

# The Justinian

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## The Justinian

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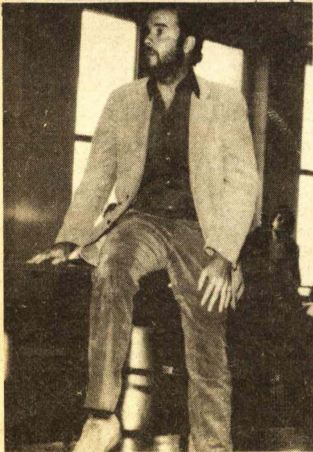


"... The business of a law school is not sufficiently described when you merely say that it is to teach law or to make lawyers. It is to teach law in the grand manner and to make great lawyers."

—Oliver Wendell Holmes, Jr.

## FACULTY HEARS KENNEDY'S PROPOSALS

by Nina L. Sturgeon



Duncan Kennedy

On Tuesday, September 27, BLS presented Duncan Kennedy as the first of four lectures in its Distinguished Visiting Scholar Program, which focuses on the topic of curriculum reform. Professor Kennedy is a graduate of Yale Law School, a co-founder of the Conference of Critical Legal Studies, and a present member of the Harvard Law School faculty. He has also clerked for Supreme Court Justice Potter Stewart, has worked in legal services, and is the author of numerous law review articles. His most recent report, *Utopian Proposal, or, Law School as a Counterhegemonic Enclave*, accuses law schools of perpetuating hierarchies which mirror those in the legal profession, and argues for change. The paper proposes a new model curriculum.

The NMC has four components: The Basic Doctrine Course, the Clinical Program, the Interdisciplinary Course and the Third Year Program. The basic notion is that the teaching resources freed by the adoption of programmed instruction with videotaped lectures would be thrown into four activities: facilitation of doctrinal learning, tutorial, clinical, and interdisciplinary teaching. The displacement of teaching time from the current conventional courses in doctrine and "legal analysis" would revolutionize the content as well as the form of what is taught in law school.

Prof. Kennedy began by acknowledging that although his proposal was originally geared to the Harvard Law School environ-

ment, he felt that the basic ideas underlying it were applicable to BLS.

His first recommendation is to enlarge the clinical experience of all law students while still in law school. He suggests instigating a massive in-house clinic that would be analogous to the type of large teaching hospital usually associated with a medical school. The proposed clinic would offer the classical legal services, plus simulations of many types of legal hearings, i.e. those involving prisoner-discipline, welfare cases, and basic family law problems such as spouse and child abuse. The point of this clinical experience would be to integrate doctrines taught in law school with real-life, day-to-day legal problems, thereby increasing both the competence and autonomy of individual students.

The second prong of Professor Kennedy's program is to keep black letter law and legal reasoning as totally separate subjects of discussion in all classes. Kennedy feels that students are greatly confused by hearing hard and fast rules presented simultaneously with traditional legal explanations. He proposes making sharp distinctions between the clinical, the doctrinal (rule-memorization), and the "legal reasoning" aspects of legal education. Kennedy asserted that this was necessary in order to permit students "to know what they are learning." He also claimed that as a result students would be better trained to do "lawyer's work".

After outlining his proposal, Professor Kennedy entertained questions from the faculty. When asked for specifics about the interdisciplinary component of the NMC, Kennedy stressed that every interdisciplinary course would be team-taught, thereby exposing students to both extremes of each issue.

As he stated in his report, "The material to be taught here cannot be coherently conceived as 'value neutral', or 'apolitical'. We would have to teach in each segment in terms of doctrines and counter-doctrines, large syntheses and critiques, with the left-right political dimensions always close to the surface." He further stated that "the problem is to get all the dogmatists in the same room together so that the students can evaluate what's really going on." Kennedy is suggesting a compulsory two year curriculum with a totally "free-choice" third year.

Professor Kennedy also strongly suggests that professors both welcome and encour-

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## LAWYERS COMMITTEE ON NUCLEAR POLICY MEETS

By Philip Rheinstein

Nuclear War has been called immoral, insensitive, insane, and dangerous. A group called "The Lawyer's Committee on Nuclear Policy" and Representative Ted Weiss (Dem. from N.Y.), are fighting to add a new word to the list: illegal.

The group contends that the "first strike" capabilities of the MX missile violate at least six principles of international law governing war. These principles are to avoid cruel and unnecessary suffering; make distinctions between combatant and non-combatant; give aid to wounded civilians; not commit genocide; not use bacteriological weapons; and not violate territory of neutral nations. All of these would be violated by the unimaginable scope of a nuclear war.

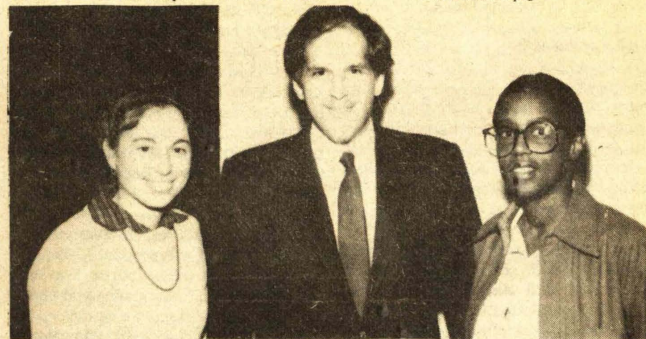
The committee also says that the first strike concept violates Art. 1, Sec. 8, Clause 11 of the Constitution which grants the power "To declare War..." to the Congress and not to the President, who alone can order a first strike. The recent events in Lebanon show President Reagan's desire to circumvent this restriction, which is spelled out in the War Powers Resolution, even in conventional war. Rep. Weiss said that Constitutional protection against arbitrary use of the nation's weapons has been all but

"reduced to non-existence" in the nuclear age. A lawyer need only imagine developing a compensation scheme for injuries based on 'wrongfully initiated war' to see that the only recourse in the law is through prevention. Arms control legislation, Weiss said, is in "bad straits for at least six months" as a result of the Korean plane incident.

On the positive side, Weiss stated the need for a legislator to be an "optimist." He said the dialogue about nuclear arms has "seriously begun," though it is far behind where it should be. Weiss faces an enormous and frustrating political issue, with little help or progress, but does not get discouraged. The members of the committee also derive satisfaction from the work they do. Weiss stressed the need for lawyers to use their "prestige for a good and positive purpose," and said, "If you're not involved politically, you ought to be."

Historically treaties have been observed only until broken, therefore the committee's strongest argument is the internal, constitutional one. Rep. Weiss said we have "no civil liberties" regarding the government's power to make war. Movies such as "Dr. Strangelove" or "Wargames" have bemoaned our total lack of control over man's most powerful weapon. The Army's traditional role of maintaining peace

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Carol Lynn Esposito, Faculty Advisor Prof. Pell and Carol Edmead

## BENTON TEAM SUBMITS BRIEF

By Michael S. Schreiber

Brooklyn Law School's Benton Moot Court Team submitted their brief for the Benton National Moot Court Competition on Tuesday, Sept. 27.

The competition, which focuses on information law, privacy, and communications regulations, is sponsored by the John Marshall School of Law of Chicago, Illinois. It is funded by a grant from the Washington, D.C. based Benton Foundation and named in honor of William Benton, the former U.S. Senator from Connecticut.

The BLS team consists of Carol Edmead, '85 and Carol Lynn Esposito, '85. Both Edmead and Esposito were chosen in early July and began preparing their brief soon after.

The case involved in this year's competition revolves around a computer which erroneously sent detailed financial informa-

tion to a government agency. This error resulted in loss of profits and emotional distress to the team's "client."

Issues in the team's brief include the duty to protect confidentiality of financial information, which is not recognized in the mythical state of "Marshall," and *res ipsa loquitur*. One of the more interesting aspects of the brief involves strict liability for computer operation. This requires the argument, unsupported by precedent, that a computer is a dangerous instrument.

Both Edmead and Esposito concede there is not yet support in the law for this position. Esposito said the entire argument is made on public policy grounds and by analogy to other machines.

The team's next step is to prepare for oral arguments which will be held in Chicago in late October. The first prize for the winning team is a \$2000 cash scholarship and a trophy for the law school it represents.





# Justinian

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## EDITORIALS

### A NEW SBA CONSTITUTION REQUIRES A NEW APPROACH

The Constitution Committee "has to get under way. It's not just specific things; the whole Constitution has to be looked at." That's how Student Bar Association President Mary Malet summed up the need for a new SBA Constitution. With this position we wholeheartedly agree. Regardless of the ultimate specifics of a new constitution, the present one is inappropriate for a community of erstwhile lawyers. The SBA Constitution lacks flexibility, its amending process is unnecessarily cumbersome, and most shaming of all, it is not written in proper English.

The *Justinian* is not the first to make these criticisms, nor is it alone in making them. Steve Richman, the Chair of last year's Constitution Committee, said the SBA Constitution was more appropriate for a third grade club. Criticism has also come from former SBA President Bobby Steinberg and current SBA Secretary Lisa Heide Gordon.

More important than the need for a new constitution is the need for openness in the drafting process. One reason last year's Committee failed to produce a new constitution is the secrecy with which Richman cloaked the procedure. That secrecy prevented reasoned discourse and input from the student body, the SBA and other committee members.

It is possible that Richman completed his draft near the end of last semester. No one knows because he withheld that draft from the final SBA meeting of last spring. He has left behind neither copies nor notes. This year's committee will need to begin anew a task which has been ignored and mismanaged for too long.

We do not intend to suggest that the blame for the failures of last year's Committee rests entirely with Richman, or that his ideas were without merit. The new SBA Constitution will need to properly define the powers of the Executive Board and the House of Delegates. It will need to provide a mechanism by which the SBA may efficiently fulfill its summer responsibilities. These suggestions are as welcome this year as they were last year. The failure of last year's Committee rests in the inability of its members to overcome the secrecy in which the Chair cloaked "his" project.

All BLS students will benefit from a new SBA Constitution, particularly if it helps create a unified body to confront the administration. This will only happen if a new committee is formed with the principles of honesty and openness in government at the head of its list.

## LETTERS

Dear Ron,

Just as I love the word, "lawberry", so did I love your "lawmerick" (*The Virtue of Selfishness or Some Are More Equal Than Others*, *Justinian*, Sept. 13, 1983). But Ron, you got no rhythm! Don't you think it would be better if it went like this?

u = unstressed; / = stressed  
u / u u / u u /  
There once was an office real swank  
u / u u / u /  
But now there is only a blank  
u / u /  
A desk and a chair  
u / u u /  
Are no longer there  
u u / u u / u u /  
Requisitioned by someone named Hank.

According to Funk & Wagnall's Standard College Dictionary, a limerick is a humorous verse of five anapestic lines, of which the first, second and fifth have three accents and rhyme with each other, and the third and fourth have two accents and rhyme with each other. From the line, "Will you come up to Limerick, Ireland?", sung after recitation of witty verse.

Here's an old and classic limerick that you can use as a rhythm guide in the future. There once was a sailor named Bates who danced the fandango on skates He fell on his cutlass which rendered him nutless and perfectly useless on dates.

K. McSweeney

To the Collective,

There is evidence that several of the professors at Brooklyn Law do not grade exams, or do it haphazardly. Time after time students have bemoaned the fact that although they have studied diligently, participated in class and returned what they thought was a good exam, they fared poorly. On the other hand, some students have confessed that they did not study carefully, were usually unprepared for class, returned a shoddy exam but, nevertheless, received one of the highest grades in the class!

Some of the evidence underlying the belief that exams are not graded is quite damning. One professor actually declared that he graded only the short answers and, since there was no class participation, the entire semester's grade was based on twenty true and false answers! Another member of the faculty was approached by a student concerning her grade exactly two months after the exam had been administered. He asserted that he "had not had a chance to grade" his four credit course. Two days later "super-prof" had graded and posted over one hundred exams which consisted of four essays! There are other examples of this unethical behavior but they are too numerous to cite. It is vital that the professors who have shirked their responsibilities recognize their duties and fulfill their obligations. Our futures often hinge on a few points which, although deserved, were lost because of the laziness of a few callous individuals.

Rosemarie Derogatis

To the Collective:

I wonder why the SBA was not consulted before the recent firings of Dean Lewis Kerman and Marvin Diller. Should that not be a function of its capacity to input into the hiring and maintenance of faculty? This bemoans either a grave lack of backbone on the part of the SBA or a total lack of consideration by the BLS administration toward the students that pay their salaries—probably both.

Sincerely,  
Mark Diamond

### KILLER FOG?

What strange mephitic came blowing out of ventilating ducts on Friday, September 23 at 2:27 PM? The noxious effluvium caused widespread coughing fits in classrooms, as students reeled from an odor reminiscent of model airplane glue while a gritty, black soot covered table-tops, books, and clothing. Some professors, it is reported, seemed oblivious to the foul miasma and, in the best traditions of academia, kept right on lecturing.

The custodial department has not offered

### I'LL HUFF... AND I'LL PUFF...

The wolf, as we all know, got winded huffing and puffing to blow down Piglet's house. U.S. diplomatic reaction to the downing of KAL flight 007 is reminiscent of such bluster.

The banning of Aerflot from U.S. airports is merely a reiteration of a previously articulated and continuing policy which does not, however, prevent transport between the two countries on other airlines. The refusal by the Soviets to accept a diplomatic letter from President Reagan demanding reparations emphasizes the futility of attempting to get jurisdiction over a sovereign nation. A U.N. debate over whether that body should "deplore" the incident rather than "condemn" the country is a paradigm of international nitpicking and timidity. An unusual open press conference in Moscow only reinforced the Soviet position that it shot down a "spy plane" and afforded it journalistic credibility at the same time. The decision by Governors Cuomo and Kean to deny Andrei Gromyko special privileges to land at a metropolitan airport via Aeroflot merely spared the Soviet Union the discomfort of having its foreign minister face tough questioning at the opening of the 38th Session of the United Nations.

Almost lost amidst this complex picture of International machinations came news from Brooklyn last week that 25 longshoremen assigned to unload vodka from a Russian freighter refused to do so. The ship sailed off still laden with its undelivered cargo. "If it meant your livelihood," a television interviewer asked, "would you then unload the ship?" The longshoremen's reply, stripped of diplomatic prudence, was passionate and confident: "No way! It coulda been my mother or your mother on that plane just going on a vacation."

This small protest in Brooklyn might very well have served to "punish" the Soviet Union at least as effectively as (if not more than) any single diplomatic measure. Similar action was taken by this nation's dockworkers when the USSR invaded Afghanistan. Admittedly, it didn't cause a retreat of Russian troops from Kabul; nor will this boycott likely force Russian apologies or reparations. Yet such grass-roots actions do serve a purpose: they allow us to purge our emotions, to feel that until we discover effective means of enforcement against violations of the laws of humanity, we can register our contempt more personally.

Sending vodka back to Piglet's house is certainly less frustrating than trying to blow it down with bombast.

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# THE WAR POWERS ACT

## EL SALVADOR

## LEBANON

By Arnold Glassman and  
Philip Russell

The United States Constitution explicitly reserves to Congress the power to declare war. The War Powers Act [50 U.S.C. § 1543 et seq.] codifies this mandate by requiring the President, *inter alia*, to report to Congress any time U.S. military personnel are projected into foreign hostilities. It further requires Congressional approval of such participation within 60 days after such report has been made.

Almost two years ago, President Reagan sent 56 military advisors to El Salvador, to assist the junta, then in power, to defend itself from guerrilla forces swelling throughout the country. In order to avoid the requirements of the War Powers Act, the advisors were to be armed only with sidearms and were not to become actively involved in actual combat. U.S. personnel were restricted to "safe" areas within the country, primarily within the capital, where guerrilla hostilities had been minimized by right-wing paramilitary groups and newly-formed government forces.

Since their arrival in January, 1981, there has been substantial documentation of U.S. military forces actively participating in El Salvador's civil war. In February, 1983, an American soldier was wounded while flying a combat mission over guerrilla-controlled areas. In January, 1982, "advisors" were caught in the bombardment of Ilopango, El Salvador's military airbase. Advisors have been filmed carrying grenades and M-16 rifles on patrols through guerrilla-contested provinces.

A report by the Treasury Department's Comptroller General points out that U.S. advisors are receiving special "hostile fire pay." To receive "hostile fire pay an advisor must sign a monthly statement that "I was subjected to hostile fire," and the approving officer must certify that the soldier was "subjected to small arms fire or he was close enough to the trajectory, point of impact or explosion of hostile ordnance so that he was in danger of being wounded, injured or killed." (Report by the Comptroller General on the *Applicability of Certain United States Laws That Pertain to U.S. Military Involvement in El Salvador*, July, 1982.)

Since June of this year, 4,500 U.S. troops have been engaged in military "exercises" in neighboring Honduras.

U.S. shipments of guns, bullets, ordnance and military transportation have

been flown into El Salvador at an increasing rate since Reagan's inauguration. Most Congressional funding for these operations is approved in overbroad, omnibus legislation which blurs the importance of the legislation and stifles debate.

Congress has neither declared war nor explicitly endorsed the presence of advisors in El Salvador.

The War Powers Act is a veritable minefield of requirements through which the President has thus far successfully tiptoed. The statute affords the Executive considerable discretion in both initiating military action as Commander-in-Chief and in deciding whether a report should be submitted, triggering the sixty-day period in which Congress must either grant an extension of time or make a formal declaration of war. If the report is submitted, and Congress takes no action within sixty days, the forces must be totally withdrawn. If the President decides that a report is unnecessary, Congress must vote to require such filing, triggering the statute. The President has filed no report on El Salvador. Reagan relies upon the dubious distinction between Vietnam-type police/advisory activities and open war to justify his nonfeasance.

Foreseeing exactly this type of semantics and foot-dragging, § 1543 (a) authorizes Congress to require the filing of a report. Last March, Congressman Richard Ottinger introduced House Concurrent Resolution 87 which would require Reagan to file a report on El Salvador. The bill was defeated.

(This summer, at the annual meeting of the Law Student Division of the American Bar Association in Atlanta, a resolution calling upon the President to comply with the War Powers Act and supporting Resolution 87 was soundly defeated by the student assembly. Unconcerned with the legal issues raised, opponents of the student-resolution concerned themselves primarily with the inappropriateness of student vocalism in matters obviously within the discretion of our trusted Executive. The exhibition of conservatism, militarism, and anti-communist sentiment which this proposal evoked at the student assembly was a shocking experience for representatives of more liberal elements present.)

Recently, the War Powers Act has gained national attention in connection with the American bombardment of peasant militia positions in Lebanon. Due to the greater consensus within the Legislative

*Continued on page 4*

By Steven Eisenstein

In response to the undeclared war in Vietnam, Congress passed the War Powers Act of 1973 to make it more difficult for any president to again embroil us in such a conflict. It was the intent of Congress that, should an emergency arise which would necessitate the introduction of American troops into a hostile area on short notice, such an emergency could not be used as an excuse for a prolonged commitment. Before this could happen, Congress would have to specifically authorize it, either by a formal declaration of war or by an extension of the 60 days the president is authorized to commit forces on his own.

Since its inception, there has not been a better arena to test the War Powers Act than the conflict in Lebanon. There has, however, arisen a nationwide debate over the applicability of the War Powers Act to this situation. President Reagan has expressed the opinion that the Act does not apply in this particular instance. He has taken the position that he has no duty under the Act to report to Congress. Section 4 (a) (1) of the Act requires the President to submit a written report to Congress within 48 hours of the introduction of American troops "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." In order to circumvent this provision, Reagan claims that the Marines are in Lebanon solely for a peacekeeping purpose and have not been introduced into hostilities within the meaning of the Act. As the number of casualties mounts, however, this argument seems less and less cogent. What does not seem to have drawn very much attention is that if the Lebanon situation does not fit within Section 4(a)(1) it must surely fit within Section 4(a)(2). This latter section mandates a report when troops are introduced "into the territory, airspace or waters of a foreign nation while equipped for combat, except for deployments which relate solely to supply, replacement, repair or training of such forces." It would be fatuous indeed to suggest that 1,500 fully armed Marines and a 16 ship task force are

not equipped for combat. Nor do any of the exceptions apply. Yet the War Powers Act was never invoked. Congress has compromised with the President and has given him eighteen months in which to use the Marines in Lebanon as he sees fit. At first glance this would seem to be a clear abdication of Congress' oversight power. Yet there could be a good reason for this reluctance to invoke the War Powers Act.

On June 23, 1983, the Supreme Court handed down its decision in *Immigration and Naturalization Service v. Chadha*, 462 U.S. \_\_\_, 103 S.Ct. \_\_\_, 76 L.Ed.2nd \_\_\_ (1983). That case was a challenge to the power Congress had reserved for itself to order the deportation of an alien to whom the Attorney General had granted permission to stay. The Supreme Court held that this provision, known as the legislative veto, was an unconstitutional violation of the separation of powers doctrine. This decision puts into doubt the over 200 other statutory provisions in which Congress has inserted a legislative veto. Among these provisions is the War Powers Act of 1973. Indeed, both Justice White in his dissent and Justice Powell in his concurrence, stated that the decision would probably invalidate the War Powers Act. A close reading of the decision shows that the fear may be well founded and that it may be Congress' own fault.

The basis of Chief Justice Burger's opinion is that Congress delegated its authority over deportation to the executive and having done so, it must abide by its delegation and comply with the Article I procedures of presentment and presidential veto. So in the War Powers Act, Congress delegated a portion of its power to declare war, itself a violation of the Constitution but one that has been consistently winked at by the Supreme Court, and having done so, Congress must live with its decision. It would seem then that having tried to strengthen its hand with the President, Congress has ended up dealing itself out of the game. With the compromise and with the recent cease-fire however, we may have to invalidate the War Powers Act's veto provision and give the President such unprecedented power, all because of a Congressional mistake.

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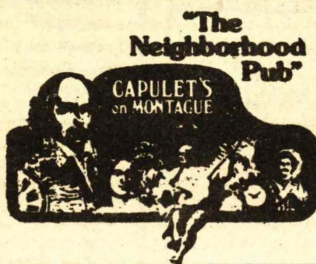
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## TUITION INCREASE HELPS MEET COSTS

By Adam Pollack

Tuition is a function of the cost of running the school, not just educating students in classrooms, according to Brooklyn Law School Bursar Rosalind Zuckerman. Tuition costs this year have increased by \$800 for upperclass day students, and by \$600 for upperclass evening students. Tuition for first year day students has increased by \$1,400 from last year, and by \$1,000 for first year evening students.

"It is indeed likely that tuition will continue to rise," said Mrs. Zuckerman, "We believe, however, that by careful planning and management, tuition, for next year, will not increase by more than 10 percent." Each department-head develops an annual budget in consultation with the dean. The dean in turn bears the ultimate administrative responsibility for the budget. The overall budget must then be approved by the Board of Trustees.

In an earlier conversation, Dean Trager revealed that he chose to set a lower tuition for returning students than incoming students. All day students could have been required to pay \$6,300, but the dean felt that incoming students were on better notice of a tuition hike.

For the last two years, students have been notified of the tuition increase by an ominous-annual-tuition-letter-of-apology/explanation, received late in the summer. According to Dean Trager and Mrs. Zuckerman, the notification was late this past year because of delays caused by the transition in the administration. "In the future, we will try to notify students of tuition in-

creases no later than the first week of June. We will announce tuition increases immediately upon their adoption by the Board," said Mrs. Zuckerman.

Prior to 1981 the school had a novel policy regarding tuition: although tuition might be increased for each successive incoming class, one paid the same tuition each semester. In other words, each class was locked-in, assured of no unwelcome surprises in the form of a letter from the dean in late summer. The graduating day class of 1983 paid \$3,800 each year during their tenure at BLS. Tuition for the first year class was \$4,000 in 1981-82 and \$5,200 in 1982-83. First year day students now pay \$6,600 per year, and night students pay \$4,900. Upperclass tuition for day students is \$6,000, and \$4,500 for evening students. According to Mrs. Zuckerman, the actual cost of educating a student at BLS this year is estimated at \$7,300.

Although most of the cost of an education at BLS is covered by tuition, there is still a substantial shortfall. The difference is met by state aid and income from the endowment. BLS's endowment is not used for day-to-day operating expenses because it is not sufficiently large enough, said Mrs. Zuckerman. In years past the income generated by the endowment has been small due to high inflation. As a matter of policy, income in excess of inflation has been used for longer-term purposes; for things such as expansion and improvement of the building or unanticipated repairs. Nonetheless, Mrs. Zuckerman assures "the law school is in good financial health."

## ANNOUNCEMENTS

More Kennedy

INFORMATION SESSION

Because of the interest engendered by the recent visit of Professor Duncan Kennedy, a meeting will be held to discuss curriculum reform on October 13 at six p.m. Anyone interested in attending should watch for signs announcing the location.

### Attention: STUDENT GROUPS

All student organizations are invited to contribute to the *Justinian*. Please inform us of upcoming forums, meetings and other events. If we know about it we'll write about it. The deadline for the next issue is

A Representative of the IRS will be at BLS on October 5th, 1983 from 1:00 to 2:00 for an information session—no interviews—for third year students. He will distribute applications at that time, which are due at the IRS by October 15, 1983.

### PERSONALS & CLASSIFIEDS

The *Justinian* will print classified ads submitted by members of the Brooklyn Law School Community. There will be a charge of \$1.00 per 25 words with a maximum of 50 words per ad. Ads may be submitted for the next issue by

## NUCLEAR POLICY

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and security has in the eyes of many Americans become a role of hostility and insecurity. As in "Wargames," "No one wins." Both Weiss and the committee's leaders stressed the responsibility of lawyers in bringing about change in this area. Lawyers are equipped to demand restraint through the legal system on the President's power to order a first strike.

One of the committee's key efforts this year is keeping nuclear weapons out of NY harbor. Staten Island has been proposed as the home port for the battleship "Iowa" which has the capacity to carry the equivalent of 33 MX missiles. This proposal would put a military target into a heavily populated area. The navy has neither affirmed nor denied the existence of nuclear missiles on the Iowa, but the committee strongly suspects their existence. Representative Weiss said that it would be difficult to load.

## EL SALVADOR

Continued from page 3

branch on that issue, the President was able to promptly submit a report and obtain an eighteen month extension period with an option to renew. The President's evasive posture with respect to El Salvador is even more appalling when contrasted with his conduct of U.S. involvement in Lebanon, where his compliance with the law was not impeded by political differences.

Phil Russell is Brooklyn Law School's ABA/LSD Representative and authored the proposal to support House Concurrent Resolution 87

unload, or store the missiles outside the harbor; if the Iowa carries the missiles, they will stay in our harbor.

Anyone interested in joining the committee, doing research, writing, speaking, or anything else, should contact Debra Nusbaum 334-8044.

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## DUNCAN KENNEDY:

et al.: The Justinian

LEGAL EDUCATION  
AS TRAINING FOR HIERARCHY

By Scott Pollock

The first program of the Forum Committee's "Distinguished Visiting Scholar" series, featuring Professor Duncan Kennedy of Harvard Law School, was held last Monday, September 26. Professor Kennedy is one of the founders of the Conference on Critical Legal Studies, which in the past several years has had a profound impact on the way in which curriculum is thought about and implemented in law schools. Professor Kennedy came to Brooklyn Law School at a particularly opportune time, given the Trager Administration's desire to build the school's national reputation.

The theme of Prof. Kennedy's discussion was "Legal Education as Training for Hierarchy." Speaking to approximately 250 students, professors, and administrators, he approached his topic deliberately with the purpose of including everyone and reducing fears.

"Hierarchy isn't necessarily planned, it's just there, and everyone recognizes it," he said. A process of ranking is inherent in legal education. "Law schools are ranked, law firms are ranked, courts are ranked." While no one actually creates lists of which place Harvard occupies above Brooklyn, everyone will admit that Harvard is ranked higher than Brooklyn. The ranking extends to job recruitment, while any Harvard student may interview with those firms which are high in the hierarchy, the Brooklyn student must be top 10 percent and law review to get even an interview. As a corollary, since the ranking "just happens," the majority of people found in the higher ranked positions tend to be white, male and upper middle class. The high paying clients, who resemble the professionals they hire, have higher ranked legal problems, which need

resolution in the higher ranked courts. Harvard goes to Wall Street and Brooklyn goes to Court Street.

Given this scenario it might seem that living in such a hierarchy would engender a cynical reaction. Yet Kennedy's attitude is anything but cynical. He described how hierarchy functions and how people at all levels can rebel against it without becoming either cynical or depressed. He said most people go through life with the idea that everyone is equal, but how in certain situations the myth is exploded and "formal equality" is perceived for what it is. For example, at ABA or AALS conventions, professors come together to discuss what they are doing, as if everything were equal and each one's positions were valid—but differences in salary, in dress and in region, are apparent.

Defenders of hierarchy say that its legitimacy lies in the assumption that the system is meritocratic. Kennedy refers to "the rules of the game versus what it feels like to be playing it." The typical law school classroom can be the scene of unbridled aggression which, if not noticed, can damage, if not totally undermine, a student's self-esteem. The pressure to give the correct answer in a limited time while other students impatiently wait to pounce is usually sanctioned and often encouraged by the professor. This sorts people out so that they can establish their own place in the hierarchy. Kennedy's message is to question—is it worth it?

The emotional reaction that we feel when we get bumped down a rung on the ladder is a mixture of resentment, self-hatred and anger. Prof. Kennedy said those moments are critical to understanding hierarchy. In

effect there has been a confrontation between a superior and an inferior. The confrontation "puts their backs against the wall," depending on how it is resolved, the hierarchy will either be affirmed or undermined. The assertion of hierarchy and the painful resentment which accompanies it happens in many different areas: Professors have been refused tenure; students have been ridiculed or negated in class; women have been chastized by patriarchal men; and children have been disciplined by their parents. Context may differ but there is a parallel response.

Kennedy said there is a patriarchal dimension to hierarchy which draws together our experiences in the family, the office and in the law schools (which, Kennedy says, are workplaces where students "produce" their later legal careers; their intellectual and legal development). What ties our experiences together is that challenges to hierarchy are met with the same arguments regardless of setting: the rebel is discredited as "intuitive, irrational, or rebellious." It is precisely this non-rational desire, to kick back at oppression, that challenges the hierarchy's legitimacy.

Professor Kennedy advocates small-scale non-sectarian rebelliousness. A lot of it. This does not mean getting kicked out of school nor spreading feces on the dean's door. It means raising questions and refusing to avoid conflict with the boss or professor over the legitimacy of hierarchy. Law school can provide an ideal setting for this kind of challenge. Kennedy said the result would be a redefinition of workplace politics.

The form of rebelliousness Kennedy has in mind takes as its guide and inspiration

the feminist creed "the personal is the political." In law school, implementing "the personal is the political" idea would significantly change the law school environment and the way students and professors think about the law.

On a programmatic level, Kennedy would abolish law school hierarchy by making all law schools equal. This would be done by paying all professors roughly equal salaries and "scrambling" faculties every few years so that there would be no schools "better" than others. Kennedy's response to criticism that this represents "collectivist reorganization" is that while law schools would not be ranked, the faculties at any given time would take on highly individual characters as a result of the random scrambling.

After speaking to students and faculty, Duncan Kennedy met with 33 members of the Brooklyn Law School chapter of the National Lawyers Guild. A discussion about hierarchy focused on the fact that students at Brooklyn Law School are often taught black letter law while policy discussions are usually discouraged. As a result students at BLS are trained for middle management jobs while students at Yale, Harvard, Columbia, and Stanford are groomed to be policy makers.

Another topic of conversation was the insensitivity and ambivalence of professors who make sexist remarks in class and who, by virtue of their position, resist challenges to the environment which they have created. Professor Kennedy recommended organizing around the issues of policy discussions in class and professional infliction of emotional distress, to demand changes.

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# KENNEDY'S PROPOSALS

Continued from page 1

age the use of such study aids as *Emanuel's*, instead of urging/pleading with students *not* to use them. "Rules can be learned fast and easy.... Why not teach students how to use these tools more effectively, as catalysts for learning black letter law?" In response to this, Prof. Myerson suggested that the reason students use *Emanuel's* to begin with is because they "want something more definite to grab onto. They really need less rules. They need to learn *how* to think." Kennedy agreed but countered that *less* student time would be spent on learning doctrinal rules since the time spent would be self-initiated and used more effectively.

Kennedy claimed that most law school professors mystify their students by using terms such as "learning to think like a lawyer" as a rationale for explaining why things are done the way they are in most law schools. Students are more interested in being told "what difference this rule will make in the real world." The term "legal reasoning" is an amorphous one, often used as a "fudge-factor" to cover up bad teaching and the consequential phenomenon that "no one really knows what they're learning."

Professor Leitner questioned who would want to teach the totally doctrinal sections that Kennedy is proposing. Referring to his eleven years of teaching bar review courses, Leitner assumed that the teaching of the doctrinal sections would be equally boring, impractical, and easily relegated to a second-class status. Kennedy did not agree that this relegation would occur. He noted that in his NMC, students in the doctrinal sections would have a right to request weekly "facilitation meetings" with each professor, for which the professor would not be required to do any extra preparation. Referring to this aspect of the plan as well as to the entire proposal, Kennedy stressed "if the faculty doesn't want to do it, it won't happen." Leitner went on to say that he felt that the teaching of the doctrinal sections "would be like foreplay, as opposed to the real good stuff." Professor Kennedy responded that this was a very advanced view. Leitner wound up his comments by noting that "I wouldn't want to teach one of these (doctrinal) sections, not for an hour, and I wouldn't want my sister to marry one either."

Professor Herman queried whether Kennedy's system would be feasible at BLS, since many students work outside of school and would have less time to devote to this experiment. She suggested that BLS might be wiser to consider the cooperative work/study approach of Antioch and Northeastern University. Kennedy responded that Northeastern's program was not really very well integrated. Professor Fullerton, who voiced her support of Kennedy's proposals, added that her experience as an Antioch student did not integrate the clinical and black-letter aspects of the law well, either.

Professor Garrison also spoke in support of Kennedy. She agreed that the first year experience "can be deadly" and that often students do not recover from it during their second and third years. Professor Poser suggested that more emphasis be placed on the second and third year curriculum, rather than the first, since "most complaints relate to the second and third years."

Professor Minda suggested that a true experimental section be set up at BLS next year, where each teacher "could experiment with new ideas and courses."

Dean Trager made closing statements asserting that BLS had a strong need for more interdisciplinary courses in its curriculum. He also expressed his surprise in finding <https://brooklynworks.brooklaw.edu/justinian/vol1983/iss5/1>

posals in Professor Kennedy's program. He did point out, however, that he found Kennedy's approach "too egalitarian."

In an interview with the *Justinian*, Kennedy was asked what he had hoped to achieve by coming to BLS. He replied that "he wanted to present a collective picture of an activated, energized, egalitarian kind of politics."

When questioned about Harvard's reaction to his proposal, Kennedy responded that "at first, the curriculum committee completely ridiculed it. They felt that it was totally 'off-the-wall.'" Later, another Harvard faculty member "incorporated over half of my proposal into another report, and presented it to the curriculum committee. This was thought to be much less far-out." Kennedy took this in stride. "The fact that people first reject your ideas doesn't mean that your ideas won't influence them. They'll get picked up in pieces, sugar-coated, and made acceptable.... undergo a re-positioning process.... It's wrong to think that only the most moderate-reformist proposal, one that has been made to look as bland as possible, can have

any influence or affect. As the history of feminism and the civil rights movement shows, sometimes being 'off-the-wall' is the only way to go."

Kennedy ended the interview by emphasizing that he felt that "BLS is a very alive and energetic community. The faculty here seem to be taking my ideas very seriously, even if they disagree.... I'm also delighted that Dean Trager saw my proposals as essentially moderate rather than radical. I thought he showed definite leanings away from the usual legal elitism."

Future speakers in the Distinguished Visiting Scholar Program include Jay Fineman and Marc Feldman of the Rutgers Law School faculty, who will speak on October 26. They will discuss a new course, "Contracts," which combines contracts and torts into one. On March 12, Frank Michaelman, of the Harvard faculty, will speak about the new, experimental, first year teaching section at Harvard, and on April 4, Paul Brest will discuss a course he teaches at Stanford University called "The Lawyering Process."

# LETTERS

Continued from page 2

## To the Collective:

In the last edition of the *Justinian*, Dean Trager was quoted as saying that "in those instances where sons and daughters of alumni who are borderline cases in regards to admittance... Consideration should go to those candidates whose parents have been consistent contributors to BLS."

Apparently the Dean believes that those responsible for the admission process should take into consideration the charitable practices of the parents of certain applicants. Such a notion is repugnant to the ideals of justice and equal opportunity—ideals to which the administration of this school claims it aspires.

Admittedly, such a policy might help to serve the valid goal of rebuilding alumni support for the school. At the same time it also serves to decrease the quality of the student body. Basing the admission decision on criteria other than the applicant's character, academic background, and potential ability to study law is unjust and unproductive, and should be avoided. It certainly should not be heralded in the school newspaper.

Stuart Diamond

The *Justinian* responds: *We neither reject nor support Dean Trager's suggestion; we merely quoted his policy so that an enlightened student body could take appropriate action.*

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# THE NATIONAL LAWYERS GUILD: A SHORT HISTORY

The National Lawyers Guild is a nationwide membership organization of over 7,000 lawyers, legal workers, law students, and jailhouse lawyers with over 90 chapters throughout the country. Since its founding in 1937, the Guild has been dedicated to seeking economic justice, social equity and freedom to dissent. The common thread uniting Guild members is the belief in a legal tradition based on service to the cause of human justice and the public's interest and support for the rights of the poor, workers, minorities, women, gays and lesbians, and progressive activists.

In 1937 the American Bar Association refused to admit Black attorneys and was actively opposed to the social welfare legislation of the New Deal. A group of attorneys founded the National Lawyers Guild recognizing the need for an alternative, progressive bar association that would be the first integrated such organization in the United States.

During this early period, the Guild's resources went primarily into legal support for the labor and civil rights movement. Priority was given to help the passage and implementation of a broad range of social legislation, including social security programs, rent control, subsidized low rent housing, and price control. The Guild was also the first legal organization to advocate the formation of legal aid clinics which would make legal services more accessible to lower and middle income people.

The Cold War years found the Guild struggling to protect the civil liberties of those under attack by the right. Guild members were involved in the defense of virtually every victim of the anti-communist witch hunt, and lobbied against HUAC, alien deportation legislation, and other repressive measures aimed at the left.

As the 1950s approached, the left, deprived of its base of support in the trade unions, became increasingly isolated. The Guild itself came under attack from the right, culminating in 1953 when the Attorney General attempted to list the Guild as a "subversive" organization. The "listing" attempt was abandoned by the government in 1959. The Guild survived but severe damage was done to the organization: fewer than 500 members remained out of a peak membership of 5,000.

The 1960s ushered in a new era for the Guild. The Committee to Aid Southern Lawyers was formed and the NLG moved into the thick of the Black Civil Rights Movement. In 1964 the Guild opened an office in Jackson, Mississippi to support Mississippi Freedom Summer.

Soon after the Mississippi Summer another mass struggle unfolded: the anti-war movement. Again Guild lawyers were there to defend demonstrators and activists. Early in 1967, the NLG began to concentrate its resources on the problem of the draft and Selective Service Law.

In the 1970s, many new young lawyers

entered the Guild, and the organization began a major expansion internally and externally. In 1971, law students, legal workers, and jailhouse lawyers were admitted to membership in the Guild. Guild members were in the forefront of progressive legal battles: the struggles for abortion rights, the expansion of legal services, affirmative action, and gay rights.

In the 1980s the Guild and Guild members continue to be leaders in the progressive legal field:

— The Guild has published highly acclaimed legal manuals in the fields of Grand Jury work, Police Misconduct, Immigration, and Labor Law.

— The National Lawyers Guild has held continuing legal education seminars on a wide variety of topics, from the representation of undocumented workers, to social security hearings, to representing draft resisters under the new Selective Service Law.

— The National Lawyers Guild is actively opposing restrictive legislation on many issues, including attempts to cut back the jurisdiction of the federal courts, limit the Freedom of Information Act, and cutoff funds for Legal Services.

— The National Lawyers Guild has challenged the legality of the Administration's aid to El Salvador, and has provided testimony on the continuing human rights violations.

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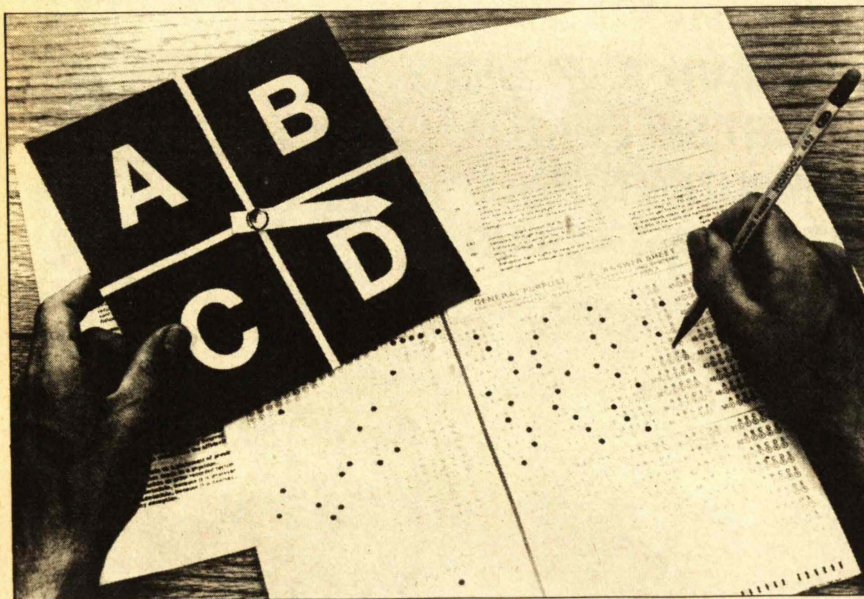
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by Ron Kaplan

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— The National Lawyers Guild has sent legal delegations to the Middle East, Guatemala, Northern Ireland, Nicaragua, and Cuba, lending our support to liberation struggles, and involving ourselves in international law concerns.

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# THE REAGAN COURT?

By David Howe

In 1953 Earl Warren became the Chief Justice of the United States Supreme Court. The Warren Court's most notable members were Justices Black, Douglas & Brennan. The Court's legacy for individual rights has remained, although procedurally diluted (per Justice Rehnquist) throughout the Burger Court's tenure. "It is increasingly clear that [Justice Brennan] deserves much of the credit for fashioning the legal theories that could support the progressive decisions of the last quarter-century, and for then persuading a majority of his colleagues [in the Burger Court] to accept them. That achievement in large part explains the survival and occasional extension of precedents from the Warren era" (see Stephen Gillers, "The Warren Court—It Still Lives," *The Nation*, September 17, 1983).

At one point the Warren Court's liberal majority was composed of six Justices (Warren, Black, Douglas, Brennan, Fortas and Marshall). However, in 1969 Warren E.

Burger succeeded Earl Warren as Chief Justice and so began the ushering in of conservative and predominantly Republican Justices. Seven of the nine Justices currently on the bench were appointed by Republican Presidents. All Justices appointed by conservative Republicans have not themselves been necessarily conservative—Eisenhower appointed the venerable Justice William J. Brennan.

The continuation of the Warren Court's progressive decisions should not only be credited to Justice Brennan's intellectual fortitude. He has had an able and persistent ally in Justice Thurgood Marshall (a Johnson appointee). Together they have been able to extend the projection of individual rights by persuading their colleagues to re-think positions on critical issues. Burger, Rehnquist and O'Connor, as conservative opponents rarely concur in Marshall's and Brennan's decisions affecting individual rights. The conservatives may still prevail...



At present, five of the United States Supreme Court Justices are over seventy years old: Brennan, Marshall, Burger, Blackmun and Powell. In contrast, Rehnquist and O'Connor are in their fifties. It is rumored that Chief Justice Burger will retire before the 1984 elections so as to ensure a Republican successor. President Reagan will thereby have appointed two Supreme Court Justices. If President Reagan wins the 1984 election it is almost certain that during his tenure he will have appointed six of the nine members of the United States Supreme Court.

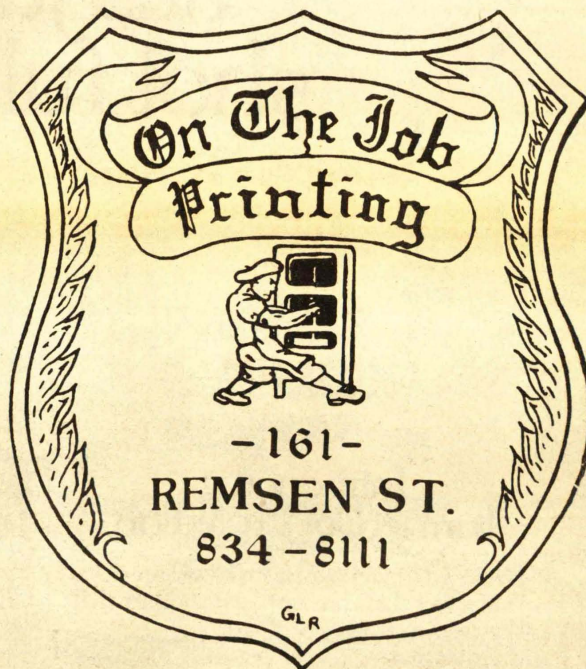
Who, then, will be Chief Justice Burger's successor and who will be the intellectual leader of the Court at Justice Brennan's retirement. The most prominent Reagan contenders are: Richard Posner, Robert Bork, Antonin Scalia and Ralph Winter.

*In the next issue of the Justinian I will discuss their qualifications and hazard a guess as to whom will be Chief Justice Burger's successor.*

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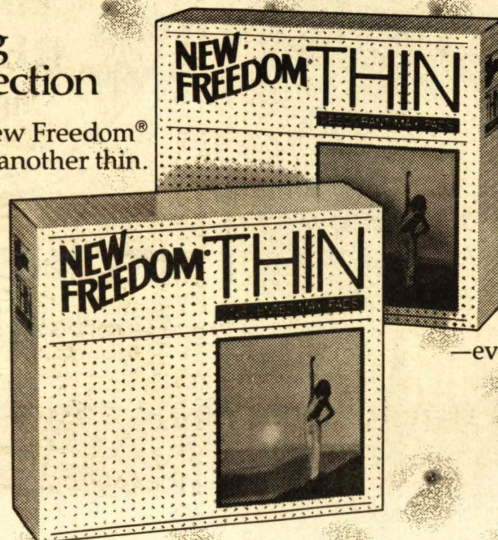
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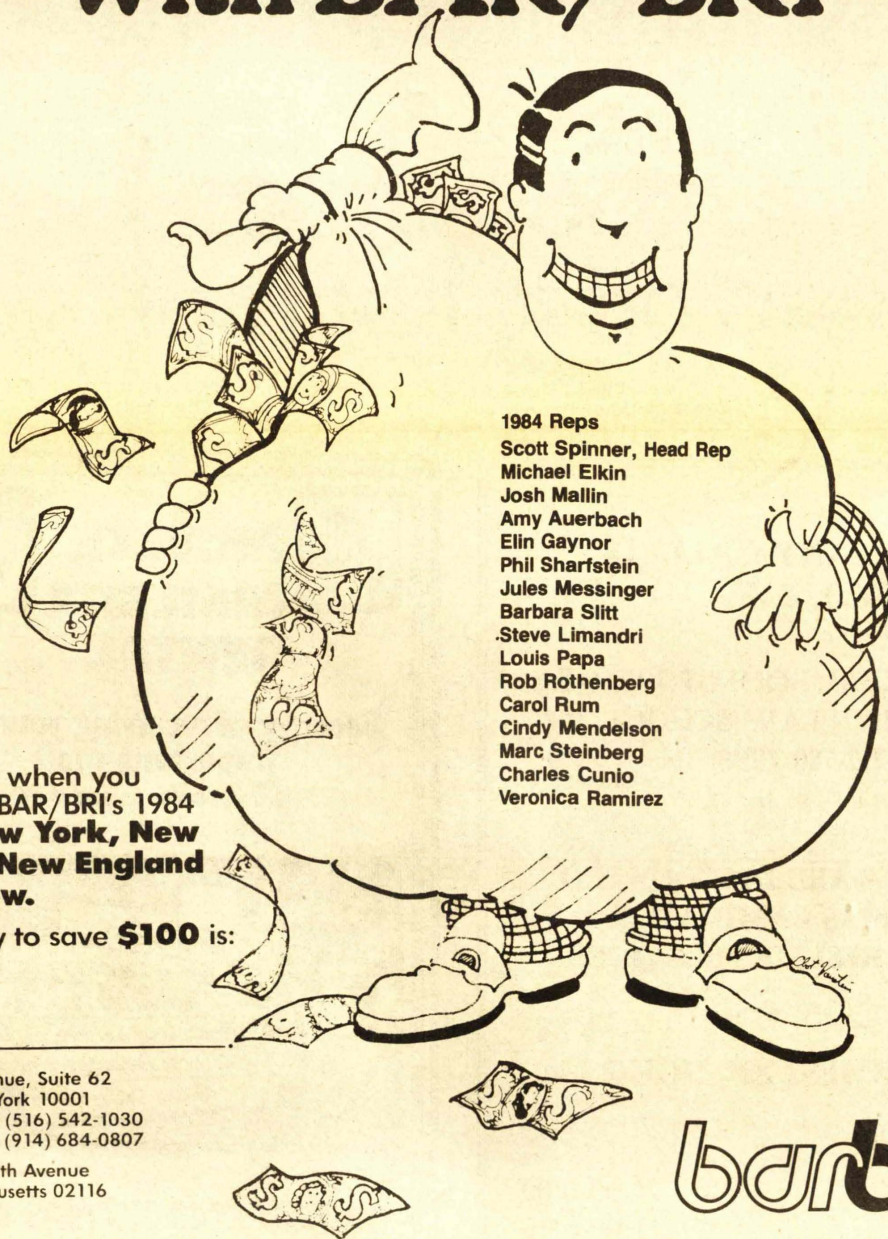
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