turned 30, I even argued an appeal before the United States Supreme Court. Equally important, I have time for other pursuits, like outdoor recreation, community affairs, and a family life.

The choice is yours, and it's coming fast. Do you want to serve 50 years solely as an attorney, an agent representing zealously the clients who hire you, or do you want to partake also of the world of the lawyer, a professional serving the higher goals of society and the justice system?

Daniel Webster said that the greatest work of human beings on earth is justice. You, the privileged few invited to attend the nation's law schools, have an opportunity, beginning immediately, to advance this work.

Consumer advocate Ralph Nader '58 co-authored with Wesley J. Smith the recently-published, No Contest: Corporate Lawyers and the Perversion of Justice in America (Random House). Nader, a former RECORD editor, was voted by Time Magazine as one of the 100 most influential people of the century.

Even the most "socially progressive" students begin to rationalize working for the large corporate firms.

Congress has cut, and threatens to destroy, the federal legal services program for the poor.

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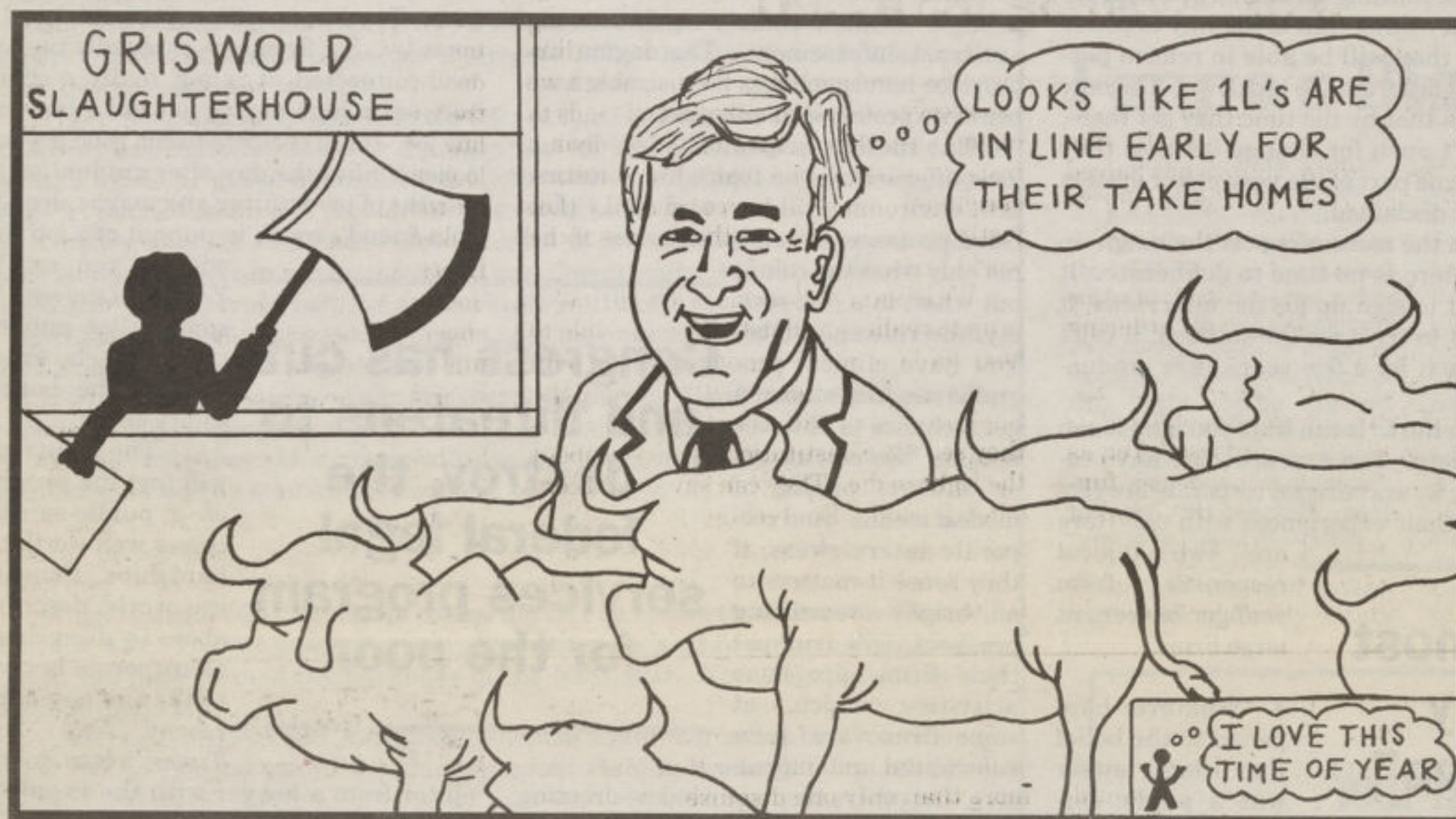
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CALENDAR

By Janie Kim '99

January
16-22

Calendar is hiccuppie with happiness to see you back. Folks, you were sorely missed. Our principal resolution for MCMXCVII is to ne'er take y'all for granted again. In this spirit, we will begin to post the periodic life-affirming PSA (public service announcement). May you all live to see your greedy, lusty dreams come true.

This week, Calendar urges all of you to chew your food with deliberate care. Death by choking will sabotage the ego's full bloom with greater ferocity than even bad hygiene or self-doubt.

The Cambridge and Lieder Opera Society offers up an evening of Italian music for ten bucks. This performance of works by Respighi, Scarlatti, et. al. will benefit the Dante Alighieri Society. Sat. 1/18. 41 Hampshire St. Cambridge. 547-7819

It's Snow World at the Computer Museum. Virtual wind will whip your face as you conquer unreal terrain on a VR bike. Free with \$5 student admission. Museum Wharf, 300 Congress St. Boston. 635-4505

Does the Tonya Harding-Nancy Kerrigan affair still bring your blood to a boil? Does Scott Hamilton's receding hairline and Dorothy Hamill's perpetual pageboy image cause you excessive worry? Work it out with a few laps on blades at the **Public Garden Lagoon**. Skate rentals available. At Boston Common. 635-4505

A Joyful Noise rings loud at the Cambridge Multicultural Arts Center's 10th annual gospel tribute to Dr. Martin Luther King. Performers Ruth Hamilton, The Green Aggregation, Bulluk Brothers and others promise rich, soulful sounds. Student tix \$10. Harvard's Sanders Theatre, 45 Quincy St. Sat. 1/18, 7pm. 496-2222

NeWorks Festival celebrates the newest writing for the Boston stage. Seep your enzymes into this creative test tube at performance labs offered by the New Theatre. Thu-Sat, 1/16-18 at 7pm & 9:30. Sun, 1/19 at 5pm & 7:30. Boston Center for the Arts. 539 Tremont St. Boston. 247-7388

Rock lively at the Middle East. **The Jesus Lizard** plays cutting-edge music on Sun-Mon, 1/19-20. 472 Mass. Ave. Cambridge. 864-EAST

Ninety-three-year-old painter **Maud Morgan**, first-hand witness to various monuments (human and experiential) of the 20th century and grand dame of the Boston art scene, shows her most recent work at Barbara Singer Fine Arts, 18 Sparks St. Cambridge. Faced with weakened eyesight and muscle control, Morgan now works with collage; paper and scissors prove as malleable, if not easier to manage, vehicles of expression.

Everybody was kung-fu fighting... at the Brattle Theatre! Hong Kong action films are the theme every Thursday between now and February. **Jackie Chan** fans are in for a treat on 1/16. The Brattle features a double feature of two of his early works: **Drunken Master** and **Snake in the Eagle's Shadow**. Enjoy.

Listening to UFOs

By Alexander Boldizar '98

I listened to the gingerbread man, remembering my Negotiation class. In Negotiation class, I have been learning how to listen. The last time I listened was when I was sitting in the English Gardens in Munich, nude, waiting for a UFO. It was two hours late. While I waited I listened to a crazy man from Houston recite: "I'm a poet and I know it, look my feet show it, they're Longfellows." A Chinese girl brought me a single grape. Then we all made animal noises while a nude black Canadian I had met at Dachau smoked cigarettes with his feet. I took a picture of his feet. I do a good elephant hoot, though when I tried to prove it during Swan Lake last Christmas I was looked at more than listened to.

Hunter saw Jesus in a blender and fainted...

The Negotiation class explains that "the mere fact of being listened to and understood can have a powerful persuasive effect." It is frightening how much of any problem solving is not about solving the substantive problem, but about feeling good. I feel good. You feel good. We can feel good together. "I am a figment of my own observation..." says Hunter. But you better not interfere with my feeling good! Paraphrasing is also a tool of negotiation. But I wonder, how do you paraphrase an elephant? Man, after all, is the only being who is his own metaphor. Yet I do not wish to become a tool.

My elephant noises made me many friends in Prague. Among them were The Ol' Bog Warriors from Hell, a drunk Scottish band which got us kicked out of several bars. They too heard my hoots. Why was a hoot so much more listenable



than words? Is there something refreshing in a man who stops being a caricature of himself, even if only to be an animal? Or is it simply that an elephant hoot is the inverse of the dog as best friend. Just as we can attribute to the dog the role of listener, one with perfect ears, so when nobody else will listen to us, we can hear in a hoot whatever we wish.

As I thought about listening to poetry and UFOs, my associations turned towards speech.

Curiously, I saw a book on the philosophy of listening, by Gemma Corradi Fiumara, on my roommate's shelf. She describes how Western culture has halved *logos* into an ordering-through-saying, "a thinking primarily anchored to saying without listening," thus losing the Heraclitan/Heideggerian notion of *logos* as the laying-that-gathers, an ordering through listening.

This halved conception of language prevents an "attitude also capable of letting anything be in its entirety." Yet, as Gadamer said, "anyone who listens is fundamentally open. Without this kind of openness to one another there is no genuine human relationship. Belonging together also always means being able to

The last time I listened was when I was sitting in the English Gardens in Munich, nude, waiting for a UFO.

listen to one another." It is hard to believe Justice Scalia will ever enter a relationship with one of those most concerned with the wish to die.

Our minds work on a *logos* aimed at saying and defining, and thus judge that which we don't know by that which is familiar and near. We think by filling in, inventing and asserting. I speak therefore I am. Listening, according to Fiumara, is "a capacity that has gradually been lost in the noisy inflation of discourse or in the infestation of pseudo-symbolic language."

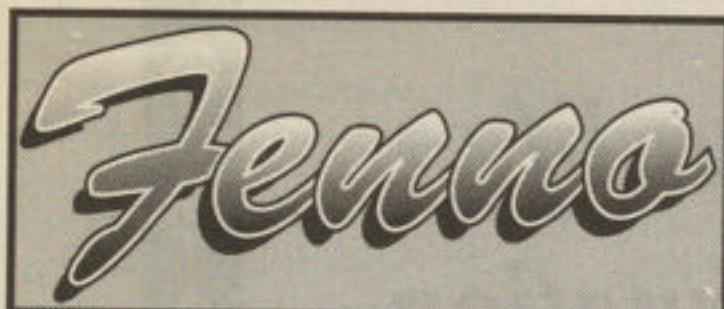
This inflation leads to speech in the form of sound bites and slogans. It leads to sports like baseball and football, with quick bursts of action between long periods during which we

can recover our attention span. It leads to an inability to hear the pains of the dying, instead insisting on a rigorous application of rights. *Fiat iustitia, pereat mundus* (Let justice reign, even if all the rogues of the world perish.)

We assert that suicide is wrong, and it is up to reality to adjust. Were we able to hear we'd not be the barrier against a pain so strong as to seek death. Soon the Supreme Court will assert whatever it is they see the Constitution as saying about the right to die. They can say so and consider it said. Everything is a clash of asserted, noisy, clanging rights. But Ears have wings, and they have flown away in the face of such cacophony.

I keep listening to Hunter and his gingerbread man, "What we have is a square sun in a square sky with square clouds because we were not content with circles, ellipses and other shapes..." Even death has become a right, to be asserted. Concept incarnate. I too am tempted to write a column asserting my view of death. Death is, after all, a wonderful thing. It is the meaning of Life. Life is defined in opposition to it; "Flame alone, frees." If Death were taught in the negotiation class, perhaps the professors would echo Freud in saying that it is only when the proximity of death is acknowledged, that life really begins. "*Si vis vitam, para mortem*." If you would endure life, be prepared for death." That's when we discover that this isn't a dream after all. And that it is.

"Nobody cares much about poetry, except poets and owners of offset presses..." So leaving an assertion about death for later, I assert about listening while I tool around paraphrasing Hunter. But I do remember listening once, even though the UFO was two hours late. It was before law school, so I had no watch at which to look and exclaim "Oh dear, oh dear, I shall be too late." I chewed on my cud and looked at the sky, waiting and listening. Every once in a while, I made my elephant hoot and it was answered by monkeys, sheep, goats, cows, and many other animals. Even some passers-by joined in. Everybody heard the hoot, everybody listened. The only time in my memory. Perhaps because I was too content waiting for the UFO to worry or notice whether I was being listened to or not. I simply lay the hoot before the passers-by as I myself lay in the grass naked, letting them gather and glean as they wished.



All of these Kennedy's confused Fenno. There was Randall Kennedy, who looked like a black man but thought like a white man; then there was David Kennedy, known primarily for "opening up" Gerald and Mary Jo Frug's marriage; and then there was Duncan Kennedy, a man whose passion for his female students was only exceeded by his passion for leather.

"Damn it," Fenno thought. "Why couldn't there be a clear-cut choice like Kennedy vs. Nixon!"

Fenno's problem began when his analyst recommended that he watch "To Kill a Mockingbird."

"What do you think Atticus Finch means when he says you should walk around in the other fellow's shoes for a while, Fenno?" Dr. Goldberg had asked, having hit the start button on his mechanical timer.

"He means that even homosexuals have foot fetishes," Fenno responded knowingly.

"Ah, Fenno ... that is one interpretation — but it's also possible that he means you should try to understand people who disagree with you."

"You mean, like, I should start listening to liberals like Sam Nunn?" Fenno inquired dubiously.

"Not exactly," Dr. Goldberg declared, calculating in his head exactly how many times he needed to see students like Fenno before he could afford to retire to Myrtle Beach and compete for the national shuffleboard championship.

"I think you should look up the founder of CLS, Duncan Kennedy, and invite him to lunch."

Two weeks later, Fenno couldn't remember which Kennedy he was supposed to find. So he lit a cigarette and spent a half-hour downloading pornography from the internet.

Then, with a sense of accomplishment, he called each of the Kennedy's, told them that they were his heroes, and invited them to lunch. As luck would have it, Duncan Kennedy was on leave and was therefore available for lunch at any time. The secretary told Fenno to meet Duncan at Maison Robert at noon the following day.

Having lived in the shadow of his father's story about meeting Robert Kennedy in 1968 for nearly thirty years, Fenno felt extremely relieved, and returned to check his messages on the alt.teen.solicitation newsgroup.

The following day, Fenno sat in his dungarees and T-shirt in Old Boston's finest restaurant while Duncan Kennedy explained to him the fundamentals of Critical Legal Studies.

"The first thing you have to remember," Kennedy explained, "is that you must always be critical. Ask the waitress where she had her nose done; tell your children that they aren't earning your love; ask deconstructive questions like why people eat sitting down but have sex standing up."

Fenno was not yet terribly impressed. He knew that proper people like his parents and Dean Clark made a point of eating standing up (he'd been to several cocktail parties at HLS) and that sex was much more fun lying down in the back of a Chevy.

"Second," Kennedy noted, "All of your activities have to be legal. You can't do anything that might threaten your only personal safety, or you might threaten The Movement! Confine your rebellion to not laughing at partner's jokes and spelling words like 'women' and 'fish' with a 'y'."

Once again, Fenno knew better. His heroes — Harry Helmsley, Ivan Boesky and Michael Milken — all knew that you sometimes gained substantially by breaking the rules.

"Finally, you must disguise your revolutionary activities as studies. You should behave in such a way that even you can't tell that you're not just and ordinary, bourgeois student or professor. That's the key to Marx's philosophy."

Once again Fenno felt disappointed. He'd seen *Animal Crackers* and *A Night at the Opera*, and he knew that Marx had more than only one disguise.

"So what's the real objective of this CLS thing," Fenno demanded.

"It's really quite straight-forward," Kennedy explained. "You need to marry a wealthy brahman heiress — like my wife Flossie — and find a cushy job where you earn \$135,000 a year. Then you start talking in complex terms, use the words 'reductive' and 'reactionary' when anybody disagrees with you, and make it a point to agree with any potential female prospect. That's why Joseph Singer does research on property while Martha's kids carry my genes. He can't raise the revolutionary standard, if you know what I mean, and I can. Law school is about power, sex, and money. I have it and they don't!"

Alas, Fenno thought, this man was even smarter than Robert Clark. Fenno was sure his old hero and his new hero must be the closest of friends, and he determined to invite them both over to listen to his new dance album, *The Emmet Till Swing*. But in the meantime, Fenno had to entertain two more Kennedys in order to please his analyst. He was starting to feel like Marilyn Monroe.

Quote of the Week

"Students seem to enjoy studying in the comfortable classrooms of Hauser Hall and in other rooms kept open as substitute study space."

— Dean Clark in letter to alumni

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