The Justinian

Volume 1993
Issue 1 *March*

Article 1

1993

The Justinian

The Justinian

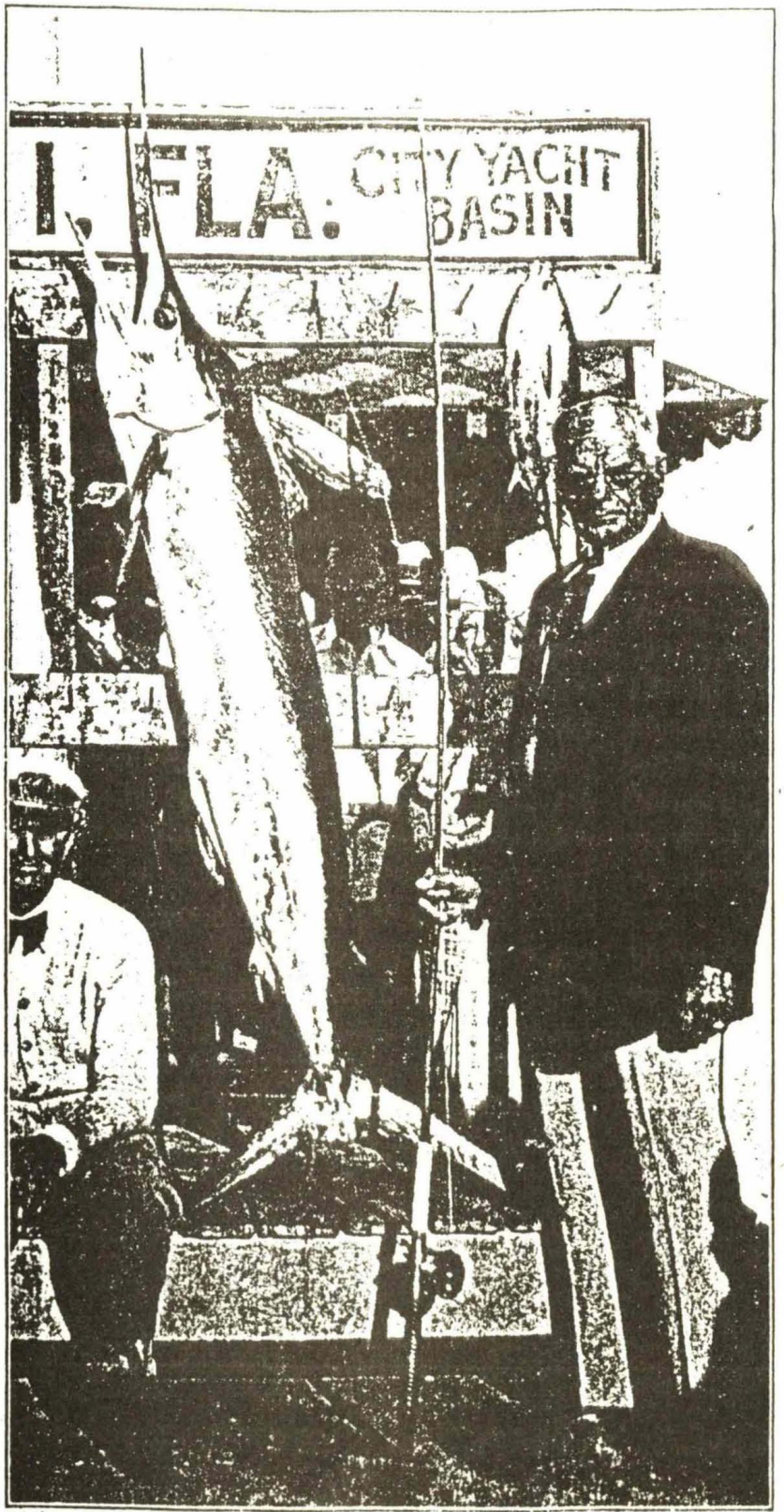
Founded in 1931 • A Forum for the Brooklyn Law School Community

March 1993 • Volume 62 • Number 4

Years Ago - April 19, 1934

THE JUSTINIAN, BROOKLYN LAW SCHOOL — Thursday, April 19, 1934

A PROMINENT FISHERMAN



Dean Richardson with Swordfish Caught off Miami

Dean Returns From Vacation Spent in Miami

Highlight of Stay Is Success in Landing 105-Pound Swordfish

MET MANY ALUMNI

Golfed Often With Justice Carswell at Miami Biltmore Country Club

William Payson Richardson, Dean of the Brooklyn Law School, returned last week from a ten weeks' vacation spent in Miami, Florida. He was in high spirits as he related the story of his 40-minute battle on March 14 with a 105-pound marlin swordfish. His success in hooking the fish—seven feet, eight and one-half inches in length—and landing it despite vigorous rushes and leaps, was the highlight of Dean Richardson's fishing experiences there.

The struggle occurred while he was deep-sea fishing in the Gulf Stream off the coast of Miami. The swordfish, before it tired, leaped thirty-eight times, by count of one of the men on board.

Besides fishing, Dean Richardson golfed daily with friends and attended the horse and dog races. He returned darkly sunburned and well rested, and remarked that he enjoyed his vacation immensely. His only criticism, he said, was that "the days were too short and the nights not long enough."

At the Miami Biltmore Country Club, Justice William B. Carswell, who was also in Florida then, paired with Dean Richardson for several rounds on the famous golf course. Dean Richardson also met many other graduates of the law school while in Miami.

Dean and Mrs. Richardson took an apartment at Coral Gables during their stay. They motored down, but returned by the Clyde-Mallory lines.

The Justinian

A Forum for the Brooklyn Law School Community

The Justinian is generally published three times a semester. Advertising inquiries may be directed to Hemantha Parvatharj at (718) 780 - 7986. The Justinian is funded by the Brooklyn Law School Student Bar Association and through advertising revenues.

Brooklyn Law School
250 Joralemon Street
Room 307
Brooklyn, N.Y. 11201
(718) 780 - 7986

Well, here we are. Back from a well-deserved hiatus. Halfway into the semester and new grades are still being posted. Spring is here. But you'd never know it.

Welcome back from your abbreviated vacations. Let's recap the political year so far:

~ William Jefferson Clinton, the first Democrat in 12 years, is sworn in as President.

~ Zoe Baird, the first female nominee for U.S. Attorney General, withdrew her nomination because of "ChildCare-Scam."

~ Kimba Wood, the second potential nominee for U.S. Attorney General, was also eliminated as a candidate because of her potential "Zoe Baird problem."

~ Finally, Janet Reno becomes the first female U.S. Attorney General but she has neither children nor a husband.

What's wrong with this scenario? Mainly that Arlen Specter probably thinks that barefoot and pregnant is synonymous with being a good woman and good women have no place in the political arena. At least not in a position of power.

I concede that when news of Zoe Baird's illegal hiring aliens surfaced, I suspended my notion of justice and legality. I have the utmost respect for working mothers because of the constant juggling and balancing acts these women must simulate in order to fulfill their career goals and maternal role. Perhaps hiring illegal aliens may not have been the proper solution. Perhaps Mr. Baird should have stayed home and tended to the children. Perhaps the members of the Senate Judiciary Committee should have been questioned on their competence to hold office based on their qualifications as competent fathers. ("Senator, are you now or have you ever been a hall monitor for the Happy Toddlers' Day Care Center?").

When Zoe Baird first announced that she had no intention of withdrawing, I thought she was extremely brave, tenacious, determined and self-confident — admirable qualities for a future Attorney General. But Zoe Baird was also under tremendous amount of pressure; pressure to defend her position as a working mother, pressure to pave the way for future female nominations in exclusively male posts, pressure not to rock the image of the newly-elected Clinton administration.

Kimba Wood became the next potential target of the red-hot Senate Anti-Working Women Crusade. Although she legally hired aliens to work in her home, Kimba Wood's employment practices were already being questioned by the media and the public. Rather than face the long, excruciating ordeal that the Committee all but promised, the Clinton Administration balked and Kimba Wood's name was never submitted for nomination.

Now, Janet Reno is the first female U.S. Attorney General. No husband. No children. The Senate Sub-Committee approved her nomination almost immediately. But, of course, (nudge, nudge, wink, wink) there is speculation of her sexual preference. Why else wouldn't a red-blooded American woman get married?

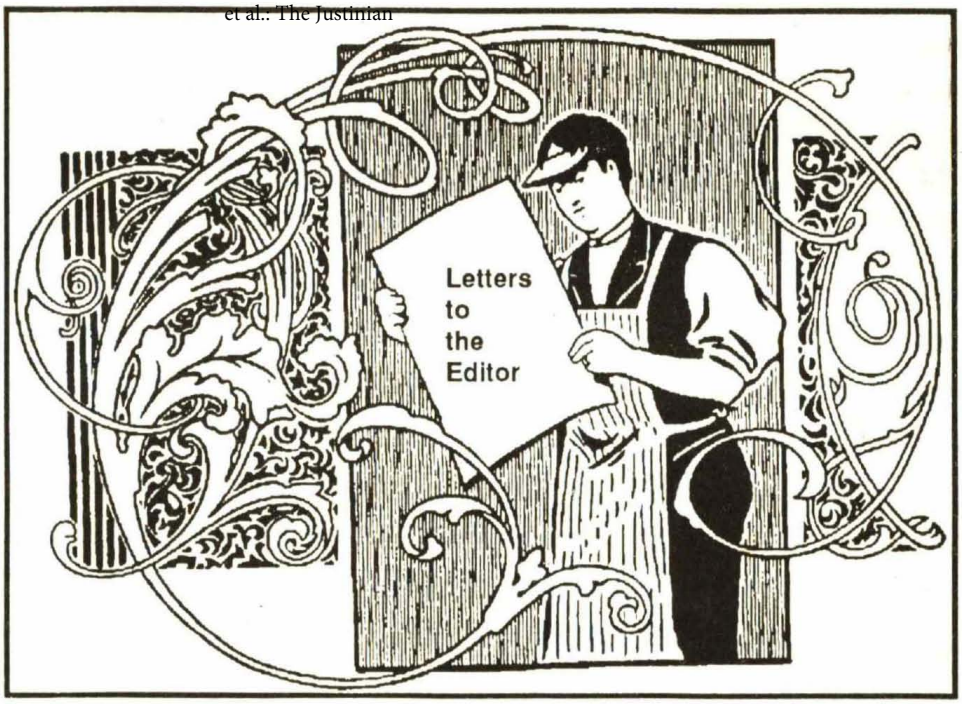
Because in the affairs of the state, women are constantly told that they must not sacrifice motherhood for a career. And the more "progressive" men are also telling women that they can have children and a career, as long as women maintain a perfect home and be primary care-takers for the children. A slight caveat: make sure that your career goal doesn't include advancement into a position of power or equal footing with the men. Or else you will have to contend with the Zoe Baird/Kimba Wood Interrogators.

President Clinton won the presidential race despite questions of an affair with Gennifer Flowers. He was a married man and a father. Clinton overcame the scandal. Or did the men in this country sympathize and forgave him? If nothing else, the dichotomy of Clinton's "affair" and the Baird/Wood "child-care scandal" has illustrated the superficiality of "change" in the Old-Boy network of U.S. politics.

We should not be surprised that gender equality has crept forward so slowly as to be hardly noticeable. It will take more than placing qualified women in predominantly male positions to affect this change. Remember, the political forum never began as a level playing field: it was a medium reserved exclusively for men. So expect sexist treatment to be forthcoming in any future female nominations to a position of political power.

Next, the Good Ole Boys of the Senate Judiciary Committee will be equating PMS with communism.

Dear Editor,



In my opinion the administration has moved too slowly in responding to the deplorable conditions that have existed in the basement of the school. It is unfortunate that we as students have an inadequate library, and the ongoing construction is distracting to our studies, but these problems were expected and anticipated as Brooklyn Law works towards completing its new building. However, the unnaturally freezing temperature of the school's interior is a condition that should have easily been corrected long before the administrators finally decided to act.

I need not describe the errant conditions I am protesting. Any member of the student body, faculty or staff who visited the school's basement could attest to the frigid conditions which have existed on any given day over the previous weeks. The radical difference in temperature between the classrooms, basement , and other rooms have not only been uncomfortable but, I suspect, is one of the underlying causes for the abnormally high number of colds and cold symptoms that have existed and continue to persist among the Brooklyn Law School population.

The problem does not cease at the basement. At times the entire facility was cold, especially on weekends. On one Sunday afternoon I wished to study at school, but was so uncomfortable I could not. I tried to study in the basement, in the student lounge, even in the library, but all locations were extremely uncomfortable that I had to leave the school and study at home. In fact, the only warm location in the entire school was the front lobby. It is a disgusting and shocking notion that a student needs to leave the school in order to study.

I am pleased that at the time this letter was written, the school has taken steps to warm the building and to stop these chilly conditions, but it seemed to be an eternity before the corrections occurred. Perhaps the administrators did not know of the conditions, but it is highly unlikely they missed the constant griping of students, or that the temperature of the cafeteria went unnoticed when they went to get lunch. Whatever the reason, the administration needs to be more responsible to the student body and in the future react quicker to problems that arise from construction. If we the students must wait an interminable period before adjustments are made, then how can Dean Trager and the Board of Trustees reasonably expect student support when they ask us to be patient with problems that develop.

AS IF THE TEMPERATURE OF THE SCHOOL WAS NOT OUR ONLY PROBLEM, the proctors who administered fall exams were another problem that needs to be addressed. Many of the proctors who gave us our exams in January should not be allowed to return in the Spring. Those hired to oversee our exams definitely need either more training or the school needs to hire more competent individuals.

Not every proctor did their job poorly and to stereotype all the persons who distributed and monitored the examinations as incompetent would be a gross overclassification. However many problems need to be addressed.

Even though these occurrences might have been exceptions from the normal behavior of most proctors, the school would be negligent in its duty as an educational facility if it did not act to address and correct these problems for future examinations. On several occasions proctors failed to stop students from writing after the exam period had ended, giving them an unfair advantage over others who obeyed the rules, or distributed exams such that some students hadn't received their exams until after other students had began working on the tests for several minutes. There are "reports" that one proctor toked on Marijuana in the bathroom on the seventh floor.

The school should investigate and if need be, fire or refuse to rehire persons who are unable to complete these tasks. To the untrained eye, it does not appear to be a difficult task to hand out exams, monitor the tests, and collect finals in a manner that is fair and ensures that all students have identical testing conditions. Perhaps the school should set guidelines or procedures which all proctors must follow.

Adam Stillman
Class of 1994

Basket Cases

By Scott Dunham

For those of you who find yourself missing the weekly dose of ridiculous law suits that Torts class provided, take heart; the goal of this soon-to-be regular contribution is to provide you with a tiny glimpse of that land of the absurd, that place where television commercials are only ten seconds long and the disclaimers are fifty seconds; that place where "reasonable" people possess no common-sense, where citizens are concerned if a contract is formed when one picks a grocery item from the store shelf. Yes, the world of the legal profession.

The National Law Journal is perhaps the best source for legal humor. The publication is subtitled "The Weekly Newspaper for the Profession." Thank God - I'd hate to think of how much worse the general public would think of lawyers if this publication got into the wrong hands. Here is a sampling of some of the legal gems recently reported:

OUTSPOKEN JUDGES: During trial, a federal judge in Los Angeles told a public defender he was "out of his mind" and accused him of delaying trial out of concern for his fee. The 9th Circuit Court of Appeals found 2-1 that this created "a pervasive climate of unfairness." The dissent cited equal abuse of the prosecution. *U.S.* v. *Valencia*, 977 F.2d 594 (9th Cir. (Cal.), 1992). *** A Vermont judge recently cited a prosecutor for misconduct, stating that the prosecutor displayed "a fury seldom seen this side of hell." The Vermont Supreme Court has asked a lower court to determine the truth of this statement.

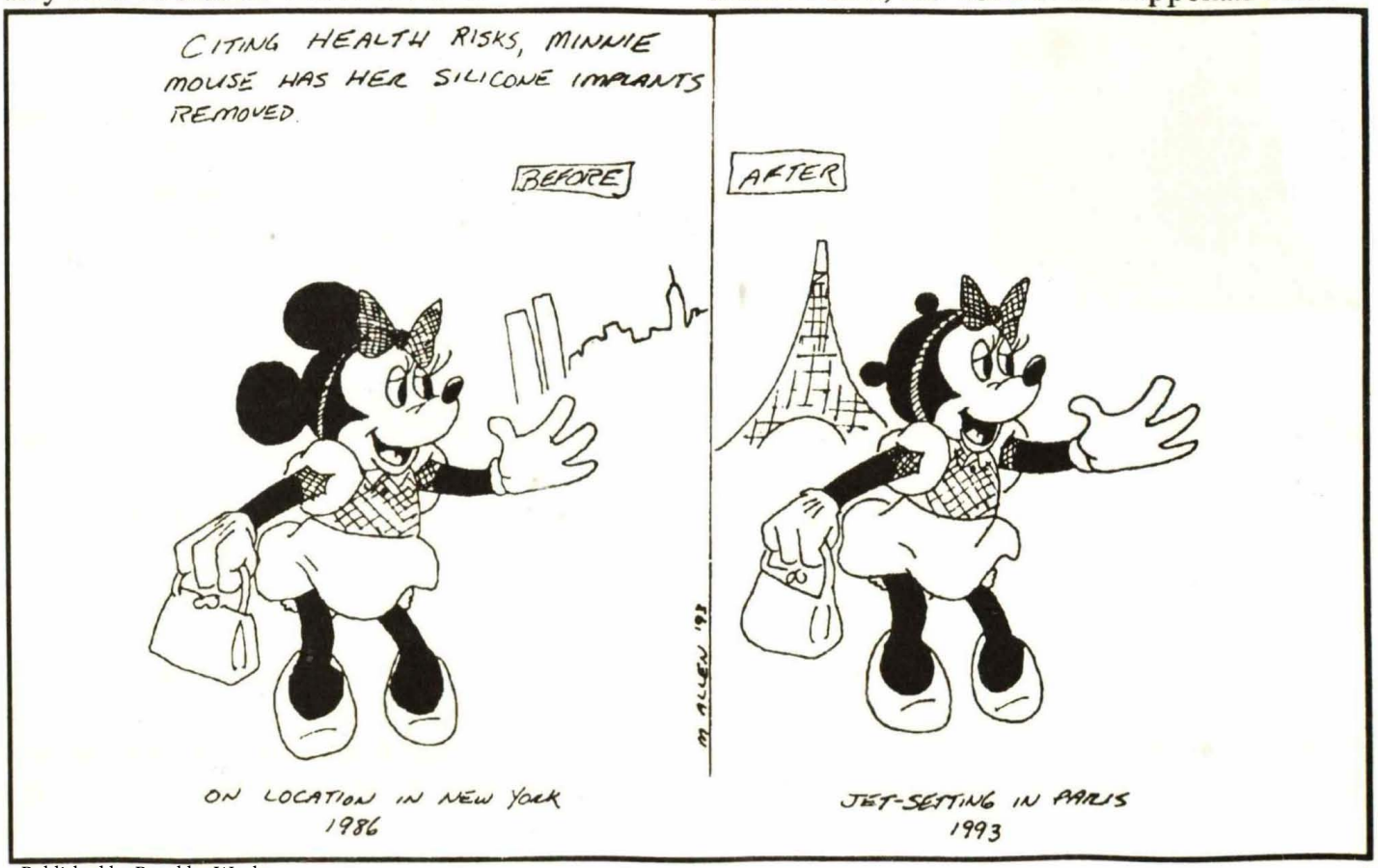
RIDICULOUS LAWSUITS: The Associated Press reports on the recently filed lawsuit against Publishers Clearing House by Carolyn Parks of Belleville, Ill. Ms. Parks claims that she was short of breath and lost consciousness shortly after licking a prize-claim stamp. In addition, Ms. Parks suffered a swollen tongue. She's suing for more than $15,000. *** This past August a man successfully sued Pepsi Cola Bottling Co. of Omaha Neb. for his impotence, which he claimed resulted from receiving an electrical shock by a Pepsi vending machine. Plaintiff's attorney claimed that the electrical shock passed through the man's body and exited via his genitals. The man's wife was awarded $35,000 for lack of consortium. *Fischer v. Red Lion Inns Operating L.P.*, 972 F.2d 906 (8th Cir. (Neb.), 1992). *** The December issue of *The*

American Lawyer reported a recent jury award of $1.5 million (later reduced by 65%) to a mother whose son died of alcohol poisoning. Her son, a college freshman, died from drinking twenty ounces of 80-proof tequila in one night. Plaintiff sued on the grounds that the tequila decedent purchased was an "unreasonably dangerous" product and contained a marketing defect since there was no warning of the dangers of drinking too much. The distillery was found to be 35% liable for the death. *Brune* v. *Brown Forman Corp.*, (citation not available).

SEX CRIMES: In *Florida* v. *Werner*, 609 So.2d 585 (Fla. 1992), the court determined that in order for a person to be charged with the crime of "committing a lewd or lascivious act in front of a child," the child must see or sense that the act is taking place. The charge stemmed from an incident in which the defendant was masturbating while taking care of his 13-month-old daughter in the bathroom. *** In *People* v. *Thompson*, 12 Cal.App.4th 195 (Cal.App. 2 Dist., 1993) the California appeals court ruled that a defendant can be charged with "attempted rape" even if the victim is dead. The key is that the defendant must reasonably believe that the victim is alive.

INEFFECTIVE ASSISTANCE: The Jan./Feb. issue of *The American Lawyer* has a small column filled with decisions in which an attorney's incompetence was NOT deemed to be "ineffective assistance of counsel". In *People* v. *Tippins*, 173 A.D.2d 512, 570 N.Y.S.2d 581 (N.Y.A.D. 2 Dept., 1991), for example, counsel provided "meaningful representation" even though he slept through portions of the trial. This same counselor solicited and accepted $5,000 from defendant's mother to "help him work harder on the case." *** *People* v. *Murphy*, 96 A.D.2d 625, 464 N.Y.S.2d 882 (N.Y.A.D. 3 Dept., 1983), involves a defense counselor who thought nothing of letting the defendant wear the same clothes at trial that he wore the day of the crime. *** *People* v. *Garrison*, 47 Cal.3d 746, 254 Cal.Rptr. 257 (Cal. 1989), found that a murder defendant was not deprived of effective assistance of counsel even though the counselor "consumed large amounts of alcohol each day of the trial...drank in the morning, during court recesses, and throughout the evening...[and] was arrested [during jury selection] for driving to the courthouse with a .27 blood alcohol content."

That's all for now. I must return to my even crazier world, the world of the Appellate Brief.



The Reasonable Woman

By Joan Marie Fasanelle

Most recently I read an article in Newsweek (brought to my attention by the Reasonable Man) which struck home. It was timely in the sense that it directly related to the continuing controversy which surrounds the St. Patrick's Day Parade. The article was entitled "The Urge to Outlaw Hate," its focus was Germany and America and the free-speech debate. The article discussed how the German Government has "reached deep into its legal arsenal" to combat the neo-Nazi violence which has cost three Turks their lives last November. Among Germany's chosen weapons were, a ban on four neo-Nazi groups, the proposed criminilization of symbols and phrases widely used by skin heads, and police raids on homes and offices of singers and producers of skin head music. Germany has even invoked a rarely used law to silence two neo-fascist leaders. The law permits the Constitutional Court to strip individuals of their civil rights. What is most unique about this situation is that no one has risen to defend the neo-Nazis' rights to express their views.

To an American, this may seem oddly "Un-American". In this country civil libertarians, supported by the First Amendment, have recently attacked state, local, and campus restrictions on racist expressions. Just last June, the Supreme Court struck down a Minnesota law (*R.A.V.* v. *City of St. Paul, Minnesota*) that banned cross-burning, the Nazi swastika, or other symbols "which arouse anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender." Our Court was upholding the view that "democracy requires giving even the most repugnant ideas a hearing." The Court was espousing the view that we should not be afraid of allowing individuals to express their views; rather, we should have confidence in our political culture's ability to learn from the free play idea of ideas.

This viewpoint seems to be lost in the ongoing controversy surrounding the St. Patrick's Day Parade. Our Mayor has refused to march in the parade and has stated that he will not be marching in the protest parade staged by the Irish Lesbian and Gay Organization ("ILGO") along 5th Avenue on St. Patrick's Day. The Mayor's spokesman stated that the Mayor's decision "is based on his belief that the St. Patrick's Day Parade should be an inclusive parade." This is also ILGO's contention.

Despite the Mayor's stance, a federal judge has recently ruled that the City can not bar the Ancient Order of Hibernians ("AOH") from excluding ILGO from the parade. This is not the first time this controversy has reached the courts. Last year ILGO brought an action against the Parade organizers (AOH) challenging the failure to grant ILGO's application to march under its banner as an affiliated group (*ILGO* v. *N.Y. State Board of Ancient Order of Hibernians).* Both parties claimed their First Amendment freedom of speech and association rights were at stake. The Court did not answer these constitutional questions, but instead held that ILGO could not be admitted to the parade in preference to a long list of prior applicants.

Just prior to the Court's decision, the New York City Human Rights Commission issued a complaint against AOH, charging AOH with discrimination against ILGO in violation of New

continued on page 10

The Reasonable Man

By Joseph Bondy

As this article goes to press, there exists a fierce debate over the St. Patrick's Day parade. Because the parade's sponsor, the Ancient Order of Hibernians, has refused to allow the Irish Gay and Lesbian Organization (ILGO) to march in the parade, the City of New York has tried to refuse to grant them a permit. In response to the city's efforts to thwart the parade, the Hibernians sued. Last month, a federal judge ordered the city to give the Hibernians a permit, thereby upholding their right to exclude homosexuals from the parade.

At first, the court's decision may seem to deny homosexuals their constitutional rights to freedom of speech and equal protection. However, the protection of the Hibernians' right to march in this case is necessary to assure the future protection of each of our rights to freedom of speech and equal protection under the law. After all, every year the Ancient Order of Hibernians goes through the proper channels to receive a permit to hold a private affair, the St. Patrick's Day parade. If we now deny the Hibernians the right to exclude homosexuals, we may one day have to allow the PLO to march in the Israel Day parade or allow the KKK to march in a Martin Luther King Day parade.

What is proper is to let these groups take out their own permit and have their own parade. No one is stopping them. In fact, the First Amendment protects all of these loudmouth hate groups who offend most of us. What makes the St. Patrick's Day issue more complex, however, is that homosexuals are not a loudmouth hate group, but rather a class of people who have been and continue to be discriminated against. Just as our country has a policy of excluding gays from the military, civilian life is peppered with examples of homosexual discrimination which are not protected by the First Amendment.

ILGO is free to demonstrate peacefully at the parade, in an attempt to "peaceably assemble and address the Government for a redress of grievances," as enunciated in the First Amendment. Yet this does not give ILGO the right to force themselves upon the Ancient Order of Hibernians. Nor should ILGO be permitted to disrupt the parade in some type of "Sharptonesqueapade."

Enforcing this policy is the best means of allowing us all to speak. Our country is made up of many diverse groups. It is very important for this multiplicity of voices to be heard. Protecting each voice's forum is essential to hearing their individual messages. You do not have to agree with the Ancient Order of Hibernians, but you must respect their right to utter their political and religious beliefs without disruption.

This principle is at the bedrock of our society. This freedom to practice one's religion or to write one's thoughts or to speak one's mind no matter how bizarre or hostile is what separates our country from many others in the world. As we learned in constitutional law, babbling idiots occasionally traffic in the exchange of ideas. Long ago I realized that I could not stick a rag down the throats of every person who annoyed me. In fact, I realized then that if I wanted to speak my mind throughout the course of my life, I had to let others speak regardless of content. Extrapolating this microprinciple to the St. Patrick's Day parade, it seems easy enough to understand that the Hibernians' message must also be delivered unimpeded. A lot of attention has

continued on page 11

continued from page 8

York City's Administrative Code. In addition, the Commission noted that AOH's waiting list was a mere pretext, a device to arbitrarily discriminate in favor of some and against other applicants. ILGO's place on the list "did not offer a real opportunity to be admitted into the parade in the future, ILGO had already been effectively rejected." However, the Commission recommended that an order requiring ILGO be included in the parade would violate the Hibernians' right of free expression. It appears to me that the District Court and Commission were misguided in reaching their ultimate decisions.

ILGO's contention that its constitutional rights have been violated is strong. Although it is true that organizers of a private parade are entitled to exclude individuals as they see fit, the St. Patrick's Day Parade is a far cry from a private parade. It is by far New York City's, if not the country's, biggest parade. It is so intertwined with the government of New York City that the organizers have come to act on behalf of the city. The Parade draws over 150,000 marchers and two million spectators. The actions of the organizers constitute State action within the meaning of our Constitution. The Supreme Court has struck down State actions which interfere with peaceful demonstrations or parades, recognizing that such interference is often interposed when the message sought to be communicated by a parade is unpopular in the community or disfavored by government authorities (*Edwards* v. *South Carolina*).

AOH's literature describes the parade as "an American Institution" which "celebrates the fact that all Americans, native and immigrant alike, enjoy the freedom of the City on the streets of New York, by implication throughout our great land." The organizers claim that membership in the parade is not limited to the AOH or to any one religious denomination, race, or ethnic group. Yet, AOH insists the parade is completely private and that it is not bound by constitutional restraints. AOH claims that it can conduct the parade as it sees fit.

ILGO is a social organization of individuals of Irish heritage. ILGO has stated time and again it is not a political organization. It wants to march in the parade because it believes that such an would allow it a historic opportunity to celebrate and affirm within its own community its pride in being lesbian and gay men of Irish decent. Why should AOH be allowed its freedom of expression at the expense of ILGO's rights? One member of ILGO stated: "To march under an ILGO banner is to simply; with integrity, with honesty and pride, to celebrate who I am, as God has created me".(quote from the City's Human Rights Commission proceeding).

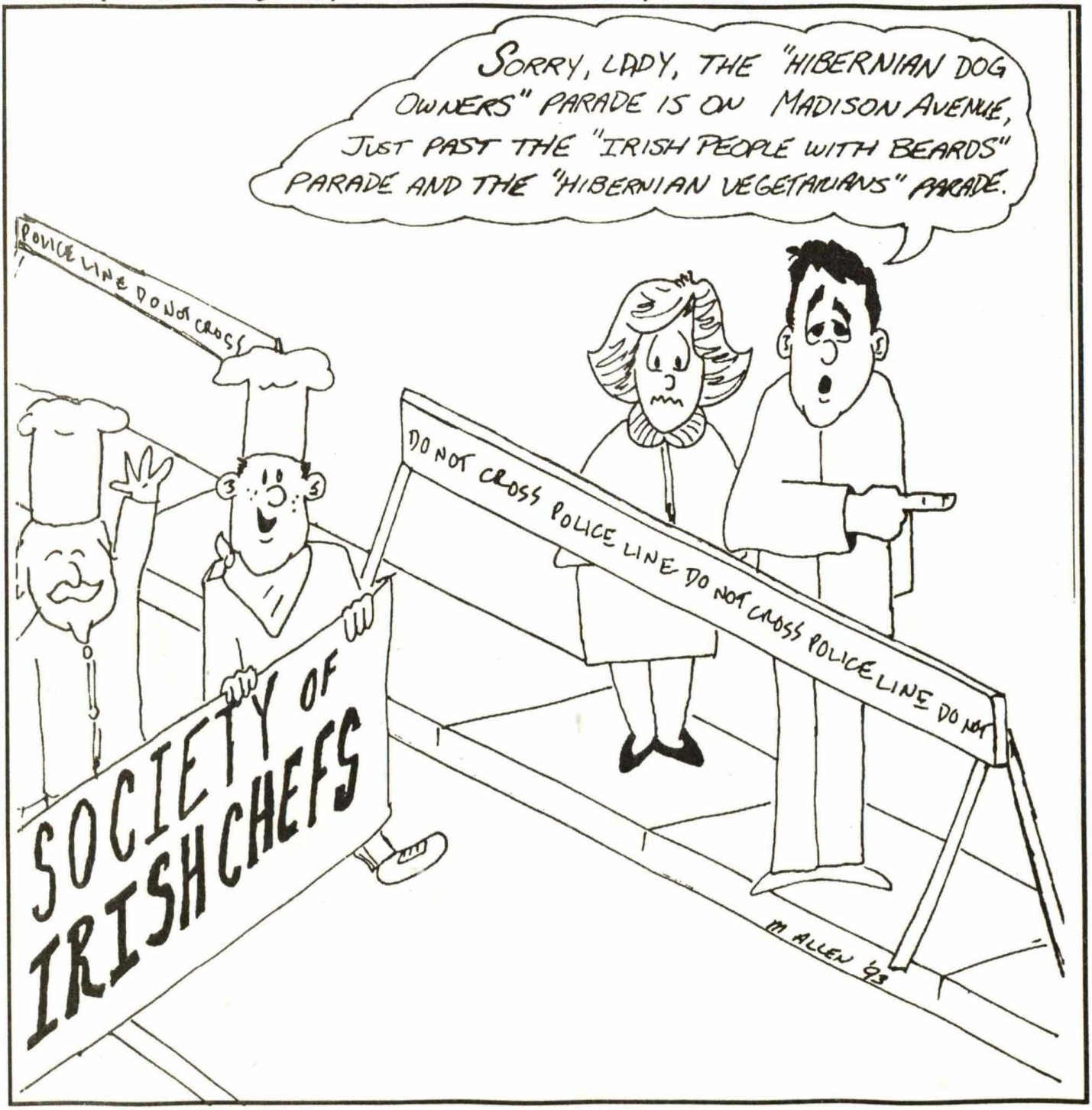
A parade is the quintessential exercise of one's First Amendment rights. What AOH is doing, by excluding ILGO, is the equivalent of State action. By deciding who to include or exclude in a parade, the organizers of the parade shape a message to be delivered. The message AOH is conveying is that ILGO has no place in Irish culture. AOH's disapproval of homosexuality and its commitment to uphold the Church's opposition to homosexuality is within its right to express, but not at the cost of violating ILGO's First Amendment rights. Both groups have their own right to express themselves in the parade.

The St. Patrick's Day Parade has significant symbolic impact; those whose banners are displayed in the parade symbolize that they have a right to celebrate their Irish heritage. If our Constitution, including the First Amendment, is to continue to serve as a unifying symbol to our nation, it must stand above conflicts of culture and values, and protect arenas where free ideas and thoughts can be expressed. One such "arena" is a public parade. New York is not Germany, and it is "Un-American" to prevent individuals from expressing their views. ILGO like any other group, should be able to "enjoy the freedom of the City on the streets of New York" on St.Patrick's Day.

continued from page 9

focused on the status of the St. Patrick's Day parade as a religious celebration. As far as this reasonable man is concerned, the religiosity of the event is of no significance. Even if the parade was not a so-called religious celebration, it should be allowed to go on. The First Amendment does not consist solely of the Free Exercise Clause, but rather confers protection upon all speech, religious or not. Therefore, the status of St. Patrick's Day as religious or nonreligious should not matter. The central issue which exists is the need to protect one of many different ethnic groups in their expression of a viewpoint, be it religious, political, or social.

I would like to make clear that I personally find the Hibernians' refusal to accept homosexuals into the parade noxious. I look forward to the day when our society's mores and values change at least to the extent that this and other similar prejudices disappear. The way to do this, however, is not by exploiting the Constitution, but by teaching people to listen to the many different voices which compose our society and to resist discrimination, hatred, and indifference towards others. So while we must protect the Hibernians today, we should all seek to change the values which underlie their exclusory behavior for tomorrow.



Vietnam Revisited

By Dean Kokkoris

Like many other Americans, my impressions of Vietnam were largely formed by war movies. Before travelling to the country this past summer, I envisioned a bustling little post-colonial nation: Hong Kong with lots of French architecture and a communist government. However, I found Vietnam to be more like Bangladesh than Hong Kong. I arrived in a country that is poverty stricken. I was disconcerted by many of the things I witnessed during my stay, and only now have I begun to appreciate the effects of living in one of the poorest and most isolated countries in the world.

I made the trip with my girlfriend, Trinh, who is originally from Vietnam. The last she had seen of her native country was on April 29, 1975, when she and her family boarded a "Huey" helicopter amidst mortar and machine gun fire at Tan San Nhut Airport in Saigon. On April 30, the city fell to the North Vietnamese Army.

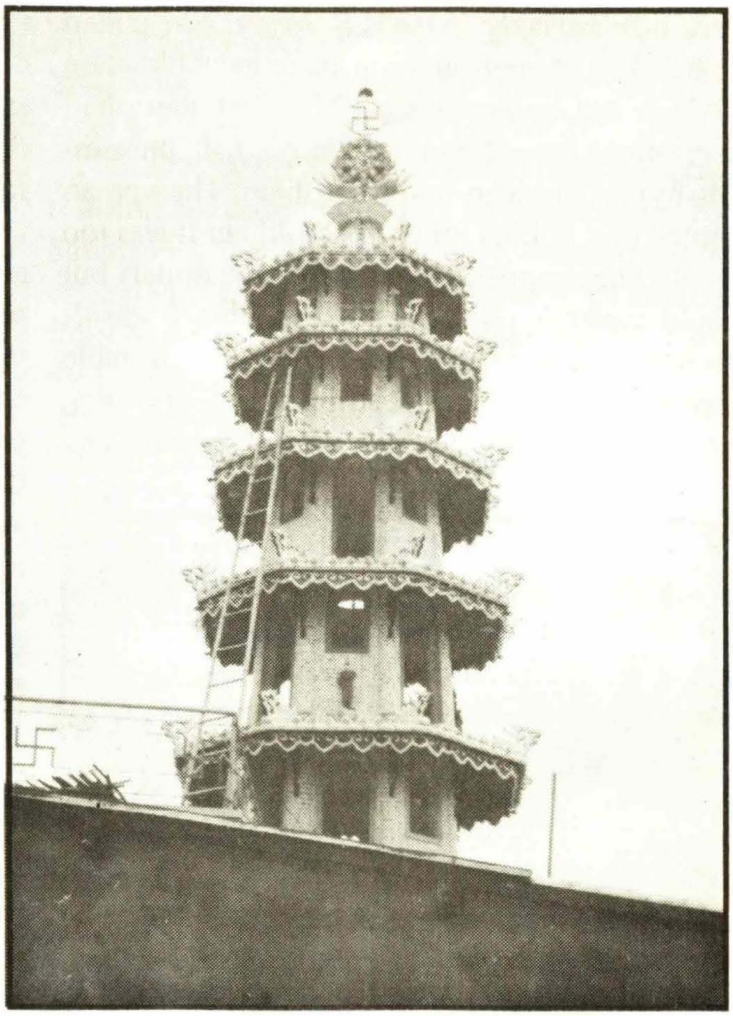
The return trip was not quite as dramatic. We arrived at Tan San Nhut on August 18, 1992, on a Boeing 707 via Hong Kong. Due to the United States trade embargo that has been in effect against Vietnam since 1975, there are no direct flights between the two countries. But the trade embargo has had far more serious consequences than hampering travel to Vietnam. It has essentially crushed Vietnam's economy. As in the case of Germany and Japan since World War Two, it makes one wonder who *really* won the war.

We spent our entire time in Saigon, where many of Trinh's relatives still live. I refer to the city by that name even though it is now officially named Ho Chi Minh City simply because that is how most Vietnamese still refer to it. Rather than take one of the official tours (through Vietnam Tourism—the official government tourist agency) we struck out on our own, to get a real sense of the place. The official tour would have been interesting, but no doubt it also would have been sanitized.

On our first day, we went to the local government office to secure the passes necessary to stay overnight. We were driven there by relatives on Honda motorbikes. As we raced through the streets of downtown Saigon, narrowly missing trucks, pedestrians and other motor bikes (that's how most people drive in Saigon), I got my first view of the city. The first thing that struck me was the sheer number of people out on the streets. Many just sat there doing nothing, staring blankly into space.

The streets of Saigon are always crowded. There is also a constant traffic of motorbikes, bicycles, pedestrians and cyclos pulsing through

the streets. Cyclos are like rickshaws except they are mounted on huge tricycles, so the drivers can pedal their passengers down the street instead of pulling them. Cyclos serve as the standard form of transportation for Vietnamese—like taxis here. There is no public transportation for local routes within the city. Automobiles are very rare. Most of the cars (usually white mini-vans) that occasionally make their way through the streets honking their horns are owned by Vietnam Tourism. These are rented out by foreigners at rate of twenty dollars per day for a car, and twenty-five dollars per day for a mini-van. This includes a driver, who stays with the car while the passengers go sightseeing or to business meetings.



The stream of human and vehicular traffic starts very early in the morning and lasts until about eight o'clock at night. Our motel room window looked out over the street, so every morning I was awakened at around seven o'clock to the sound of motorbikes and horns. These motorbikes seemed to have no emissions controls, because after a ten minute ride through the city, you could wipe a whole handful of soot off your face. I tried to find out about renting a motorbike myself. I can ride one fairly well, although it would be a tremendous challenge in Saigon, because there are no rules whatsoever for navigating the roads. I was informed by a Vietnamese-American (who had come back to visit), however, that if I got into an accident I had better be prepared to stay there for the rest of my life. I could not tell whether she was kidding, but I lost interest in renting a bike.

After surveying the street scene in Saigon, it seemed to me that about half of the population spent a good deal of its time travelling back and forth through the streets on motorbikes, bicycles, or by foot. It is still a mystery to me exactly where these people were going and what they did when they got there. I later came to understand that the crowded conditions in Saigon were a result of migration from the surrounding rural areas. Since there are no jobs available there, people have flocked to Saigon to look for work, hoping perhaps that foreign tourists (including overseas Vietnamese returning home to visit) and businessmen visiting the city will provide opportunities to make money.

Le Loi Street, named after the ancient Vietnamese hero who defeated the invading Chinese armies, is the main strip of Saigon. It is a wide road with several lanes and two islands to separate them. The sidewalks are lined with stores and street vendors selling anything you can think of: T-shirts, trinkets, books, etc. As foreigners walk down the sidewalk, the vendors wave and step out in front of them in what might be called aggressive marketing. A woman holds up a T-shirt with the inscription "Good Morning Vietnam." "Four dollar," she says. As you begin to walk away, the price drops. "O.K. Three dollar. O.K.? Two dollar!"

Some of the vendors hawked war memorabilia to foreigners: old U.S. military money issued to G.I.s during the war. The asking price for this money was relatively expensive. They must have thought that it had some sentimental value to foreigners, especially Americans. One woman tried to sell me some old flint cigarette lighters that

were standard issue in the U.S. Army. She pulled a whole box of them out from under her table when she saw me approaching. Many of them had inscriptions carved into them in English, presumably by the G.I.s who had owned them. The woman wanted four dollars for each. I told her it was too much. She dropped the price to three dollars but would lower it no further. I told her I wasn't interested. She then reached underneath the table once again and produced a string of U.S. army dog tags. "One dollar," she said. I turned around and

walked away.

Foreigners are not a very uncommon sight on Le Loi Street, but they are on the side streets and on the poorer parts of town. So when we took a walk through the other parts of town, we attracted lots of stares. After a while it became uncomfortable. Everybody was staring at us. And it wasn't just me that they stared at—apparently they could tell that Trinh was also a foreigner. They could tell by the clothes that she wore that she did not live in Vietnam. Most foreigners in Saigon travel around in cars or vans rented from Vietnam Tourism, complete with driver. These vehicles do not attract stares. I began to get the impression that the people of Saigon *expected* us to travel by car (first class) rather than by foot or even by cyclo (third class).

However, the rented cars do attract the attention of hundreds of street urchins. Every time passengers alight from a car or white mini-van, they are greeted by a swarm of little children, children with dirty faces and tattered clothes. They beg for money, using whatever English exists in their vocabulary. Usually it is simply: "You, you, you... give me money." Some of these children try to sell you postcards, eight for a dollar. Often the children will follow you wherever you go, even if you refuse to give them money. They will not follow into stores, however. There seems to be some unwritten agreement between them and the storeowners that the stores are not their "turf."

If you do give one of the children money, the news spreads quickly. Early in the trip I gave one of these children the equivalent of fifty cents in Vietnamese currency. We were standing in a little park across the street from one of the big hotels. This is an area where many of the beggars gather because they are likely to find foreigners there. The park seemed nearly empty, and this one little boy kept asking me for money. As soon as I gave it to him, I was surrounded by a group of children, begging for money and tugging at my pants and sleeves. It was as if they appeared out of nowhere.

Later on, I heard something that made me stop giving money to these children. I was told that the children were put up to their begging by adults who took their money and mistreated them, a la Oliver Twist. Just before I had arrived, there was a story circulating in the news about a boy who had had his arm broken by his "boss" so that he would look more pitiful and thus beg more successfully.

There are also adults who beg, but usually they either very old, or they are disfigured in some way. Sometimes women carrying children come to beg, and they push the children right in front of you, so that you can touch them.

Some of the children get angry when you ignore them after they have been following you for a while. A couple of boys who were tugging at my

sleeves began to pinch me when they realized they weren't getting any money. When I yelled at them, they laughed. Another group of children who followed us back to our mini-van began yelling and banging on the windows after we got in without giving them anything.

The Rex Hotel is an old American style four star hotel. There is a bar and cafe on the roof which affords a great view of downtown Saigon. Curiously, customers here are given bills charging them in American dollars, even though there is a trade embargo with the U.S. and U.S. credit cards cannot be used in Vietnam. It seems odd to see Japanese, Australian and French businessmen paying their bar bills here in American dollars. There is also a fancy restaurant and a nightclub inside the hotel. Prices in the hotel restaurant are substantially higher than those in the average Saigon restaurant. Still, you can get a decent fillet mignon there for three dollars. A room costs about seventy-five dollars per night.

There is a five dollar admission charge for the nightclub at the Rex Hotel. Inside it is dimly lit, and there are many small tables surrounded by booths. In the center of the room, there is a stage for the band and a dance floor. The house band plays dance music ranging from waltzes to disco, the kind of music you would expect to hear at a wedding. The room is filled mostly with bands of Japanese and Taiwanese businessmen who are seated at the booths. Seated in the back of the room at a few large tables are Vietnamese women dressed in traditional Vietnamese dresses (ao zais). They wear picture/name tags that indicate they are hotel employees.

After the men are seated, a hostess will walk over to the table and ask them it they want to "meet someone." If so, the men will be joined by hostesses from one the back tables. According to hotel policy, these women are not to accompany guests back to their hotel rooms. They are only to provide companionship in the nightclub, to drink and dance with the guests. These hostesses speak English fairly well, and they work entirely on tips. Most of them have day jobs and come to work at the hotel at night for the extra money.

Over at the Saigon Floating Hotel, the scene is a little bit different. As its name indicates, the Saigon Floating Hotel is on a barge which floats on the Saigon River. It was imported in its entirety from Australia. The rates are expensive there and the food is overpriced. There is a discotheque in the basement called "Down Under" (pretty clever). "Down Under" is a small club that features a large screen T.V. that shows rugby games, a decent-size bar, and a decent-size dance floor, complete with reflecting-glass balls hanging from the ceiling a la Saturday Night Fever. The admission for "Down Under" is seven dollars for men and free for women. This pricing structure is ingenious in that it virtually excludes Vietnamese men (seven dollars is more than seven days pay for the average Vietnamese worker), but does not exclude foreign businessmen or the young ladies who come to sell their services to them.

These young ladies are not hotel employees. On an average night, they all crowd up on the dance floor and sway to the music, while Japanese, Taiwanese, Australian, and other foreign businessmen stroll through the crowd to pick one out. A young Amerasian guy who I befriended in Saigon explained to me that these women usually charged about 150 dollars when they worked the Saigon Floating Hotel, but that the same women charged

much less when they were working the local bordellos (for Vietnamese men).

Trinh and I stayed in a motel outside of the 'exclusive' area of Saigon, away from all of the fancy hotels. Our motel was called the "Mimosa Mini-Hotel," and it was a five-story concrete structure attached to a row of commercial buildings. The room cost fifteen dollars per day, and it was very comfortable, comparable to a Ramada Inn. Considering that most Vietnamese do not have running water, we were living in relative luxury...until there was a huge rainstorm (we visited Vietnam during the monsoon season, so it rained sporadically nearly every day) which flooded four floors of the motel. Apparently the gutters had backed up, and the rainwater from the roof went into the motel instead of into the streets, which were covered in almost a foot of water. The water in the motel was about ankle deep, and it went cascading down the central marble stairway like a huge man-made waterfall.

After we moved our belongings to the fifth floor, which was dry, I grabbed a mop and joined the motel staff in pushing the rest of the water out of the rooms and down the stairway. As I passed one of the girls who was also mopping, I said, "Joi oi!"—which is Vietnamese for "Oh my God!" She got a real kick out of that; she started laughing and yelled over to her friend in Vietnamese: "Did you hear what that man said? He said 'Joi oi!'" She also got a kick out of the fact that I was barefoot. Lots of Vietnamese walk around barefoot, but I guess she had never seen a foreigner without shoes.

Although my trip to Vietnam was depressing, there were also lots of wonderful moments which I do not have the time to catalogue here. I guess the one point that I wanted to make in this article is that it is about time to end the trade embargo with Vietnam. Japan, France, and Australia, to name a few countries, have already begun investing in Vietnam and have greatly benefitted from the country's natural resources, its highly educated and industrious work force, and its inexpensive labor. No doubt the price for trade and investment in Vietnam has been significantly lowered due to the American embargo and the American refusal to allow Vietnam to receive economic aid from the International Monetary Fund and the World Bank. However, conditions in Vietnam have improved for most people since the foreign investment began, although the country has a long way to go.

Vietnam also represents a potential market of 70 million people for consumer goods. Although Saigon has been under communist rule since 1975, the free market there is alive and well. The stores on the city's main stripes bustle with activity. While in Saigon, I also visited some of the largest indoor flea markets I have ever seen (my point of reference is the Roosevelt Field flea market on Long Island). Many of the Vietnamese who speak English are very friendly to Americans, and will strike up a conversation on the street. Many also seem eager to have an American presence return to Vietnam.

The Bush Administration took the first steps towards re-establishing relations between the U.S. and Vietnam in December 1992. U.S. companies may now obtain licenses from the Treasury Department which allow them to open offices in Vietnam and take the preliminary measures necessary to do business there. Fifteen American companies have already been granted such licenses. However, business cannot begin until the U.S. government ends the embargo. So far the Clinton Administration seems to have taken a tougher stance toward Vietnam, requiring a full accounting of all missing U.S. soldiers, something that has not been done for World War Two or any other war in recent history.

This April during the meeting of the International Monetary Fund and the World Bank, the U.S. will again be asked to reconsider its veto of financial aid to Vietnam. It is the only country maintaining this veto, which has blocked hundreds of millions of dollars of aid. Hopefully the Clinton Administration will do what is best for both countries before that meeting and lift the embargo. The Vietnamese have already put the war long behind them, and its about time we did the same.

SBA UPDATE
by Eric Schwartzman

In the next few weeks the SBA will undergo a change in leadership, but before the SBA elections will be completed there is still some business to be finished. Specifically this business includes "SPRINGFEST-1993" and the Spring BLOOD DRIVE.

Springfest - 1993

At the time this article was written and put to print SPRINGFEST-1993 was scheduled to take place on Saturday, April 17, 1993 at The Warwick Hotel, from 8:00 p.m. until 1:00 a.m. Tickets will be sold by the current SBA executive board as well as your current SBA reps. A limited number of tickets will be available. For complete event information and ticket policies see the Springfest advertisements posted within the building.

Spring Blood Drive

On April 26, 1993, the SBA will again be sponsoring the annual Spring blood drive. Over the past three years Jennifer Naiburg has successfully coordinated each of the blood drives sponsored by the SBA and I just wanted to thank her publicly for her efforts. In the end however without your contributions the drives would not have been as successful as they have been. The upcoming drive will again be held in the third floor lounge and administered by New York Blood Services. Movies will be shown to keep you entertained and cookies and juice will be served to rejuvinate all who generously contribute.

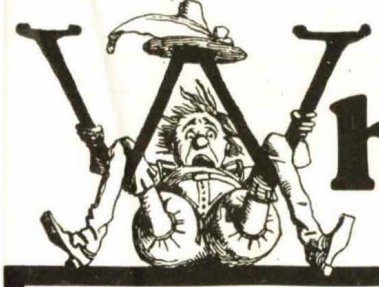
Elections and Election Rules

In the weeks immediately following Spring Break the SBA will be running elections for next years academic term. Students will be electing a new SBA Executive Board as well as student members of the House of Delegates (our own student legislature). I encourage all students interested to run for office. At this point everybody has seen posters advertizing the elections and announcing the nomination periods. Students can easily self-nominate themselves by completeing the appropriate forms found in the outer SBA office in the back of the SBA office. The duties required of SBA Executive Board positions as well as SBA Delegates are posted in the outer SBA office. The election rules are simple and are few in number. Most are based on commen sense and respect for fellow candidates. See the election advertisement within this issue.

Reflections and Ackowledgements

This past year BLS has underwent quite a few growing pains ranging from decreased library services to continuous noise to periods of freezing weather inside the building. Trying to address the numerous concerns and complaints was not easy. Some were simple to correct, others have never been fully addressed. However we somehow have managed to survive.

When I ran for the office of SBA President I did so because the school over my first two years had become a major part of my life from classes themselves, to the various part-time jobs I held within the building, to the friends I made, including the people who make this place run day to day. I did not accomplish all that I wanted to but I know I was able to help where I could. This may sound corny but it's what I believe. Unless students, faculty, and the staff care about this place and the people in it the school will simply be a set of buildings we pass through. I have never looked upon this place as simply a way station to the rest of my life but have looked upon it as a part of my life. I hope each of you have or will take advantage of the opportunities that BLS has to offer. I also want to thank each member of the SBA House of Delegates and Executive Board for their service in the past year. I thank those SBA groups who successfully programmed and ran the events that make the SBA what it is. I encourage those groups who didn't meet their goals to close out the year by laying a foundation towards the 1993-1994 academic year. I also want to thank the administration, faculty, and the BLS staff for your contributions to student life I want to especially thank Student Services, the maintenance staff, and the security staff, as well as my housemates for putting up with all the crap that came along with my moving in.



Why Worry?

This year, another bar review course has put out a poster inducing students who have already signed up with other bar review courses to switch programs.

BAR/BRI refuses to play this game.

We believe that students are mature enough to enroll in a course. If they believe they made a mistake, they are mature enough to change courses.

If a student signs up with BAR/BRI or with any other bar review course, that student's objective is to pass the bar exam. And our obligation as attorneys is to help them with that objective, and not to destroy their confidence in themselves and in their course.

We will not undermine students' confidence in their course by playing on their insecurities.

After all, we're attorneys. And we intend to help you become attorneys, too.

BAR/BRI
BAR REVIEW

(212) 719-0200

"Where professional responsibility is more than just a course."™

New Centrism on the Supreme Court

By
Professor Joel Gora
Professor William Hellerstein
Helen R. Neuborne

Editor's note: The following discourses were given to alumni at Dean's Day, which was held this past February. Ms. Helen Neuborne is the executive director of the NOW Legal Defense and Education Fund.

Introduction **Professor Joel Gora**

We are here today to discuss a new phenomonon on the Supreme Court: the apparent emergence of a more moderate "swing" bloc comprised of Justices Sandra Day O"Connor, Anthony M. Kennedy and David Souter. Praised by its supportors as the New Centrist Bloc, and condemned by some of its critics as a new "Wimp Bloc," these three Justices seem to have emerged as an important new force on the Court.

The lightning rod for the speculation about this important new development on the Court was the highly unusual "joint opinion" the three Justices co-authored in *Planned Parenthood* v. *Casey*, last year's closely-watched abortion case. The joint opinion, signed and written by all three Justices, when coupled with the votes of the two remaining liberal Justices, Harry Blackmun and John Paul Stevens, resulted in "reaffirming" the core holding of *Roe* v. *Wade*. A week earlier, the same five Justices joined together, in an opinion written by Justice Kennedy, to reject the offering of modest non-demoninational prayers at high school graduation ceremonies. *Lee* v. *Weissman*.

Thus, within less than a week, the twin pillars of the Reagan/Bush constitutional agenda—taking abortion out of the Constitution and putting school prayer back in—had been undermined and rebuffed. A major change in the direction of the Court on these critical issues had been averted for a time and, with the hindsight of the recent Presidential election, perhaps for a long time at that.

The influence of the centrist bloc goes well beyond these two headline-making cases. When united, the three Justices were nearly invincible, for example, in 15 divided cases last term where the three all joined, they controlled the outcome. In the closest 5-4 cases, the three Justices, plus the two liberal Justices, controlled 5 of the 14 cases. By contrast, in 5-4 cases, Chief Justice William Rehnquist, and Justices Antonin Scalia and Clarence Thomas were in the majority the least number of times. As recently as the term before, the Chief Justice had been with the majority in 75% of the close 5-4 cases.

There also seems to be developing a special affinity between Justices Kennedy and Souter: they each dissented a record *low* 8 times in 108 cases, i.e. in over 90% of the Court's decided cases each was with the majority. By comparison, the Chief Justice racked up 21 dissents; Justice Scalia dissented 24 times; and Justice Thomas registered a high of 26 dissents. Clearly the three Justices on the right think the Court was wrong a good portion of the time last Term.

The three centrists, however, thought each other right most of the time, voting together a solid 73% of the time. Finally, those three each agreed with all the other Justices more than 50% of the time, i.e. they were the least "disagreeable" of all the Justices—the obvious statistical profile of a centrist bloc willing and able to coalesce to form a majority as often as possible.

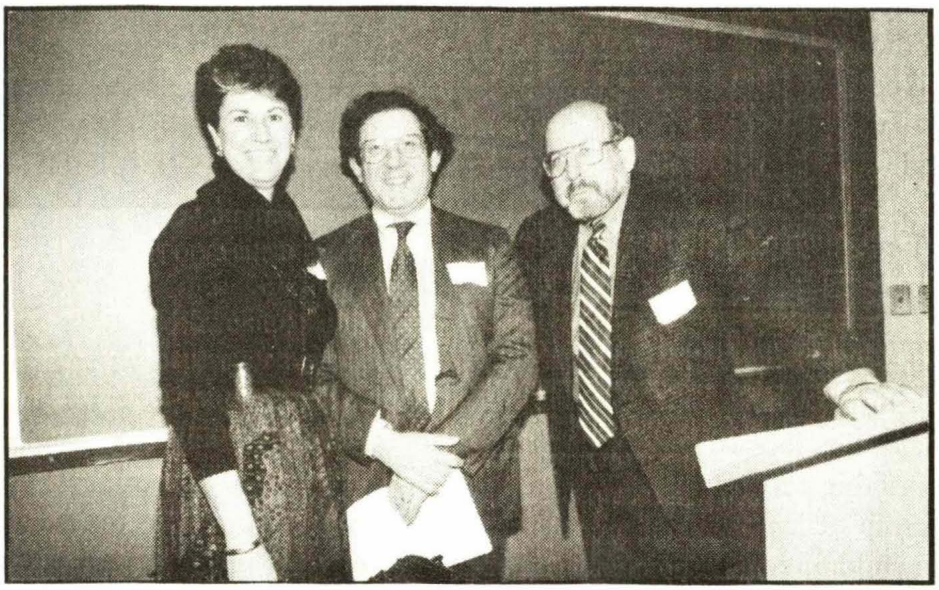
Finally, the Court itself seemed more "liberal" last year than in recent memory. Dean Jesse Choper of Boalt Hall Law School, identified 27 "individual rights" cases on the Court's docket and found that the "liberal" position prevalied in 18 cases, i.e. 2/3 of the time. But he cautioned that

liberals may be winning battles, but losing wars. (It is also interesting to note that Justice Kennedy took the "liberal" side in 2/3 of these cases as well.)

How did this all come about? Are these three Justices the new Harlans, Powells or Stewarts? What is the nature of this new pivotal bloc? and "Will the Center Hold?"

Justice Anthony M. Kennedy

I became particularly interested in Justice Kennedy because of a dissent he wrote in a case where I helped write an amicus curiae brief for the ACLU. (The case was *Austin* v. *Michigan Chamber of Commerce*.) I figured that any Justice who would agree with the arguments in an ACLU brief could not be all bad. That dissent was also Kennedy's first significant opinion strongly supporting a First Amendment claim against government. As a result, I like to claim some responsibility for having helped to "raise his consciousness." Two and a half years later, in commenting on Justice Kennedy's First Amendment jurisprudence this past Term, I found myself observing: " Justice Anthony Kennedy has clearly emerged as the present Court's most vigorous advocate of the fullest protection for First Amendment rights; indeed, there are occasions when his views and approaches evoke memories of the staunch positions of a William J. Brennan or even a Hugo L. Black."



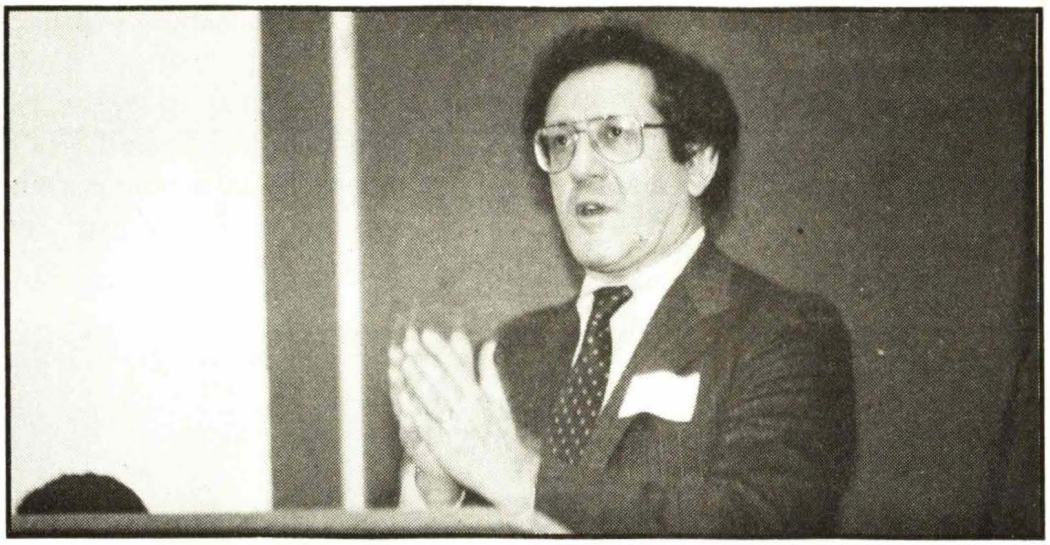
Who is this First Amendment partisan who joined the High Court exactly five years ago this month? At the time of his nomination, his main claim to fame was who he was NOT: Not Robert Bork or Douglas Ginsburg. You will recall the raging 1987 battle over the pivotal seat occupied by Justice Lewis Powell. Before Justice Powell retired, the line-up on the Court was as follows:

Brennan, Marshall, Blackmum Stevens
Powell
Rehnquist, White, O'Connor, Scalia.

While Justice Powell was by no means a great liberal, he did adhere in a pivotal way to the liberal position on issues like abortion and affirmative action. That is why such a ferocious battle was waged over his successor. In the general fatigue following the Bork defeat and the Ginsburg meltdown, it was not surprising that Anthony Kennedy was confirmed by the Senate by a vote of 97-0.

His background was consistent with achieving such an easy confirmation. Justice Kennedy was the son of a well-to-do Sacramento, California family. His father was a prominent lawyer-lobbyist in the State's capital. Perhaps because of work he had done with then-Governor Ronald Reagan and his aide Ed Meese, Kennedy was appointed to the Ninth Circuit by President Gerald Ford in 1975. At age 39, he became the youngest federal appeals court judge in the country. For the next twelve years, he would write approximately 400 opinions, mostly of a moderate caste, but some of which raised concerns in the liberal legal community on issues such as women's rights and school desegregation. But during confirmation hearings, he did embrace a recognition of privacy interests as a part of constitutionally protected liberty.

Nonetheless, liberals were very wary, fearing that had gotten "Bork without the Bark." The conservatives, however, were looking forward to having a solid conservative majority on key issues like abortion, separation of church and state, and law and order. And for the next two years, Justice Kennedy did not disappoint, as he entered his Scalia/Rehnquist period.



1. *The Scalia/Rehnquist Period - Spring 1988 to June 1990.*

Joining the Court in the midst of the 1987-88 Term, the new Justice quickly helped form solid conservative majorities in several key cases, including: (1) restricting residential picketing, (2) allowing censorship of high school newspapers, (3) denying poor children equal funding for school bus transportation and (4) supporting the government in most criminal cases.

But the first chapter of the story was not totally grim for liberals because Justice Kennedy joined with Justice Brennan in First Amendment cases allowing lawyers to engage in mail solicitation of clients and protecting charities against excessive government regulation. To the astute observor, such developments might be seen as harbingers of things to come.

But such liberal stirrings would *not* manifest themselves during the 1989-90 Term. Indeed, in that Term, the worst liberal fears seemed to come true. In seven significant civil rights cases, Justice Kennedy joined majorities to give narrow interpretation to statutory rights and no protection against on-the-job discrimination. *Patterson* v. *McClean Credit Union.* Over powerful liberal dissents, he wrote opinions rejecting Fourth Amendment challenges to drug and alcohol testing of employees and applying only a deferential balancing test to measure the privacy claims. *National Treasury Employees Union* v. *Von Raab; Skinner v. Railway Labor Executives' Association.* In a case involving a political rock concert at the bandshell in Central Park, Justice Kennedy wrote a restrictive decision, watering down standards for judging government regulation of the time, place and manner of speech. No longer would government have to show that the regulatory method was the least restrictive means to achieve the regulatory objectives. *Ward* v. *Rock Against Racism.*

But perhaps the two most ominous indications that Justice Kennedy would be a full-fledged member of the conservative camp came in two cases involving those most controversial topics: abortion and church-state relations. In the 1989 *Webster* v. *Reproductive Health Services* decision, Justice Kennedy joined Chief Justice Rehnquist's plurality opinion which, while not quite explicitly overruling Roe v. *Wade* as Justice Scalia would have done, nonetheless subjected state regulation of abortion to minimal judicial scrutiny. Likewise, in *Allegheny County* v. *Greater Pittsburgh ACLU*, which involved the validity of permitting the placement of a Christmas nativity scene and a Chanukah menorah on government property, Justice Kennedy *refused* to find a violation of the Establishment Clause. His dissenting opinion would allow government recognition and accomodation of religion, so long as no one was "coerced" into religions observance or no *real* "establishment" of

an official religion had occurred. And his dissent harshly criticized the majority for its "unjustified hostility toward religion."

Those on the right were clearly satisfied with Justice Kennedy's performance during his first full term on the Court. Overall, he voted with Chief Justice Rehnquist and Justice Scalia 92% and 85% of the time, respectively. By contrast, he joined Justices Brennan and Marshall in a meager 30% of the cases. He did, indeed, seem like Bork without the bark. And it was expected that he would come through on the conservative agenda with respect to law and order, abortion and church-state issues.

Once again, however, there were some countersigns that the perceptive observor might note. One was Justice Kennedy's crucial concurring vote to strike *down* a flag burning law. In words foreshadowing the future, he stated he felt compelled by text and precedent to reach that result: "The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution as we see them compel the result....[I] do not believe the Constitution gives us the right to rule as the [dissenters] urge, however painful this judgment is to announce....[It] is poignant but fundamental that the flag protects those who hold it in contempt....[The defendant's] acts were speech.... So I agree with the Court that he must go free." *Texas* v. *Johnson*. Also, in ruling against a local affirmative action plan for minority contractors, he staked out a position on racial equality that would bear important fruit in later Terms: "The moral imperative of racial neutrality is the driving force of equal protection." *Richmond* v. *J.A. Croson Co.*.

The Court's 1989-90 Term, may have been a year of transition for Justice Kennedy. While he remained conservative on abortion and law and order issues, he started finding his own voice on First Amendment issues For example, in *United States* v. *Kokinda* he wrote an important concurring opinion on the right to use public places and public property as a public forum for public speech. In the *Austin* case I mentioned earlier he filed an important *dissent against* government censorship of political speech, condemning the Court for "upholding a direct restriction on the independent expenditure of funds for political speech for the first time in its history." In that case he also rejected government's power to allow suppression of some organizational voices, but not others: "Each of these [censorship] schemes is repugnant to the First Amendment and contradicts its central guarantee, the freedom to speak in the electoral process. And he listened to the voices of public interest organizations spanning the political spectrum from the Chamber of Commerce to Greenpeace Action: "I reject any argument based on the idea that these groups and their views are not of importance and value to the self-fulfillment and self-expression of their members, and to the rich public dialogue that must be the mark of any free society."

2. *The Souter/O'Connor Era - 1990 to the present and beyond.*

Justice David Souter arrived on the Court in the Fall of 1990, replacing the great liberal champion, Justice William Brennan. From the beginning of Justice David Souter's tenure, he and Justice Kennedy

seemed to have a powerful judicial affinity for one another. As time would tell, those two Justices, joined in numerous areas by Justice O'Connor, would provide the core of the new moderation on the Court.

In the 1990 term, two cases dramatically illustrated Justice Kennedy's movement toward the center and his willingness to take a very activist stance on issues of racial equality.

In *Powers* v. *Ohio*, over a Scalia/ Rehnqhist dissent, Justice Kennedy ruled that a *white* criminal defendant has standing to protest the prosecution's use of peremptory challenges against *black* jurors. Listen to Justice Kennedy's words: "...a prosecutor's discriminatory use of peremptory challenges harms the excluded jurors and the community at large." "The Fourteenth Amendment's mandate that race discrimination be eliminated from all official acts and proceedings of the State is most compelling in the judicial system."

From *Powers* it was a short step to applying the same principle of racial equality to jury selection by *private* parties in *civil* litigation. Again, over conservative dissents that there was no "state action" present, Justice Kennedy reiterated that the courthouse was the last place racial exclusion could be tolerated, for that would compound "the racial insult inherent in judging a citizen by the color of his or her skin." *Edmonson* v. *Leesville Concrete Co.* (The principle now even limits the jury selection practices of criminal *defense* counsel, see *Georgia* v. *McCollum*, which is perhaps a step too far.)

The *Edmondson* case also illustrates the capacity of Justice Kennedy to listen, and listen well. Last year at the ABA Convention, he spoke movingly about the lawyer's argument in the civil juror exclusion case: the lawyer spoke not about his own client, a black construction worker suing a corporate employer for workplace injuries, or about the corporation's attorney who peremptorily challenged and removed two black jurors, but about those two jurors themselves and the racial bigotry they thought could not infect the hallowed precincts of a federal courthouse. That argument, Justice Kennedy said, with its sharp shift in focus from the plaintiff to the jurors, was "the correct sense of voice that allowed us to understand the case."

Indeed Justice Kennedy seems to be achieving his own "sense of voice." Listen to his voice in some key First Amendment cases.

In *Gentile* v. *State Bar of Nevada*, a lawyer was disciplined for holding a press conference to protest that his client's indictment had been a frame-up by corrupt police detectives. Here is what Justice Kennedy said in rejecting punishment of the lawyer: "Petitioner engaged not in solicitation of clients or advertising for his practice....His words were directed at public officials and their conduct in office. There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment."

In ruling against the New York statute that escrowed the proceeds of telling the story of one's crime, (the so-called "Son of Sam" statute) the Court majority applied a traditional compelling interest formula to hold the state had not adequately justified the content-based restrictions by showing sufficiently important reasons for burdening speech. Justice Kennedy's approach would have swept far more broadly. When a law restricts speech *solely* by reference to its content, and that content does not come within one of a few well-defined categories like incitement or obscenity, then **no** compelling interest can save the statute: "[T]he New York statute amounts to raw censorship based on content, censorship forbidden by the text of the First Amendment and well-settled principles protecting speech and the press. *That ought to end the matter.*" (emphasis added) *Simon & Schuster, Inc.* v. *New York State Crime Victims Board.* Justices Hugo Black and William Douglas could hardly have said it better.

Likewise, in a case involving restrictions on the free speech activities of the Hare Krishna group at New York's major airports, the majority took a crabbed view of defining and safeguarding the rights of speech in a public forum. *International Society for Krishna Consciousness, Inc.* v. *Lee.* By comparison, listen to Justice

Kennedy's perspective: "The liberties protected by the public forum doctrine derive from the Assembly as well as the Speech and Press Clauses of the First Amendment and are essential to a functioning democracy. Public places are of necessity the locus for discussion of public issues, as well as protest against arbitrary government action. At the heart of our jurisprudence lies the principle that in a free nation citizens must have the right to gather and speak with other persons in public places." Justices Brennan and Marshall could not have said that better.

One of the two shockers last Term that led to the extensive analysis of the existence of the new centrist bloc was *Lee* v. *Weisman*, the graduation prayer case. But astute observors who listened to the oral argument would have been less surprised by the outcome. Told by government counsel that attendance at the high school graduation was "voluntary" and therefore that students who were offended by prayers were free not to attend, here's how Justice Kennedy responded: "In our culture, graduation is a key event in a young person's life. It is a very substantial burden to say that he or she can elect not to go." Little wonder that this same critical evaluation was the centerpiece of the Court's subsequent ruling that religious observances at high school graduations transgressed the vital line separating church from state. Under the Establishment Clause, Justice Kennedy ruled, the majority, not the objector, must yield.

Finally, let me mention *Planned Parenthood* v. *Casey*, where this discussion all started. That opinion, reaffirming the doctrine of substantive due process and liberty, despite all of its analytical warts, included the following passionate observations: "It is a promise of the Constitution that there is a realm of personal liberty that the government may not enter." "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." Since Justice Kennedy read these words from the bench in announcing the Court's decision, we can assume they are his. They could have easily been uttered by Justice William Douglas.

To be sure, *Casey* cut back on *Roe*, replaced its compelling interest analysis with a less demanding "undue burden" inquiry and upheld most of the restrictions at issue. But the three centrist Justices strove mightily to safeguard the Court's legitimacy, continuity and stability.

The final question is *Why?* What can account for this new centrist block on the Court and for the new critical positions taken by Justice Kennedy? Or are the causes too subtle for any calculus? Various speculations have been offerred. Some have suggested that with the liberal Justices Brennan and Marshall gone, the more moderate Justices have moved toward the center to re-establish a new balance. Others observe that three centrist Justices may alienated by the hard doctrinal positions of Justices Scalia and Thomas. The conservative commentators, Evans and Novak, in seeking to explain Justice Kennedy's positions in the abortion and church-state cases, have uncovered a plot by liberal Harvard law professor, Lawrence Tribe, to plant liberal law clerks in Justice Kennedy's chambers.

Observors seeking more profound explanations have focused their attentions on the wisdom of the constitutional framers in fashioning Article 3's protections of judicial independence and life tenure to try to insure the principled protection of constitutional safeguards against majoritarian overreaching. We have seem that Article 3 magic work before in the careers of some of the Court's most important Justices, who wound up in far different places than they started. The names of Hugo Black and Earl Warren come to mind. The same magic may be operating with the respect to Justice Anthony Kennedy. As he himself said in a very significant speech to the American Bar Association last summer: "We must never fail to ask what the law ought to be. It is essential for lawyers and judges to continue to ask whether the results they achieve are yielding real and substantial justice. This does not mean we act in a political sense. We are, of course, bound by the law and our tradtions of logic and reason, precedent, stare decisis; but also by our own sense of morality and decency." It's hard to imagine Robert Bork making that same speech.

Comments on Sandra Day O'Connor

Helen R. Neuborne

Middle of the road Justices, like Sandra Day O'Connor, make a frustrating target for instant analysis. The gray areas that they map at the center of an issue often lack the clarity and the passion of the work of their more ideologically driven colleagues. It's far easier to sketch a Marshall or a Scalia than to capture the elusive essence of a centrist like Sandra Day O'Connor. That's all the more frustrating because Justice O'Connor's historic role as the only woman ever to sit on the Supreme Court provides a mighty temptation to view her ideologically as woman first, and a Justice second.

I propose to do a little of both. First, a look at O'Connor, J., the Justice.

From her appointment to the Court by President Reagan in 1981, Justice O'Connor has sat on an ideologically fragmented Court. During her first decade on the Court, Justice O'Connor moved back and forth between the Court's conservative wing and its precarious center, with a pronounced tilt to the right. She consistently voted against affirmative action, authoring the opinion in *Crosson*, which struck down a Richmond, Va. set aside plan for minority contractors, and concurring in *Wygant*, which struck down a plan giving minority teachers preference against lay-offs; in favor of the death penalty, authoring concurrences in *Penry* v. *Lynaugh*, upholding the death penalty for the mentally retarded, and *Stanford* v. *Kentucky*, upholding the death penalty for 16 year olds; and against a broad reading of the rights of criminal defendants. She wrote the opinion for the Court in *Coleman* v. *Thompson*, the case that overruled the landmark expansive view of habeas corpus in *Fay* v. *Noia*, which had refused to permit state technicalities to bar federal habeas corpus review.

As the Court's personnel changed though, Justice O'Connor moved dramatically to the center, if a move to the center can ever be dramatic. With Justice Powell's retirement in 1987, she assumed principal responsibility for holding the center against a mounting ideological assault from the right. Why Justice O'Connor felt a responsibility to hold that center is the mystery I'll discuss in the second half of this talk.

With the successive appointments of Justice Scalia, Kennedy, Souter and Thomas, the conservative wing of the Court, led by Chief Justice Rehnquist and Justice White, appeared to have a safe majority. The constitutional right to abortion and strict separation of church and state were announced as the first candidates for oblivion. Only Justices Blackmun and Stevens clung to the old faith.

But the predictions of a massive Supreme Court move to the right failed to consider the tenacity with which Sandra Day O'Connor would fight to hold the center. She insisted that a middle ground be found between the extremes of left and right and, to the amazement of court watchers, she persuaded Justices Kennedy and Souter to join her in a centrist bloc that controls the current Court.

Her characteristic judicial approach, patterned on the jurisprudence of Powell and Harlan,

is to reject the ideological "all-or-nothing" positions urged by each side and to seek to craft a middle position that gives something to each.

For example, in the influential church-state case of *Lynch* v. *Donnelly*, she upheld a government sponsored creche in Pawtucket, R.I. as not violating the Establishment Clause because it contained enough plastic animals and candy canes. Several years later, in *Allegheny County* v.*Greater Pittsburgh ACLU*, she distinguished between an unlawful creche at the courthouse and a lawful religious display (a menorah) on public property several blocks away. Thus, she permits the government sponsored display of religious symbols in public places as long as they seem secular to her and do not send a signal to non-believers that they are outsiders and not full members of the political community. Strict separationists reject her position because it permits some government endorsed religious displays. The religious right rejects her position because it places very significant limits on the content and positioning of religious displays. Law professors love her position because it requires the drawing of lines that are so fine that no one else can understand them.

In the recent case of *Lee* v. *Wiseman*, she joined with Justices Kennedy and Souter, to defeat the attempt to reintroduce prayer into the schools at a junior high school graduation ceremony, but characteristically left open the possibility that state sponsored prayer might be acceptable in other, less coercive settings with an audience less vulnerable to peer pressure.

Most dramatically, she followed the same relentlessly centrist practice in the abortion area. Rejecting the feminist argument that abortion is almost always protected and the Bush administration's argument that it is never protected, she sought a middle ground - her now historic formulation of the "undue burden" test in *Planned Parenthood* v. *Casey*, an intermediate standard of review she had begun to develop in earlier separate opinions in *Webster*, *City of Akron*, and *Hodgson*. As with the church-state cases, the concept of undue burden is not always visible to the naked eye, leaving to Justice O'Connor's subjective intuition how much of a burden a particular regulation is and inviting a generation of litigation over the question. In *Casey*, she found a husband notification requirement an undue burden, writing an eloquent opinion on the changing role of women in the family and the risks posed by male domination and spousal abuse; but upheld a 24 hour waiting period forcing women to return, an intrusive so-called "informed consent" procedure; a requirement of parental consent for minors, again not acknowledging or analyzing the legitimate fears many teens have of abusive parents; and an elaborate recording system for doctors, forcing them to be publicly identified as abortion providers, again failing to acknowledge that we are losing MDs at a furious rate because many can no longer stand the harassment.

In cases involving values of federalism, though, she does not seek a middle way. Although her prose remains moderate and her approach coldly analytical, she is an ardent defender of states' rights. She has championed the tenth amendment,

fought against federal habeas corpus review of state criminal convictions and argued strenuously for deference to local political judgments.

It is most particularly her views on gender equality that often run counter to her conservative approach to issues of federalism and the role of courts, although even here, in cases close to her heart, her centrist perspective is apparent. Despite her general aversion to affirmative action in a racial setting (she dissented in *Metro Broadcasting*, which upheld an affirmative action plan for granting broadcast licenses to minorities), she wrote a cautious concurrence upholding an affirmative action plan for women in *Johnson* v. *Santa Clara Transportation Agency*, where a government employer voluntarily agreed to hire a qualified woman on a construction crew over a qualified man, but stressed the limits imposed on such a plan by the 14th amendment, which would require some showing of past discrimination. In *Price Waterhouse* v. *Hopkins*, where a top earning woman was denied partnership because she wasn't "feminine" enough, Justice O'Connor condemned stereotypical hiring and promotion practices victimizing women, but made them difficult to prove when mixed motives were involved. In *Casey*, she rescued *Roe* v. *Wade*, from oblivion by recognizing for the first time in a major abortion decision that women cannot be equal unless they can control their reproductive destiny, but she substantially narrowed the constitutional protection available to them.

In other gender related cases, she crusaded against unfair statutes of limitations on paternity suits, striking down statutes of 1, 2, and 6 years and championing the cause of the abandoned mother and child. She dissented from a refusal to permit state courts to force servicemen to share their pensions with divorced spouses. She dissented in *Rust* v. *Sullivan* when the Court voted 5-4 to uphold a gag rule forbidding federally funded family clinics from informing women of their right to an abortion. She dissented in *Bray*, when the current Court voted 6-3 that the Ku Klux Klan Act does not protect women from mobs outside abortion clinics. In *Roberts* v. *United States Jaycees*, she upheld efforts to ban gender and race discrimination in private clubs that play a significant role in business success. And in *Mississippi University for Women* v. *Hogan*, she struck down a single sex nursing school that excluded men because it was based on stereotypical visions of gender roles.

Thus, in case after case involving women, Justice O'Connor fought for a world in which women have an equal chance, free from the burden of stereotypical prejudice - but the centrist in her often placed significant limits on the process.

Now a brief word about Sandra Day O'Connor, the woman. She was born in 1930, on a ranch in Arizona. She divided her early years between her grandparents in El Paso, where she went to school, and her father's ranch in Arizona, where she spent her summers. She entered Stanford at 16 and graduated from Stanford Law School, third in her class (Rehnquist was first), at 22. Rehnquist got a Supreme Court clerkship with Justice Jackson, but for almost a year, Sandra Day O'Connor tried unsuccessfully to find a job with a California firm. Only one job offer was made - she was offered a job as a legal secretary with Gibson, Dunn & Crutcher.

She never forgot that year. It is, I believe, the fuel that turned an otherwise safely conservative jurist - President of the Phoenix Junior League and an ardent Goldwater Republican - into a centrist.

When she returned to Arizona, she worked as an Assistant County Attorney, principally because she believed the private practice world was closed to a woman. She took time off to have three children. In 1965, she was appointed an assistant State Attorney General. In 1969, she was elected to the Arizona Senate, where she became majority leader. While a member of the Senate, she tipped her hand by voting against several pro-life bills and by voting in favor of the ERA. In 1975, she was appointed to the Arizona judiciary, where she served quietly until her appointment to the Court in 1981.

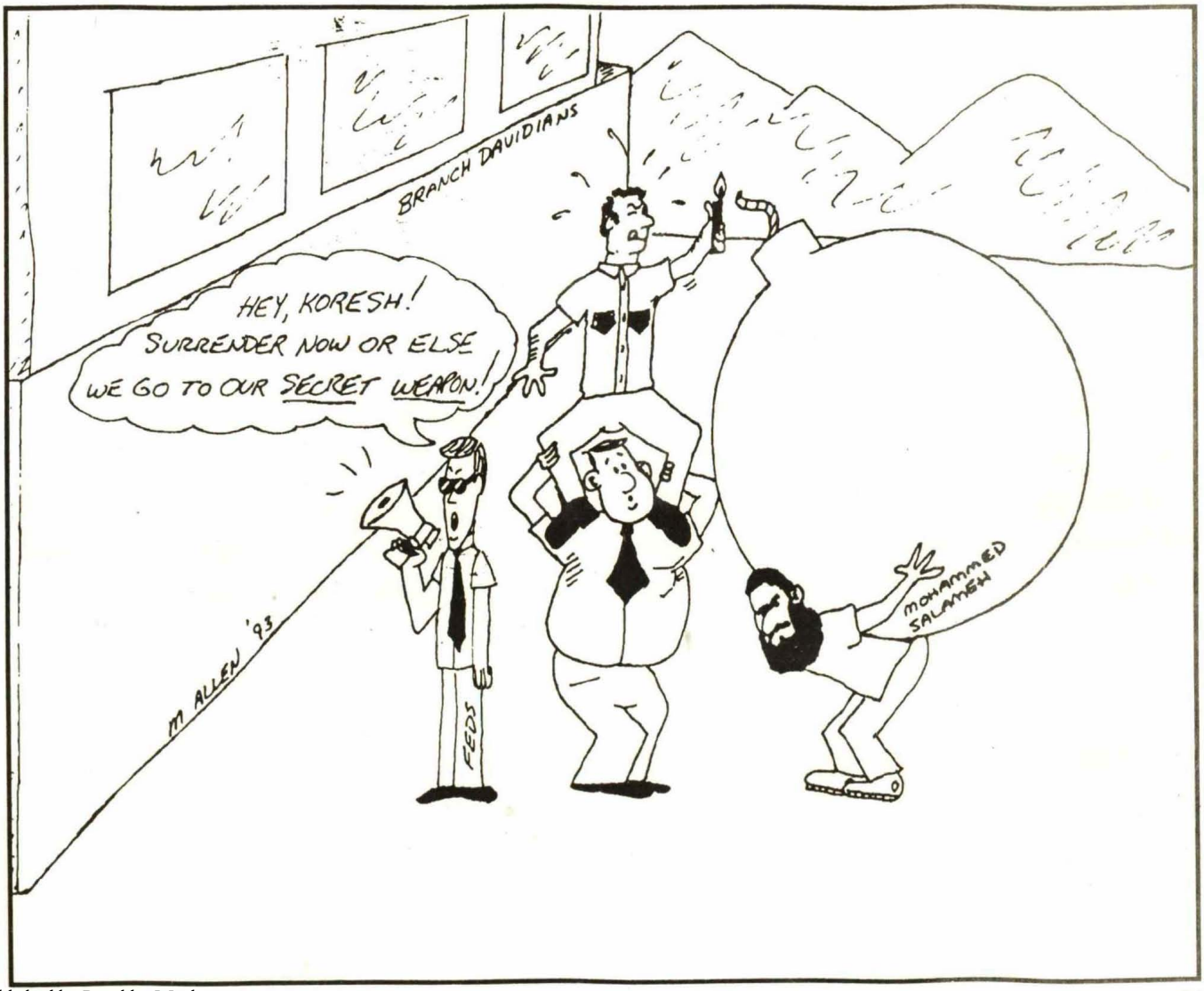
Her appointment to the Court resulted in two atmospheric changes - no more "Mr. Justice" - the phrase mysteriously disappeared from the Supreme Court reports; and the promulgation, at her urging, of a gender neutral Federal Rules of Civil Procedure in 1987.

I believe that what unites O'Connor, J., the

Justice, with Sandra Day O'Connor, the woman, is her experience as a target of discrimination. Everything in her judicial philosophy and her political background point to comfortable service on the conservative wing of the Court. She should be a faithful ally of Justice Rehnquist. That's why Ronald Reagan appointed her. But she's not. Her first-hand experience with gender bias established a wedge - a wedge that forced her to temper her instinctive views with her knowledge of harsh reality. From that wedge has sprung the complex jurisprudence of Sandra Day O'Connor.

Ironically, Justice O'Connor rejects the notion that her experience as a woman has shaped her jurisprudence. Stung by the stereotypical reception she received after she graduated from Stanford, Justice O'Connor is wary of conceding that women are different from men. But her warm remembrance of Justice Marshall as a man whose life experiences enriched the Court's understanding of the reality of race prejudice demonstrates the importance of diverse perspectives. Her role as the only member of the Court to *know* what it feels like to be rejected from job after job because of gender equips her with a unique perspective that has altered her jurisprudence and has played a significant role in the emergence of a centrist alternative to the Rehnquist counter-revolution that never was.

continued next page



The Emergence of Justice David Souter

Professor William E. Hellerstein

Introduction

When David Souter was nominated on July 25, 1990 by President Bush to succeed Justice Brennan, he shortly became known as the "stealth" candidate. This was due to the paucity of his expressed views at the time. Like the radar tracking stations seeking to monitor the Stealth Bomber, the radar antennae of the multiplicity of interest groups that descended, found him untrackable. In short, Justice Souter in his prior life left few "footprints" with respect to his views about the major issues of our time. When asked for his views of Souter by a news reporter, the late Justice Thurgood Marshall said, "Souter, who? I never heard of him." However, after two years on the Court, a very interesting picture of Justice Souter is beginning to emerge.

Background

Justice Souter was born in Melrose, Massachusetts on September 17, 1939 which makes him several months younger than me. He graduated from Harvard College, was a Rhodes scholar, and then graduated Harvard Law School in 1966. He was not even yet on campus when I graduated in 1962. Do I feel old. No, but I am not used to referring to Justices of the Court as "kid."

Although Souter had served for a short time as a judge on the U.S. Court of Appeals for the First Circuit, his legal experience was primarily in state government (indeed, he never wrote an opinion while on the 1st Circuit). He was the attorney general of New Hampshire, a New Hampshire superior court judge and a justice of the Supreme Court of New Hampshire.

Having replaced the liberal colossus William J. Brennan, much of the speculation surrounding Souter's appointment centered on whether he would provide a fifth vote for an emerging conservative majority. And his first term on the Court lent not insubstantial support to this concern.

First Term: 1990-1991

In a number of 5-4 decisions during his first term, Justice Souter joined the conservative majority and appeared to signal that he would actively participate in the Court's continuing move to the right.

1. In *Rust* v. *Sullivan*, he voted to uphold federal regulations prohibiting doctors from advising patients of abortion as an available procedure. As you know, President Clinton immediately upon taking office, canceled that regulation.

2. In *Barnes* v. *Glen Theatre*, he voted to uphold a state ban on nude dancing.

3. In *Payne* v. *Tennessee*, he voted to overrule recent decisions excluding from death penalty determinations, evidence on the impact of the crime on the victim's family.

4. In *Arizona* v. *Fulminante*, he voted with the majority to hold that the harmless error doctrine could be applied to the assessment on appeal of cases in which a coerced confession was introduced against the defendant.

5. In several cases, he joined the majority in further restricting the availability to state prisoners of federal habeas corpus.

Statistics also demonstrated the rightward tilt of Justice Souter. He voted with Chief Justice Rehnquist in 86 percent of the cases. In the previous term, by contrast, Justice Brennan had voted with the Chief Justice in only 38 percent of the cases. Moreover, the Justice with whom Souter voted least often was Thurgood Marshall — only 58% of the time.

However, there were also during this first term indications that Justice Souter might not become the darling that right wing conservatives believed or at least hoped that he was.

1. In *Parker* v. *Dugger,* he voted with the majority to invalidate a death sentence imposed by the trial court over a jury's recommendation of life imprisonment.

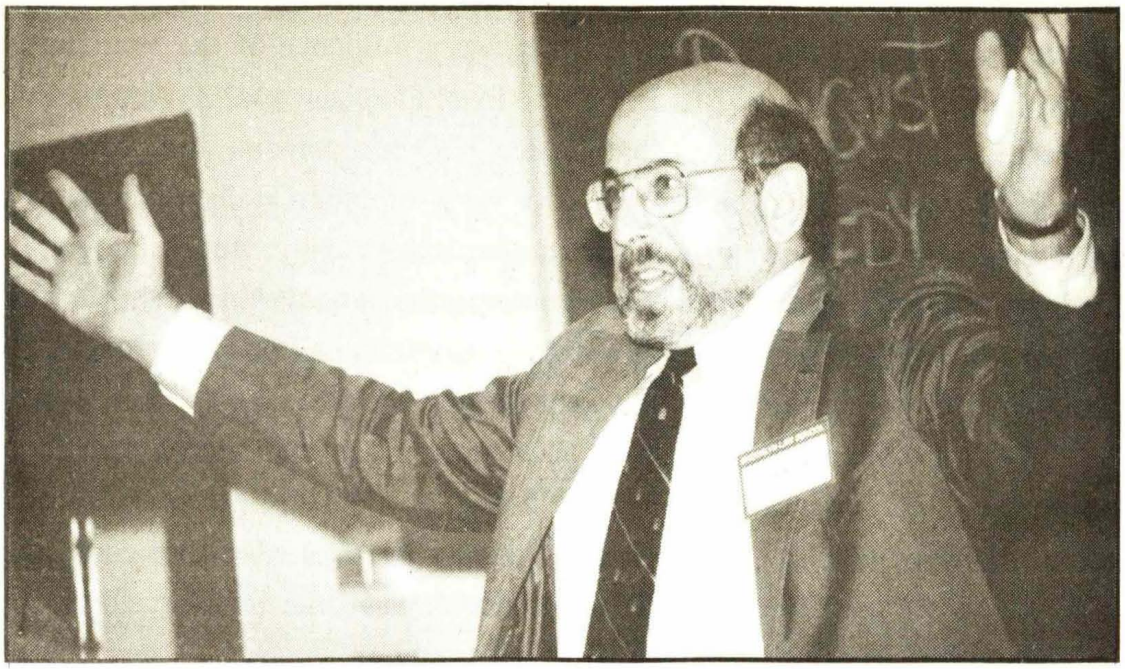
2. In *Cohen* v. *Cowles Media*, he dissented from the majority's refusal to give First Amendment protection to a newspaper's publication of a confidential source.

In this, his first term, Souter was the most reticent justice in recent memory. He got off to a slow start, wrote very few opinions, and his opinions did not reveal any clear judicial philosophy. Contrast this, if you will, with Justice Clarence Thomas' behavior last year, his first on the court; he was anything but reticent.

During his confirmation hearings, Souter mentioned his admiration for Justice John Marshall Harlan II, not an uncommon reverence among Harvard graduates of that time given the heavy influence of the Frankfurter-Harlan model of judicial restraint. And I believe that Justice Harlan's persona and philosophy will prove very important in the emergence of Justice Souter's philosophy. But Justice Harlan, while conservative, is no darling of the far right. His dissenting opinion in *Poe* v. *Ullman*, calling upon the Court to strike down a state ban on contraceptives for married couples, formed the core of the Court's subsequent opinion in *Griswold* v. *Connecticut* which, of course, set the stage for *Roe* v. *Wade*.

The Second Term: 1991-92

Justice Souter's second year on the Court was quite a different story. Indeed, purely statistically, Souter emerged as a very important player. Consider if you will that in the 14 cases in which the Court was divided 5-4, Souter was with the majority 13 times. No other justice even came close. Consider also that in only 8 of slightly more than 100 decisions issued did Justice Souter



dissent. By contrast, Justice Thomas, though he joined the Court a month late, missing 17 cases, dissented in 22. Souter, clearly no bull in a china shop, may quietly have slipped into the role most often in recent years held by Justice Powell—the true "man in the middle."

But there may even be more to Justice Souter's role than as the "man in the middle." Substantively, something took place in his second term. Indeed, our program this afternoon, I believe is 1/3 due to what he did last term. And as you have already heard from my colleagues, what Justice Souter did in tandem with Justices O'Connor and Kennedy, especially in the waning days of the term, may well have been a harbinger of a substantial sea change from the path carved previously by both O'Connor and Kennedy and to a lesser extent by Souter himself during his first term.

The decision in *Planned Parenthood* v. *Casey* was, as you already know, the signal event of the term. Joining forces with Justices O'Connor and Kennedy, Souter was part of the unusual unsigned joint opinion that set out a new, middle ground test for the constitutionality of restrictions on abortion: "whether they constitute an undue burden." However, insofar as the joint opinion stressed the importance of institutional integrity and *stare decisis* in rejecting the call for the overruling of *Roe*, the fine hand of Justice Harlan and his dedication to the Court's institutional role can be seen. This part of the abortion opinion Justice Souter actually read from the bench and it has been said that his statement about the importance to the Court of adhering "under fire" to the *Roe* v. *Wade* precedent, appeared to represent his most deeply felt views about the role of the Court — a view expressed on numerous occasions by Justice Harlan.

Of Souter's role (and his emerging closeness with O'Connor and Kennedy) in the *Planned Parenthood* case, Ruth Marcus of the *Washington Post* has written that being aware that he would soon confront the abortion issue, Souter studied it months earlier and poured over the briefs in *Roe* v. *Wade* during the summer recess. She also tells us that Souter goes to church with O'Connor and that he shared Thanksgiving dinner at their house. Regarding Kennedy, accord-

ing to Ms. Marcus, Souter studied the tapes of Kennedy's confirmation hearings as a guide to his own and that on Souter's confirmation, the first congratulatory call he received was from Justice Kennedy.

An equally important signpost in Justice Souter's emerging jurisprudence is his role in *Lee* v. *Weisman,* where he voted with the majority to strike down the Rhode Island high school graduation prayer but where he also wrote separately, joined by Stevens and O'Connor, that government must remain strictly neutral in the choice between religion and no religion, not just refrain from favoring one religion over another. And here is where life becomes worth living.

In *Lee*, Justice Scalia (the conservatives' intellectually prodigious standard bearer) dissented vehemently. He railed against the majority decision, stating:

> To deprive our society of this important unifying mechanism [the prayer] in order to spare the nonbeliever what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law.

In attacking the majority, Scalia did not bother to conceal his rage: The Court's "psychojourney," he said, is "nothing short of ludicrous... Interior decorating is a hard rock science compared to psychology practiced by amateurs" (This was, it has been said, a dig at O'Connor's earlier holding that the city of Pittsburgh could not display a creche without also constructing a "secular" monument, such as a "rotating wishing well." Scalia then dismissed the majority opinions as "conspicuously bereft of any reference to history."

But here's the rub. Justice Souter's concurrence, in fact, reviewed the evidence of the framers' intentions in meticulous detail, concluding that "history neither contradicts nor warrants reconsideration of the settled principle that the Establishment clause forbids" nonpreferential as well as preferential support for religion. Scalia simply ignored Souter's arguments about the intent of the framers. Instead he disingenuously shifted his focus from original intention to subsequent practice or tradition. He made much of the fact that presidents have traditionally issued Thanksgiving proclamations. But as Souter took pains to point out, Madison later apologized for his Thanksgiving proclamation (which it is said he had issued only to win the War of 1812) on the grounds that he felt all ceremonial uses of religion "a palpable violation of ... Constitutional principles."

Scalia's failure to engage Souter's originalist arguments (almost always Scalia's home turf) allows for the inference that he had no viable response. *Lee* v. *Weisman,* therefore, should be memorialized as the case in which Souter challenged Scalia on his own terms, and won. No light accomplishment for a reticent, thin, hermit-like (we were led to believe) Justice from the New Hampshire boonies.

In the two *International Society for*

Krishna Consciousness cases, Justice Souter stood very tall for free speech. In the first case, the Court in an opinion by the Chief Justice, held that an airport terminal was a nonpublic forum for First Amendment purposes and therefore the Port Authority's ban on solicitation of contributions satisfied the reasonableness requirement. In the second case, a majority of the Court held that a ban on the distribution of literature in Port Authority airport terminals violated the First Amendment. Justice Souter agreed with the striking down by the Court of the ban on leafletting but he dissented from the ruling upholding the ban on solicitation. In his view, the regulation was unconstitutional because it failed to satisfy the requirements of narrow tailoring to further a significant state interest.

Despite the liberal slant of Souter's work in these cases, and some others (such as *Doggett* v. *United States*, in which he authored the Court's 5-4 opinion holding that the Sixth Amendment's Speedy Trial Clause was violated by a delay of 8 and 1/2 years between indictment and trial even though the defendant could not prove actual prejudice), it would be a mistake to jump to the conclusion that Justice Souter will be other than a consistent centrist; it might even be a mistake to conclude that this past year was other than aberrational. Consider some of the other positions he took this past term:

1. He voted to allow the government to prosecute foreigners kidnapped from their country.

2. He voted to limit access to federal courts for environmental groups.

3. He voted to uphold limitations on union organizers' ability to contact workers on their employer's property.

4. He adopted a narrow interpretation of the Voting Rights Act and made it easier for school boards and prison officials to be released from court supervision and consent decrees.

However, in a trend that started during his first term and became more pronounced last term, Souter qualified his votes with concurring opinions quite frequently. For example, in the Georgia school desegregation case, in which the Court made it easier for once segregated schools to be released from court orders, Souter wrote separately about how school officials in some instances may be responsible for segregation caused by demographic changes.

THE 1992 TERM —SO FAR

Justice Souter's performance during the current term can be characterized to date as quite active for he has already authored a significant number of opinions. Again appearing are the Harlan-like themes and the felt need on Souter's part, while agreeing with the majority, to write concurring opinions expressing his different approach to a case. Most significantly, however, is his increasing sidings (in criminal, mainly capital habeas corpus cases, and a civil rights case) with Justices Blackmun, Stevens, and either Kennedy or O'Connor when they are on the "liberal" side of the ledger.

In *Nixon* v. *United States*, the Harlan influence was especially apparent. The case involved the complaint of an impeached federal judge from Mississippi about the constitutionality of Senate Rule XI which allows a committee of Senators to hear evidence against an impeached individual and to report that evidence to the full Senate. The Senate voted to convict

Nixon, and the presiding officer entered judgment removing him from his judgeship.

The majority opinion, written by the Chief Justice, held that the controversy was non-justiciable because the language and structure of Art. I, section 3, cl. 6 demonstrate a textual commitment of impeachment to the Senate. The opinion also stated that the Court was persuaded that the lack of finality and the difficulty of fashioning relief counseled against justiciability.

Justice Souter, in concurring, placed his emphasis on the political question doctrine, a favorite of the Frankfurter-Harlan-Bickel "passive virtue" school of institutional constraint. Applying that philosophy here, Souter concluded that "this occasion does not demand an answer."

In two capital cases decided last week, *Herrera* v. *Collins* and *Graham* v. *Collins*, Souter dissented from majority rulings that upheld the death penalty, and in *Bray* v. *Alexandria Women's Health Clinic*, he dissented partially, finding that the prevention clause (as distinguished from the "deprivation clause") of Section 1985(3) of the Civil Rights Act could be applied to anti-abortion demonstrators on the ground that they had engaged in a conspiracy which had as its purpose, "preventing or hindering the constituted authorities of Virginia from giving or securing to all persons within Virginia the equal protection of the laws."

And lastly, how many of you noticed the front page picture in the *New York Times* last week which showed Justice Souter holding Justice Brennan's arm at Justice Marshall's funeral? Will it come to be that in the future, Justice Brennan will serve as a model for Justice Souter, close if not equal to the Harlan model?

Consider that last September, Justice Souter said of Justice Brennan at the Harvard Club in Washington, D.C. the following:

> We see greatness when we see Justice Brennan. Justice Brennan has left an enduring legacy as the author of opinions that form our constitutional landscape today. The fact is that the sight and sound and thought of our contemporary world is in good measure a reflection of Justice Brennan's constitutional perception.

Are these words just kind tribute to a retired Justice or is Justice Souter, the successor in interest to the seat occupied by Justice Brennan, telling us something of his embracement of the greatness which he grants to his precursor? Time will tell and for me — hope springs eternal.

But even if my hopes are not entirely fulfilled, we already know that the far right is very unhappy with Justice Souter. The *Wall Street Journal* recently quoted Thomas Jipping, Vice President of the Free Congress Foundation, which coordinated support for Souter's nomination among conservative groups, who bemoaned that Justice Souter has been "horrible in some of the real fundamental areas." Such a disheartened outcry enriches my day — in a Clint Eastwood sort of way.

CONGRAGULATIONS
TO THE 1992-1993 MOOT COURT HONOR SOCIETY INTERMURAL TEAMS

NATIONAL TEAM
REGIONAL FINALISTS
NATIONAL OCTO-FINALISTS
BRIAN FRAWLEY
JENNIFER NAIBURG
PHOEBE WILKINSON
REGIONAL BEST ORALIST:
JENNIFER NAIBURG

F. LEE BAILEY
RECORD: 3 WINS - 1 LOSS
KARIN ENDY
JASON LESKO
DAVID OLARSCH
coaches:
MARCY NORWOOD & MIKE UYSAL
PRELIMINARY ROUND BEST ORALIST:
DAVID OLARSCH

INTERNATIONAL LAW
REGIONAL CHAMPIONS
BEST BRIEF
INTERNATIONAL FINALS
PATRICIA GAVIRIA
CLAIRE KELLY
JOSH KIERNAN
GEORGE XIXIS
editor: OLIVER ZITZMANN
coach: RENEE REDMAN
FIFTH BEST ORALIST:
CLAIRE KELLY

NATIONAL TRIAL ADVOCACY
REGIONAL FINALISTS
NATIONAL FINALS
IVAN ALTER
NICHELLE JOHNSON
STEPHEN WIDOM
REGIONAL BEST ADVOCATE:
IVAN ALTER
REGIONAL QUARTER-FINALISTS
STEVEN LANE
JONATHAN NELSON
JOAN SCHWARTZ
alternate: TOM SMALL
PRELIMINARY ROUNDS BEST ADVOCATE:
STEVEN LANE
coach MARCY NORWOOD

CONSTITUTIONAL LAW
QUARTER-FINALISTSTHIRD BEST BRIEF
SUSAN FARBER
LEWIS LEIBERMAN
BLAIR TODT
coach: IDETTE GRABOIS

SECURITIES LAW
OCTO-FINALISTS
NATALIE JACOBY
MARK WHITNEY
TODD ZARIN
coach: MIKE BOYAJIAN

PRINCE-EVIDENCE
FINALISTS
FIFTY BEST BRIEF
SCOTT BERSIN
BONNIE SARD
coach: PHOEBE WILKINSON

GOOD LUCK TO THE FOLLOWING TEAMS IN THEIR UPCOMING COMPETITIONS

LABOR LAW
JEANNE ANNARUMMA
MATT FELDMAN
DAVID FRIEDLANDER
coach: STEPHANIE WISSINGER

NASSAU TRIAL
PETE BERNIER
RANDY LEVINE
MARIUS WESSER
coaches: DOMINIQUE BRADY & RICHARD NOLL

FAMILY LAW
JOHN MALLOY
JANINE MANZO
RACHEL SCHWARTZ
coach: HELENE FISHER

PRODUCTS LIABILITY
ANDY JOHNSON
GERI HENLE
TED PAVLOUNIS
coach: LEE TRINK

THE MOOT COURT HONOR SOCIETY WISHES TO EXTEND OUR SINCERE THANKS TO EVERYONE WHO SUPPORTED US THROUGHOUT THE YEAR.

The Military Ban:
Distinguishing Constitutionality and Morality
By Anthony Ranieri-Berger

During the presidential campaign, then-candidate Bill Clinton made a promise to America that one of his first actions as President, if elected, would be to lift the ban on gays and lesbians in the military. Bill Clinton is now the President of the United States, and despite tremendous opposition (particularly by the Joint Chiefs of Staff), he is attempting to keep that promise. As a result there is a tension between the President and his opponents on this issue which is by nature dramatic and, because extreme, virtually tangible.

Should the military be allowed to continue to exclude persons from service on the basis of mere status as a homosexual? When President Clinton answers "no" to this question he speaks with a reasoning which to me is irrefutable. Discrimination on the basis of status which is unrelated to ability should not be condoned. When the Joint Chiefs answer "yes" to this question they speak with "tradition" and "history" on their side, and many of the reasons they cite have a legitimacy that seems unarguable. Who am I to say that a soldier's concern, for example, about being leered at in the shower is not legitimate? This side of the debate seems weaker to me because I view such arguments as misplaced. However, it has a strength in that the "reasons" supporting the ban are based in factual situations. They are concrete, and much easier for the populace to grasp than are the lofty abstract constitutional concepts the President wants to make paramount. The arsenals on both sides are formidable, and the feelings intense.

The debate has caught the public's attention. It seems, in fact, that almost everyone has something to say. What I read and hear—in the papers, on the news, in subway cars, in the Brooklyn Law School cafeteria—embodies, or can be reduced to, a single statement: What do *I* want? In this debate parochialism is at its height.

The what-do-I-want statement comes in many forms. There is the anti-gay military person's version: When I'm in the shower, I don't want some homosexual looking at me "that way." Read: I want gays kept out of the military because I don't want to feel sexually objectified. (Incidentally, this statement is overwhelmingly male-oriented.)

There is the anti-gay religious zealot: I don't want gays in the military (or for that matter in any aspect of life) because (fill in the religion) says it is wrong. Read: I want my view of sexual morality to dominate to the exclusion of all others.

There is the position of many of the Joint Chiefs: We know we have homosexuals in the military; it's ok as long as they stay in the closet. Read: I want the reality of homosexuality covered up.

In order to find out how many Americans are participating in the I-want statement-making frenzy, simply consult the newspapers to read about the numbers of phone calls made to congressional representatives on the issue.

Some of these statements are irrelevant to the debate. For example, the military personnel concern about privacy is one that can be dealt with organizationally once a determination is made to permit homosexuals to enter the military. The two obvious possibilities for handling this concern are educating soldiers and segregation. I do not endorse the latter; the military most likely does not endorse either. Irrespective of one's approach to handling the issue of privacy, however, the issue itself is one which is unrelated to the issue of whether gays should be in the military in the first place.

If there is a right of gays and lesbians to equal treatment in military hiring practices they should be admitted into service. The inconvenience caused the military by having to accommodate privacy concerns once that is done is not merely a small reason for finding there is no such right to equal treatment, it is no reason at all. It has

continued on page 39

never been a rule of constitutional law that the Constitution of the United States bends to ease. Did the Supreme Court in its *Brown* decisions consider, in its reasoning, whether Americans would *like* the result?

Some of these statements must be scrutinized in order to determine whether they are appropriate statements for Americans to be making at all: "I want my view of sexual morality to dominate to the exclusion of all others; I want the reality of homosexuality covered up." While I am not suggesting that the proponents of such ideas have no right to announce them, I resolutely assert that the proponents of such ideas are being irresponsible citizens when they announce such bigotry.

Notions that run counter to that ideology which is the foundation of this country are not "American" notions. The ideology to which I refer is one which promotes equality among classes of citizens, one that does not subject the members of a minority to dominance and oppression by the majority. When a person says something which in essence is: I shall close you out of participation in society on the basis of your status (as homosexual, black, woman, etc.), that person affronts this nation's ideological fabric. More importantly, that person affronts the Constitution.

It was my inclination when I first considered placing my thoughts about the military ban on paper to list the anti-gay atrocities I hear coming out of people's mouths and to counter each and show how unreasonable anti-gay sentiments are. However, I haven't the time to list them all, and no one else has the time to read them. Besides, so many gay-oppressive statements are so subtle that even I as a gay person am not necessarily sensitive enough to detect them. How then could I refute them? Physical limitations prevent me, however, physical limitations are only one reason for not joining the dialogue at this level. A much more meaningful reason is that this level of discourse is petty and unhelpful. It rings in my head when I play it out, sounding like the "Did not—Did, too" arguments of children. Discourse at this level would be useless and irresponsible.

Why would participating in prejudice-focused arguments be useless? Moritz Goldstein, in a German work called *Deutsch-judischer Parnass* which is quoted in translation in John Boswell's *Christianity, Social Tolerance and Homosexuality*, wrote, "We can easily reduce our detractors to absurdity and show them their hostility is groundless. But what does this prove? That their hatred is *real*. When every slander has been rebutted, every misconception cleared up, every false opinion about us overcome, intolerance itself will remain finally irrefutable."

I believe Mr. Goldstein; whatever argument I make against the continued deprivation of constitutional rights gays and lesbians endure is based ultimately on my belief that no moral value attaches to homosexuality. Whatever argument a person might make to the contrary is based ultimately on that person's belief that a strong negative moral value attaches to homosexuality—that it is "wrong." This debate is unresolvable. The right/wrong beliefs are too basic. Their proponents are likely to see those beliefs as self-evident truths; their minds are not to be changed. The effect of this argument is very simply that each side lets off steam.

When I say that it would be irresponsible of me to participate in the petty dialogues that relate to the morality of homosexuality, what I mean is that it is my duty to participate, not in the personal debate, but in the constitutional debate. I do not believe that the debate between those who believe homosexuality is wrong and those who believe it is not shall ever be resolved. I do not care to resolve it. People can believe what they will. I do believe, however, that it is a terrible transgression of principle to view that debate as though it were the debate over the constitutional issue of whether the Constitution's guarantees of privacy and equal protection apply to gays and lesbians. They are not the same debate, and they must be kept separate.

The best example of the confusion of these two debates is recorded in the United States Supreme Court decision in *Bowers* v. *Hardwick*, 478 U.S. 186 (5-4 decision), *reh'g denied*, 478 U.S. 1039 (1986). In that case Hardwick brought to the Supreme Court an issue that was wholly constitutional. That issue was whether the Constitution affords (all) persons a sphere of privacy, regarding in-home, adult, consensual sexual behavior, into

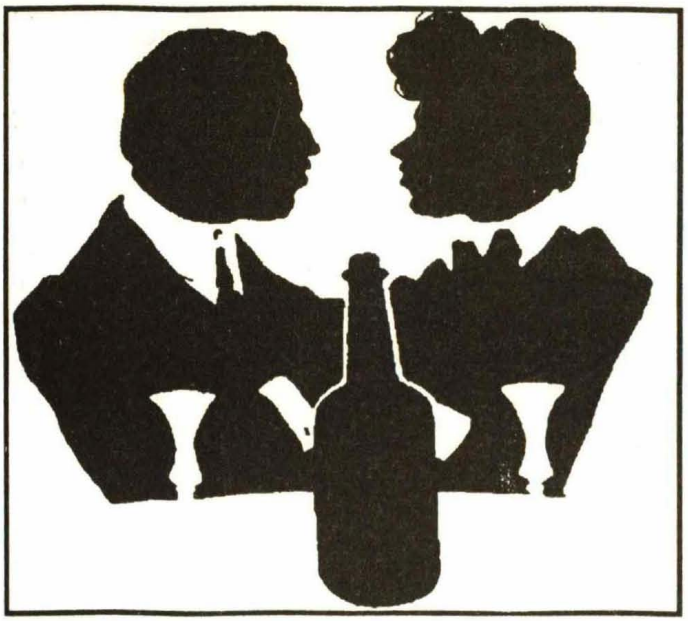
which the State cannot intrude. The issue that the Supreme Court chose to decide was whether "the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." *Id.* at 190. By reasoning that homosexual sodomy had traditionally been considered immoral, the majority of five concluded that the Constitution did not afford gays (men, apparently) a right to engage in that act. Thus, the Court implicitly decided against Hardwick's contention that a sphere of privacy exists into which the State may not inquire by entering that sphere in order to opine explicitly that what was going on there was wrong. By virtue of its reasoning, the Court begged the constitutional question brought to it by *Hardwick* and caused that issue to devolve into the issue of whether homosexuality was moral.

The *Hardwick* opinion is disheartening to anyone who is a guardian of the civil rights afforded us by our Constitution. To me the opinion is woeful. It is an example of how wise justices, whom the nation views as the exemplars of sagacity, can be unwise. Today the opinion is frightening to me, and this not because of the opinion's ramifications, but because of its herald-like qualities. That decision, attesting the fall of wise justices from wisdom, foretells the same disgrace occurring on a national level. Moralists are confusing the moral issue with the Constitutional one, and the populace is being suckered, literally suckered, into believing that the moral issue and the Constitutional issue are the same.

Conflating the issues this way destroys the integrity of our constitutional values. Unless those in power and those who otherwise make their voices heard strive to take a discerning approach to understanding the real issue, this nation is in danger of suffering a constitutional event which can only be called catastrophic.

What do I think is the responsible approach to take to this issue—for Americans, Supreme Court Justices, the President, ordinary citizens, and law students? I think the responsible approach is to focus on the Constitutional issue: Does the Constitution condone discrimination on the basis of status? This question has been answered over and over again in the negative with respect to women, racial minorities, and other classes of citizens. I believe that it is right and just, and true to our national ideals, to shift the focus of the debate away from the moral issue and toward the constitutional issue. If the focus is so shifted, I believe that the vast majority of people who do not condone homosexuality would nevertheless have to concede that gays and lesbians are afforded the same constitutional protections as everyone else and that to deprive them of constitutional protections, *that are theirs as much as anyone else's*, is a crime against our national ideals.

I urge all of the students of this school, both those who are sympathetic to the plight of gay and lesbian Americans and those who are not, to see what values really are at stake in this debate. For those "liberal" persons among you who want to effectuate the civil rights of gays and lesbians, please do not waste your time arguing with others that homosexuality is not immoral. It isn't necessary, it doesn't help, and it avoids the real legal issue. For those of you who are disgusted by homosexuality, or are otherwise not "gay-friendly," please take the time to be thoughtful about this issue instead of following the convenient path of reactionism. If you fail to give yourself the opportunity to form an opinion on the constitutional issue (unadulterated by the moral one), you are neglecting your obligation to assess whether the behavior of the American collective is fueled by prejudices which the Constitution does not sanction. The issue is not one of morality, it is one of American treatment of American citizens.



WINE, WOMEN AND SONG

by Joseph Bondy

Welcome to the latest episode in Brooklyn Law School's premier entertainment column, Wine, Women & Song. This month I would like to do a couple of different things. First, I will start off by upgrading/downgrading previously reviewed restaurants. Second, I will present an updated inexpensive wine list. Finally, I will review yet another hidden gem of a restaurant nestled in our neighborhood.

Cafe Buon Gusto on Montague Street, between Clinton & Henry, has now become bland, useless, and utterly lame. I consistently find myself forced to order the same boring pasta dish and same salad for lack of anything else interesting to eat on the menu. The cappucino continues to be small and the froth weak. The service has declined and the wine list is still miserable.

On the other hand, Acadia Parish on Atlantic Avenue, just off of Clinton, has become the happening place to eat Cajun food in New York. Although you heard it first from the taste wizard, Acadia Parish just received a long overdue review in the *New York Times*. Currently, I would recommend as entrees all of the fish, grilled or blackened, chicken cutlet "Orleans style" (served in a crawfish cream sauce), and grilled or blackened ribeye steak. If possible, have these entrees served up with sweet potatoes and dirty rice. For appetizers, start with chicken tenders, fried calamari, and the excellent crab cakes. For dessert, the coconut custard pie and pecan pie are very tasty, and don't forget the Cajun coffee.

As far as good and inexpensive wines go, I am partial to reds. I recommend that people looking for bargains in the Bordeaux department focus on wines from vintages which have been maligned by the critics, but which often turn out to be great bargains. Among these are the years 1984 and 1987. Look specifically for Chateau Gloria 1987, $9.99 and Chateau Meyney 1987, $11.99. As far as other inexpensive reds, Spain has some very nice Riojas which tend to be light and fruity. Among these lively Riojas, I recommend the Marques de Riscal Rioja, Reserva 1987, $8.99. And don't forget the charming Chiantis. Try a Gabiano Chianti Classico at about $8.00. I personally enjoy Ruffino Reserva Ducale Chiantis from early years. However, recent ones are also very yummy, possessing firm structure, lively fruit, and no mouth wrenching tannins. Out of Australia, some pretty good wines have also emerged. Check out Penfold's Koonuga Hill cabernet and shiraz grape blend 1990, which is a round full-bodied wine at the modest price of $7.00.

And now to seal the fate on yet another restaurant on Montague Street. That infernal establishment inhabited by wanna be metropole waiters... Slades. I have to say that my dislike of Slades has grown over time. It started out as just a fair spot with good calamari and delivery service until 12:30 in the morning, but grew into a festering parlor of primal annoyance. Your experience at Slades begins by entering the sunset bisque toned dining room which cries out to emulate a restaurant

of a far higher standard, (of course, that's so they can charge you more, but we're all astute here so we're not fooled). The candle lit aura is very romantic, which is good because with the slow service you are likely to be left alone for a long time. Just in case you are on a first date and you run out of things to talk about, you can always count on Slades to have their 76 inch TV blaring in your ear. If you like a social environment, for example, eating in a restaurant with at least one other diner, then don't go to Slades. To be fair, I think I should tell you at least a little bit about the food. I like the mashed potatoes. I also like the lime breast of chicken. Unfortunately, these are not worth $12.95. The aged black angus steak is also pretty good, but very overpriced at $24.95 for the large size. The pasta dishes are to be avoided at all costs as they are generally almost inedible. Desserts are equally banal. So visualize yourself at Slades, sitting alone, unattended, forced to listen to someone else's movie on an intrusive screen, served by snotty, condescending waiters, who ultimately slip you a check that's far higher than it should be. My advice, don't do it.

On the yum-yum tip, the Moroccan Star on the corner of Court Street and Atlantic Avenue, is a safe haven for hungry travellers. The chef, Ahmed Almontaser, has cooked at such esteemed places as Luchow's, the Four Seasons, and La Brasserie. I'm not sure what he is doing in Brooklyn, but it's alright with me. The Moroccan Star serves up an array of food which is a hybrid of Middle-Eastern and French cuisines. The prices are extremely reasonable and one has the added benefit of bringing *her* own wine or alcohol. I'd recommend hoummus and glabah (lamb meat), chicken or seafood crepes, and all of the chicken dishes which are surprisingly good. For dessert, you can have a rasberry crepe with whipped cream. The Moroccan coffee is the strongest coffee I have ever had and is not recommended for pregnant women, people with heart conditions, and those beneath 48 inches in height. The last time I ate at the Moroccan Star, dinner for two, including appetizers, entrees, dessert and coffee, cost $34.00.

There you have it. Those of you who are sick of me have something to talk about for a little while. Those of you who do take my advice have a few places to visit this month. Regardless, I'll be back next time to share the results of my spring tasting bonanza. Good luck eaters.

THE PLACEMENT & CAREER SERVICES OFFICE CORNER

"OPEN HOURS"

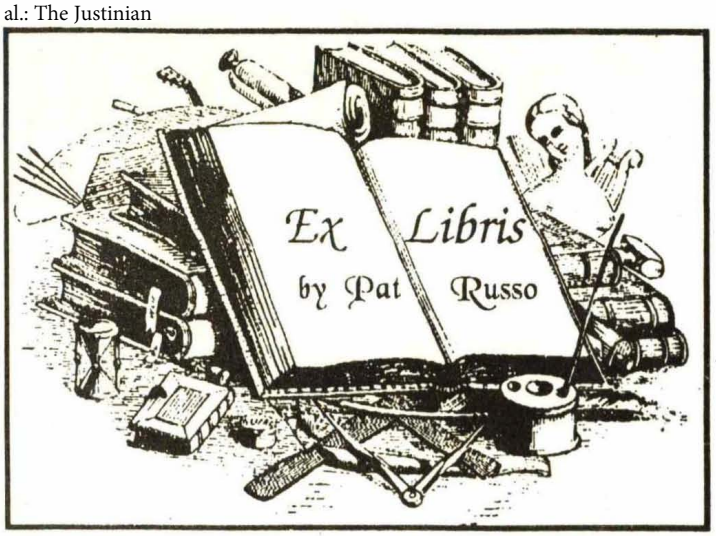
We are setting aside time for "walk-ins", when a member of the professional staff will be available to meet with you <u>without an appointment</u> for a brief counseling session. This is ideal for all of your quick questions and for advice which does not require a full counseling session. The open hour appointments will last approximately 10 minutes, or longer if no other students are waiting. If you need additional time, you can schedule a regular appointment as a follow-up.

The schedule of open hours is:

Mondays	9:00 a.m. - 10:00 a.m. and 4:00 p.m. - 5:00 p.m.
Tuesdays	10:00 a.m. - 11:00 a.m.
Wednesdays	1:00 p.m. - 2:00 p.m. and 4:00 p.m. - 5:00 p.m.
Thursdays	9:00 a.m. - 10:00 a.m.
Fridays	1:00 p.m. - 2:00 p.m.

<u>PATHFINDER</u>

<u>Pathfinder</u> is the monthly newsletter of the Placement & Career Services Office. Copies are available each month in the Student Lounge, the Cafeteria, the Placement Office, and in a box in front of the elevators in the lobby of 250 Joralemon Street. If you aren't reading <u>Pathfinder</u>, you are missing out on important job and career information. It's never too late! Start now with the February issue, copies of which are still available. It is full of important dates.



THE PELICAN BRIEF
by John Grisham
371 pp. New York:
Island/Dell
$6.99 (hardcover price is now heavily discounted)

Perhaps no other novelist has developed such a large readership in the last few years greater than that of John Grisham. Indeed, booksellers are unsurprised that his latest work, *The Client* (Doubleday) (to be reviewed next month) will make its first appearance on the New York Times best-seller list on March 21st at the No. 1 slot. Even more amazing is the fact that the Island/Dell mass market editions (softcovers) of his three other books now number more than seventeen million in print. These three titles-all legal thrillers-are among the top five of the paperback best-seller list: *A Time to Kill* at No. 4, *The Firm* at No. 2 and *The Pelican Brief* at No. 1.

The Pelican Brief's title refers to a document that leads to a whole lotta trouble for the main character, Darby Shaw. It seems that a very apt assassin has just succeeded in killing two Supreme Court Justices. In the middle of this well-coordinated and somehow connected double murder is Miss Shaw, the No. 2 ranked second-year student at Tulane University Law School who is currently having an affair with her Constitutional Law professor.

As she and her paramour, Professor Thomas Callahan, awaken one lumbering New Orleans morning, they are confronted with a special news bulletin followed by a statement from the President, dressed in a cardigan (Yes, Jimmy Carter did that) on the recommendation of his closets advisor Fletcher Coal, who seems to be quite similar to real-life Press Secretary George Stephanopoulos.

Unlike the less motivated law students who might otherwise be more relaxed in the canceled classes due to the period of mourning announced in conjunction with the assassinations, Darby has taken it upon herself to try and find the connection between the murders. She works in a study carrel in the law school library for hours based on only two assumptions.

First, the person or group responsible committed both murders for the same reason. Second, the varied backgrounds, ages, and judicial philosophies of the two dead justices eliminate hatred or revenge as motives. Instead, there must be the need to have different justices on the Supreme Court because out there in the large heaps of cases piling up in the state and federal courts there was one case that was different. This case would eventually have a strong possibility of being heard by the Court and one side wanted to win and would enhance a victory even with the murders of two of the nine justices considered most adverse.

Obviously, she finds the case-there would not be a book if she missed it. Nonetheless, the brief she writes-the pelican brief-starts an unbelievable chain of events as it hits all the wrong nerves and even makes it to the Oval Office. Her brief makes her a target of the "bad guys" as well as being highly sought by the F.B.I. Thus, all sides are quickly converging on Darby Shaw-leading to mysterious and deadly consequences.

Mr. Grisham's interlocking of fiction and legal issues makes for a truly captivating presentation, particularly for law students. But this is not writing directed to the lawyer. As Esther B. Fein pointed out in her *Book Notes* column: "Mr. Grisham's rare quadruple concurrent appearance in the top five of [the best-seller] puts him in the stratosphere of best-sellerdom." With the creation of complicated-yet riveting plots and good writing evident in *The Pelican Brief,* and a lucrative forthcoming film version of *The Film* starring Tom Cruise is it any wonder why John Grisham is high in the clouds.

Author's Note: I am sorry to disappoint those who would want me to divulge the nature of the brief or the identity of the "bad guy," but I always hated the endings being spoiled for me. A Hint: the butler did not do it.

An Entertainment Guide

By David Frey

Since my last article, many people have complained that the equation in that article to determine the intelligence of a Staten Island or Long Island woman was:

(1) *A stupid thing to put in my article.* All I can say is, "Duh! " Have you read this article? Not exactly Pulitzer material. (Find an intelligent statement - I dare you);

(2) *Anti-Italian and anti-Jewish.* Get a grip, please. I said Staten Island or Long Island women - despite any ego problems, there are many females on these islands with hair who are neither Italian nor Jewish.

(3) *Didn't make any sense.* Due to an editorial error, the equation was mangled. The correct equation to determine the intelligence of a Staten Island or Long Island woman is as follows: I.Q. = 130 x (1 ÷ ((1 + height of hair in inches) x (1 + amount of hair spray used in ounces))). As printed, the equation actually vaulted the intelligence of those who are hair challenged. I apologize to anyone who panicked due to a sudden increase in I.Q. points.

(4) *Sexist.* The equation was in response to a comment a woman said to her husband at a movie. The correct equation to determine a man's I.Q. is obvious: 100 + (average number of channels flipped to during ten minutes of watching the news).

However, if I overtly offended anyone, I apologize. I'll try to be more sensitive next time.[1]

Movies

Sniper

If action-adventure movies are finely-tuned stock cars in the Indianapolis 500, *Sniper* is a Yugo with a blown cylinder. *Sniper* is a warm-hearted story about a Scout leader who sends his troop out on a snipe hunt.

No - I'm lying - a snipe hunt would've been more entertaining. *Sniper* was really about a semi-psychotic Marine and an Olympic shooting medalist who have to kill some really bad people for our government. These really bad people turn out to be South American drug lords and/or generals about to create a dictatorship, I think. It doesn't really matter - continuity was obviously not a real concern. In the penultimate final scene, the Olympic shooting medalist uses one bullet to kill an evil sniper and his partner, the semi-psychotic Marine (Tom Berenger, who I suspect ad libbed his death, hoping to bail out of this movie). He then carries his dead partner, who he shot through the head, out of the hacienda of the really naughty South American drug lord and/or general. In the *next* final scene, however, Tom Berenger is standing next to the Olympic shooting medalist (who is now a semi-psychotic killer also), running for a friendly helicopter which somehow knows where they are, even though they had previously missed a rendezvous, and do not have any communication equipment on them. Luckily the helicopter pilot must have read the script and knew where they were going to haphazardly run while being chased by 10 gun toting evil South American-type extras.

If you decide to see this movie, I've warned you. If you watch the closing credits, you will notice that this movie had a "Post Prodiction [sic] Supervisor." Too bad he wasn't a post prediction supervisor, because then they wouldn't have made this movie, and I would've gone to see *Sommersby* with my wife instead. She tells me that *Sommersby* was a good movie, if you ignore Richard Gere's accent.

Sniper gets a C-, although it did have some good special effects.

Sommersby (or *An Officer and A Gentle-Impersonator*) gets no rating, since I didn't see it. However, Traci™ did like it, even though Richard Gere managed to keep his clothes on the whole time.

Groundhog Day

This movie asks the burning question, "How many times would a man attempt suicide if he had to live the same day over and over, trapped in Punxsatawney, PA?" Bill Murray, Andie MacDowell and Chris Elliott star in this movie written and directed by Harold Ramis. The premise is funny, and Bill Murray is funnier than he has been in a long time. I really enjoyed this movie, but some people felt it lasted too long. Well, que sera sera sera sera sera. B+.

The Crying Game

In writing a review for this movie, one must debate whether or not to give away the surprise ending. I've decided not to do so overtly. I will give you a hint - it's the first time I noticed a credit for prosthetics in a movie, although it is apparently not all that uncommon. Enough said on that subject.

The Crying Game is really a guys movie. Why? Because women figure out the movie almost instantly, while men don't, so it's more entertaining for the less intelligent gender. I would suggest that if there are any men who haven't seen this movie yet, you go see it with other guys - you'll appreciate it more. My wife, who will admit that she is an autistic movie savant, managed to ruin this movie at the earliest point possible.

I give this movie an A-, but an A+ for plot twist of the year. If this movie doesn't get at least the best supporting actor Oscar award, I'll be *very* surprised.

Video

Beguiled - 1970 movie starring a handsome Clint Eastwood as an injured Yankee soldier nursed back to health at an all-girls school in the South. My description is better than the movie, which has one of the worst endings ever. C-.

Freejack - Running Man without Arnold. Stars Emilio Estevez, Mick Jagger & Anthony Hopkins. B-.

Encino Man - Get some grindage and chill with your favorite Betty-nug for this buff vi-i-deo, buddy. And remember - no weasing the juice. B+.

Buffy the Vampire Slayer - a lot better than the title. B.

Cutting Edge - Hockey, ice skating and choreography by Robin Cousins - what more do you want? Stars D.B. Sweeney and Moira Kelly. B+.

Harvey - stars Jimmy Stewart and Harvey the Invisible Rabbit. If you've never seen this movie, what are you waiting for? A+++.

Housesitter - He's Steve Martin. She's Goldie Hawn. They're up to wacky hijinks. B.

King of Comedy - For those who hate the French, this movie stars Robert DeNiro as Rupert Pupkin. A solid A.

Meet John Doe - starring Gary Cooper and Barbara Stanwyck (who looked a lot like Shannen Doherty in those days), this movie is as timely as ever. The perfect allegory to end the Reagan/Bush years. A+.

The Philadelphia Story - starring Jimmy Stewart, Cary Grant and Katherine Hepburn. The first (and only) soap opera with good acting (Jimmy Stewart won the Academy Award for Best Actor for his role in this movie) and a plot. A-.

West Side Story - classic movie about a band of youths whose only outlet for their frustration is through vicious acts of singing and dancing. I'm sure the gangs in L.A. would be terrified by Russell Tamblyn's manic gymnastics. A-.

The Last Temptation of Christ - I'm no longer surprised that this was in the "bargain" rental rack. The born-again Christians who boycotted this movie really gave this movie more publicity than it could've otherwise gotten. Even a writhing, naked Barbara Hershey couldn't get this movie a rating above C-.

The Prince of Tides - An excellent movie which shows that Southerners are equally as screwed up as anyone who is brought up in Manhattan. A.

Jungle Fever - although the ending is a bit weak, this is a very solid movie by Spike Lee. Even if you're a rascist you're sure to enjoy at least half this movie, so what can you lose?

Miscellaneous

New York Philharmonic - Tuesday Evening Series

Since I just can't get enough entertainment in my life, I decided to attend a concert on Tuesday, January 12, 1993 at 7:30 p.m. - right in the middle of finals week, and about 2 hours after my Environmental Law exam. And why? Why would I do this when I still had another final coming up in two days? In order to provide you, my readers, with something to read during lectures.

The first piece played was Mozart's Symphony No. 23, D major, K.181 (in case you want to pick up a copy of the conductor's score). I had not heard this piece before, but the program assured me that Mozart wrote it in 1773, after he had so impressed the citizens of Italy that they never invited him back again. The piece was lively and pleasant, played by the scaled down orchestra that is usually used with Mozart and Beethoven pieces. (In fact one of the interesting things about Mozart and Beethoven symphonies is that, if you are seeing them performed live for the first time, you are struck by the relatively small size of the orchestra). The next piece was Haydn's Concerto for Cello and Orchestra, D major. The guest cellist was Yo-Yo Ma (you might have seen him recently on Mr. Rogers or with Bobby McFerrin). Although the piece is a bit long, Mr. Ma's technique and feeling is quite impressive.

The final piece before the intermission was Morawetz's "Memorial to Martin Luther King" for Solo Cello, Winds, Percussion and Piano. When I subscribed to this series, this was the only piece that worried me. I knew by its title that it was obviously written in the last 25 years. My general rule is that any music written by a Slavic in the 20th Century is trouble. Case in point - Stravinsky. But, I digress. The program claimed that the piece was only 20 minutes long, so what did I have to lose, right? Wrong. This "music" was the orchestral version of an enema. It lasted too long and left you feeling sickly. It was mainly a cacophony of noise, amd I was constantly worried that poor Mr. Ma was always on the verge of sawing his Stradavarius cello in half with the bow.

After the audience was allowed to recover from this composition, the full orchestra returned to the stage and finished up the night with Dvorak's Symphony No. 8, G major, Op. 88. Dvorak's music is very festive, conjuring up images of folk dances. I quite enjoyed this piece. On the other hand, after the Morawetz travesty the sound of cats fighting would have been welcomed.

The night gets a B. If the New York Philharmonic promises never to play Morawetz again, I'll bump it up to a B+.

[1] Actually, let's face reality - I probably won't.

Jennifer "The Vampire" Naiburg says:

"Mark APRIL 26, 1993 on your calendars !!

to contribute your time and blood at the

1993 SBA BLOOD DRIVE

to be held in the Third Floor Student Lounge."

(Any individual wishing to help please contact Jenn in the SBA Office)

SBA WANTS YOU TO RUN FOR OFFICE

SBA EXECUTIVE BOARD ELECTIONS

Nomination Period: March 17, 1993 through April 2, 1993, 5:00 p.m.
Election Dates: April 14, 1993 through April 15, 1993
Election Hours: 10am-2pm & 3pm-9pm
Run-Off Date: April 21, 1993
Positions Available:
President, Day - VP, Eve/PT - VP, Treasurer, Secretary, ABA - Rep, NYS Bar Rep

SBA DELEGATE COUNCIL ELECTIONS

Nomination Period: March 17, 1993 through April 16, 1993, 5:00 p.m.
Election Dates: April 28, 1993 through April 29, 1993
Election Hours: 10am-2pm & 3pm-9pm
Positions Available:
Class of 1994: 6 Day Delegates, 2 Eve / PT Delegates
Class of 1995: 6 Day Delegates, 2 Eve / PT Delegates
Class of 1996: 2 Eve / PT Delegates

ELECTION DAY RULES & PROCEDURE

1 - Only BLS Students with current school ID will be permitted to vote after initialing their names on current BLS enrollment rolls. 2 - The polling place and locked ballot box will be located in either the lobby or the cafeteria of 250 Joralemon Street and will be staffed by members of the Election Committee. 3 - No member of the Election Committee may be a candidate. 4 - Each executive board candidate is permitted one poll watcher present to observe the tabulation of the ballots.

RULES CONCERNING ELECTIONEERING AND POSTERS

1 - No electioneering will be done within 50 feet of the polling place. This rule is not meant to prohibit a candidate from (a) casting her/his own ballot, or (b) going to or from class, the library, the cafeteria, lockers. 2 - Posters may go up only after a self-nomination is submitted to the Election Committee. Posters hung before a self-nomination is submitted are subject to removal. 3 - Posters may not be hung on the doors leading in or out of the stairwells, classrooms, or bathrooms or within the bathrooms themselves. 4 - Unauthorized removal or tampering with posters will subject the violator to the Election Committee disciplinary process.